

The Indian

Limitation Act

(IX of 1908)

File No-30

1

V. V. CHITALEY

AND

K. N. ANNAM RAO

In one sense no reported case can ever be obsolete while the laws and judicial usages of English-speaking countries are what they are: that is, no man can say beforehand that any given case, however antiquated or trifling it may appear in itself to be, may not at some time have its use for the modern practitioner or text-writer. Every decision in the books is part of the history of the law, and no part of that history can be absolutely insignificant.—(Sir Frederick Pollock, Bart., LL.D., Corpus Professor of Jurisprudence in the University of Oxford.)

Accurate knowledge of the present state of the law upon any subject involves necessarily the history of the development of the law upon that subject, which can only be attained by following down the decisions touching upon it. — (Francis M. Scott, Justice, Supreme Court, New York.)

The law is the last interpretation of the law given by the last Judge.

The enunciation of the most elementary principle of law is frequently met by a demand for "an authority in support of that proposition" No time spent upon providing oneself with a precedent is ever wasted even though the book may have to be judiciously hidden from view until required.—(The Hon'ble Sir Cecil Walsh, Kt., K.C., Ex-Offg., Chief Justice, Allahabad High Court.)

The last Judicial Interpretation of the law is the Law on which your case hangs.

To correctly appraise a Judicial decision, it is important to know later applications of its rules to varying states of facts by way of extension or qualification. — (S. Shepard, Chief Justice, Court of Appeal, Washington (U. S. A.).)

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Advocate High Court Jammu & Kashmir

A. I. R. Commentaries

THE INDIAN LIMITATION ACT (IX OF 1908)

WITH EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES.

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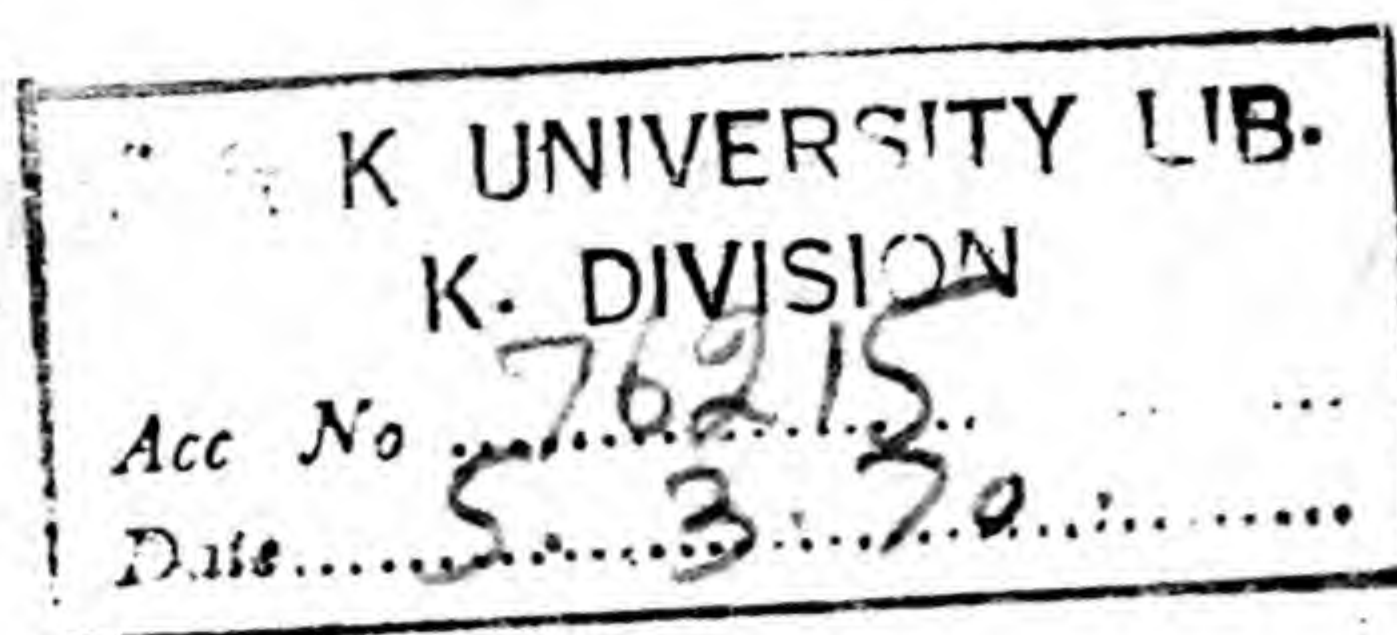
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The statute law herein stated is as on 1st September 1951 and
the case law, as on 1st June 1951.

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2ND AND SUBSEQUENT EDITIONS
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Laws, thus limiting suits, are founded in the noblest policy. They are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity or the antiquity of transactions. Controversies are limited to a fixed period of time lest they should be immortal while men are mortal — *Ne autem lites immortales essent, dum litigantes mortales sunt.* (STORY'S *Conflict of Laws*.)

A statute of limitation instead of being viewed in an unfavourable light as an unjust and discreditable defence, should have received such support from Courts of Justice as would have made it what it was intended emphatically to be, a statute of repose. (JUSTICE STORY in *Beli v. Morrison*.)

PREFACE TO THE THIRD EDITION

Among the major Acts of adjective law which play an important part in the administration of justice in our courts and which come in for constant reference and application in the daily work of the courts, the Limitation Act occupies a place almost at the top of the list. A question of limitation is such a constant phenomenon in civil litigation and has such a decisive role that the profession can hardly do without a good text book on the Law of Limitation which is up-to-date.

The second edition of this book was published nearly 10 years ago. Although copies of the book were sold out many years ago and the book has been long out of print, it has not been possible to bring out the third edition earlier. Various difficulties have come in the way of a timely publication of the third edition. We wish to express our regret for this delay. But our pleasure is all the greater that we are now able to launch the third edition and we hope that it will receive the same liberal support of the legal profession as the previous editions and as the other commentaries published by the A I R.

It is needless to say that this edition includes and incorporates all the changes in the Law of Limitation that have taken place in the intervening period after the last edition. The Statute has been amended in a number of places and there have also been changes made by the Adaptation Orders. The last important change has been the extension of the Act uniformly to the whole of India, except Jammu and Kashmir.

Among the legislative amendments that have taken place in the interval after the last edition, the most important have been the changes in Section 20 of the Act. The profession well knows the difficulties that were felt in the interpretation of the former section. It used to be a matter of great controversy to determine whether a payment was made for interest as such or for principal, as to how payments made by a debtor were to be appropriated &c. The amendment of the section has now set at rest all these conflicts and a simple section has been placed on the Statute Book which does away with all these complications. The reader will find in the commentaries on the section the change in the law clearly explained.

It is quite natural that a very large number of decisions have been pronounced regarding this branch of the law and the incorporation of these decisions with the consequent changes in the text of the commentary has, of course, been the main task in the preparation of this edition.

Now remains the pleasant task of thanksgiving. The authors are indebted to Messrs. V. S. Balkundi, B.A., LL.B.; V. B. Bakhale, M.A., LL.B.; Assistant Editors, the All India Reporter, D. H. Zadgaonkar, B.A., LL.B.; K. S. Bakre, B.Sc., LL.B.; R. G. Dhoble, B.A., LL.B.; D. R. Rajandekar, B.A., LL.B., G. M. Jatar, B.A., LL.B. all members of the editorial staff of the A. I. R. and D. W. Chitaley, B.A., LL.B., for their sincere co-operation in the preparation of this edition.

10th Sept. 1951.

V. V. C.
S. A. R.

PREFACE TO THE SECOND EDITION

THE fact that a SECOND EDITION of this work has been called for within three years of the publication of its first edition is ample testimony to the cordiality of the reception accorded to the first edition and the Authors wish to thank the legal profession for this encouragement. During the three years that have elapsed since the publication of the first edition hundreds of decisions bearing on the law of limitation including some important pronouncements by the Privy Council have been reported and there have also been some changes in the statute. All these have been considered and incorporated in this edition. Opportunity has also been taken to revise the book thoroughly and to check all the references. Special attention is drawn to the foot-notes. They do not contain merely the references of the cases relied on in support of the propositions in the body of the work but often include critical notes on cases and other matters which could not conveniently be given in the body.

The law of limitation is a very tough branch of the law and the Indian Limitation Act is an Act which requires revision and amendment in several places. That supreme desideratum in any system of law, namely, certainty, is greatly lacking in its provisions, giving rise to numerous doubts and conflicts. The task of interpreting and explaining the provisions of the Act has by no means been an easy one. The Authors have, however, endeavoured to take a comprehensive view of the subject and present it in a systematic way, combining the ideal of exhaustiveness with that of a scientific exposition of the underlying principles.

A fresh General Index has been specially prepared for this edition. The addition of a Table of Cases is a feature which, it is hoped, will enhance the usefulness of the book.

The Authors wish to thank the following gentlemen for their valuable assistance in the preparation of this edition : Messrs. S. Appu Rao, B.A., B.L., Advocate of the Madras High Court, V. S. Balkundi, B.A., LL.B., K. S. Bakre, B.Sc., LL.B., V. R. Buche, B.A., LL.B., W. N. Gadgil, B.Sc., LL.B., and G. B. Shidhaye, B.A., LL.B., Pleader, Nagpur.

V. V. C.
K. N. A.

PREFACE TO THE FIRST EDITION

THE CORDIAL RECEPTION accorded to their Commentaries on the Civil Procedure Code and the Criminal Procedure Code, has induced the authors to venture again before the legal public with this Commentary on the LIMITATION ACT.

The authors have, in the plan and execution of this work, followed the same method as that adopted in the two previous publications. All the decisions of their Lordships of the Privy Council and the Superior Courts of India and Burma, bearing on the Limitation Act, have been collected, studied carefully and analytically and endeavour has been made to enunciate with clarity and precision the basic principles of law underlying them. To unravel the huge mass of case-law that has gathered on the subject and to deduce the principles has by no means been an easy task. But no pains have been spared to do so and to classify the principles so deduced under appropriate headings and present them in a logical and cogent manner. The aim has been to make the commentary as useful as possible to the Bench and the Bar and the authors have therefore attempted to discuss all the various questions arising in practice under this Act, by reference to fundamental principles, illustrated by the decisions of the Courts. It cannot be gainsaid that the hackneyed method of merely digesting cases under each section has ceased to appeal to the profession as being of no real help or guidance in appreciating the decisions.

Wherever there is a conflict of decisions, attempt has been made to resolve the conflict by discussing the question on first principles and the authors have not shrunk from the task of criticising decisions which, on applying the basic principles of law, are found to be open to such criticism. In the foot-notes, special care has been taken to explain the decisions cited and to indicate the applicability of the principles illustrated by them.

In order to facilitate reference, the full text of the Act has been given all in one place. The synopsis and the grouping of other important and useful subjects given under the heading "other topics" will, it is hoped, be of help to the reader to find out the particular subject required with facility and ease.

Corresponding sections of the earlier Limitation Acts have been given in the foot notes under each section, to enable the reader to appreciate the decisions on such enactments in the light of the language of those enactments.

The authors trust that this work will receive the same generous support from the Bench and the Bar as was accorded to their Commentaries on the Civil Procedure Code and the Criminal Procedure Code.

The authors desire to express their indebtedness to R. K. Manohar, B.A., LL.B. Advocate and D. V. Chitale, B.A., LL.B., Pleader, Nagpur; Messrs. S. Appu Rao, B.A. B.L., C. Srinivasa Rao, M.A., B.L., and V. Srinivasa Iyer, B.A., B.L., Advocates, Messrs. T. R. Ananthasubramania Iyer, B.A., B.L., K. G. Subramania Iyer, M.A., B.L., N. Balasubramania Iyer, M.A., M.L., and E. R. Gopinatha Rao, B.A., B.L., Pleaders, Coimbatore; Mr. V. S. Balkundi, B.A., LL.B., Pleader, Nagpur and Mr. B. S. Panisuff, B.A., LL.B., Advocate, Bombay, for the very valuable help rendered by them in compiling and bringing out this work.

March 15, }
1938.

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ABBREVIATIONS

| | |
|------------------------------|--|
| A. O. | ... Government of India (Adaptation of Indian Laws) Order, 1937, as modified by the Government of India (Adaptation of Indian Laws) Supplementary Order, 1937. |
| A. C. A. O., 1948. | — Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. |
| A.I.R. 1914 All., Bom., etc. | ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years. |
| A. L. O., 1950 | ... Adaptation of Laws Order, 1950. |
| A. M. L. J. | ... Ajmer-Merwara Law Journal. |
| All. or I. L. R. All. | ... Indian Law Reports, Allahabad Series. |
| Agra. | ... Agra High Court Reports. |
| All L. Jour. | ... Allahabad Law Journal. |
| All. W. N. | ... Allahabad Weekly Notes. |
| All. W. R. | ... Allahabad Weekly Reporter. |
| App. Cas. | ... Law Reports, Appeal Cases (England). |
| Beng. L. R. | ... Bengal Law Reports. |
| B. R. | ... Bihar Reports. |
| Bom. or I. L. R. Bom. | ... Indian Law Reports, Bombay Series. |
| Bom. H. C. R. | ... Bombay High Court Reports. |
| Bom. L. R. | ... Bombay Law Reporter. |
| Bom. P. J. | ... Bombay Printed Judgments. |
| Bourke | ... Bourke's Reports. |
| Bur. L. Jour. | ... Burma Law Journal. |
| Bur. L. R. | ... Burma Law Reports. |
| Bur. L. Tim. | ... Burma Law Times. |
| Cal. or I. L. R. Cal. | ... Indian Law Reports, Calcutta Series. |
| Cal. L. Jour. | ... Calcutta Law Journal. |
| Cal L. R. | ... Calcutta Law Reports. |
| Cal. W. N. | ... Calcutta Weekly Notes. |
| C. P. L. R. | ... Central Provinces Law Reports. |
| Cor. | ... Coryton's Reports. |
| Cr. L. J. | ... Criminal Law Journal. |
| E. R. | ... English Reports (England). |
| Hay | ... Hay's Reports. |
| Hyde | ... Hyde's Reports. |
| Ind. App. | ... Law Reports, Indian Appeals. |
| Ind. Cas. | ... Indian Cases. |
| Ind. Jur. (N.S.) | ... Indian Jurist (New Series). |
| Ind. Jur. (O.S.) | ... Indian Jurist (Old Series). |
| Ind. Rul. | ... Indian Rulings. |
| J. L. R. | ... Jaipur Law Reports. |
| Kar. (I. L. R.) | ... Indian Law Reports, Karachi Series. |
| K. B. | ... Law Reports, King's Bench (England). |
| Knapp | ... Knapp's Reports. |
| Lah. or I. L. R. Lah. | ... Indian Law Reports, Lahore Series. |
| Lah. L. Jour. | ... Lahore Law Journal. |

| | |
|-------------------------|---|
| L. J. | ... Law Journal (England). |
| L. R. | ... Law Reports (England). |
| L. R. A. | ... Law Reporter. Allahabad. |
| L. T. | ... Law Times (England). |
| Low. Bur. Bul. | ... Lower Burma Rulings. |
| Luck. or I. L. R. Luck. | ... Indian Law Reports, Lucknow Series. |
| Luck. Cas. | ... Lucknow Cases. |
| Mad. or I. L. R. Mad. | ... Indian Law Reports, Madras Series. |
| Mad. H. C. R. | ... Madras High Court Reports. |
| Mad. Jur. | ... Madras Jurist. |
| Mad. L. Jour. | ... Madras Law Journal. |
| Mad. L. Tim. | ... Madras Law Times. |
| Mad. L. W. | ... Madras Law Weekly. |
| Mad. W. N. | ... Madras Weekly Notes. |
| Marsh. | ... Marshall's Reports. |
| Mar. L. R. | ... Marwar Law Reports. |
| Moo. Ind. App. | ... Moore's Indian Appeals. |
| Moo. P. C. C. | ... Moore's Privy Council Cases. |
| Mys. H. C. R. | ... Mysore High Court Reports. |
| Nag. (I. L. R.) | ... Indian Law Reports, Nagpur Series. |
| Nag. L. Jour. | ... Nagpur Law Journal. |
| Nag. L. R. | ... Nagpur Law Reports. |
| N.-W. P. H. C. R. | ... North-West Provinces High Court Reports. |
| Oudh Cas. | ... Oudh Cases. |
| Oudh L. Jour. | ... Oudh Law Journal. |
| Oudh L. R. | ... Oudh Law Reports. |
| Oudh S. O. | ... Oudh Select Cases. |
| Oudh W. N. | ... Oudh Weekly Notes. |
| (P.) A. C. A. O., 1949 | ... (Pakistan) Adaptation of Central Acts and Ordinances, 1949. |
| Pat. or I. L. R. Pat. | ... Indian Law Reports, Patna Series. |
| Pat. H. C. C. | ... Patna High Court Cases. |
| Pat. L. Jour. | ... Patna Law Journal. |
| Pat. L. Tim. | ... Patna Law Times. |
| Pat. L. R. | ... Patna Law Reporter. |
| Pat. L. W. | ... Patna Law Weekly. |
| Pat. W. N. | ... Patna Weekly Notes. |
| Pun. L. R. | ... Punjab Law Reporter. |
| Pun. Re. | ... Punjab Records. |
| Pun. W. R. | ... Punjab Weekly Reporter. |
| Q. B. | ... Law Reports, Queen's Bench (England.) |
| R. & J.'s | ... Rafique and Jackson's Oudh Privy Council Decisions. |
| Rang. | ... Indian Law Reports, Rangoon Series. |
| Rang. L. R. | ... Rangoon Law Reports. |
| R. B. | ... Revised Reports (England). |
| R. S. C. | ... Rules of the Supreme Court of England. |
| Sar. | ... Saraswati's Privy Council Judgments. |

| | |
|----------------|---|
| Sau. L. R. | ... Saurashtra Law Reporter. |
| Shome L. R. | ... Shome's Law Reports. |
| Sind L. R. | ... Sind Law Reporter. |
| Suther. | ... Sutherland's Privy Council Judgments. |
| Suth. W. R. | ... Sutherland's Weekly Reporter. |
| Times L. R. | ... Times Law Reports (England). |
| U. P. B. R. | ... United Provinces Board of Revenue. |
| U. P. L. R. | ... United Provinces Law Reports. |
| Upp. Bur. Rul. | ... Upper Burma Rulings. |
| Weir | ... Weir's Criminal Rulings. |
| W. R. (Eng.) | ... Weekly Reporter (England). |

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|-------|------------------------------------|
| Art. | ... Article. |
| B. R. | ... Board of Revenue. |
| Civ. | ... Civil. |
| C. A. | ... Court of Appeal. |
| Cl. | ... Clause. |
| Cr. | ... Criminal. |
| D. B. | ... Division Bench. |
| F. B. | ... Full Bench. |
| F. C. | ... Federal Court. |
| F. N. | ... Foot-Note. |
| G. I. | ... Government of India Act, 1935. |
| Jour. | ... Journal. |
| L. P. | ... Letters Patent. |
| N. | ... Note. |
| O. | ... Order. |
| P. | ... Page. |
| P. C. | ... Privy Council. |
| Pre. | ... Preamble. |
| Rev. | ... Revenue. |
| R. | ... Rule. |
| S. | ... Section. |
| S. B. | ... Special Bench. |
| S. C. | ... Supreme Court. |

IN FOOT-NOTES :—

('66) means (1866); ('04) means (1904); ('27) means (1927); ('39) means (1939).

Full year reference is given prior to 1866, like (1818) and *not* ('18); (1865) and *not* ('65) and so on and to all English cases.

The figure preceding the A. I. R. reference denotes the *Volume* Number of the All India Reporter. Thus, in (40) 27 A. I. R. 1940 Oudh 441, the figure 27 denotes the 27th Volume of the All India Reporter, "1914" being the 1st Volume.

sions of the different High Courts. These relate for the most part to matters of detail rather than to questions of principle, and a sufficient account of the amendments proposed in respect of them will be found in the Notes on Clauses annexed to this statement.

4. It would be possible to enact the proposed alterations by an amending Act. But the Limitation Act of 1877, has been already amended by no less than eleven different enactments. It is clearly desirable to have the whole of the statutory law on the subject dealt with in one Act and to clear the Statute-book of these scattered enactments. It is proposed for this reason to introduce an amending and consolidating Bill, embodying the alterations to which attention has been called, re-enacting the present Act in other respects and repealing the various Acts and provisions in which the law is now contained.

The 2nd January 1908.

H. ERLE RICHARDS.

NOTES ON CLAUSES.

The sections and schedules of the Act have been re arranged, the saving and repealing provisions being placed at the end.

In the Act various suits, appeals and applications are described by reference to the number of the particular section of any Act under which the suit, appeal or application in question may be instituted, preferred or made. Most of these references are to sections of the Code of Civil Procedure, and as the majority of these sections have, in the Civil Procedure Code Bill now before the Legislature, been relegated to Rules which may from time to time be altered and may be different in different Provinces, it has been considered advisable in framing the clauses and articles in the Bill to avoid these references and to render the provisions of the Bill self-contained as far as possible.

CLAUSES OF BILL.

Clause 1.—It is proposed that section 33, which provides for suits on mortgages affected by the Privy Council case, should take effect on the passing of the Bill, and that the rest of the Act should come into force simultaneously with the Code of Civil Procedure now before the Legislature.

Clause 2. — The definitions have been re-arranged in alphabetical order.

No. (6) has been added to make the term "moveable property" include growing crops in accordance with the amendment proposed in the Civil Procedure Code Bill. This is for consideration. It was approved by the Select Committee on the Code of Civil Procedure of 1903 and was inserted in their Draft Bill (Schedule IV).

Clause 5. — Words have been inserted in this clause to include applications to which the clause may be made applicable by the Code of Civil Procedure. This amendment has the approval of the Special Committee on the Code of Civil Procedure, 1907.

Clauses 7 and 8. — The last clause of section 7 with some verbal modifications has been placed as a separate clause after clause 8 so as to make it clear that its provisions are applicable to cases governed by either of the clauses 7 or 8.

Cases of a person entitled to institute a suit or make an application being under any legal disability are dealt with by sections 7 and 8 of the Act.

THE INDIAN LIMITATION BILL (1908).

STATEMENT OF OBJECTS AND REASONS.*

1. One immediate circumstance which has moved the Government of India to undertake legislation in connexion with the Indian Limitation Act, 1877, is the hardship which has been caused to the holders of mortgages of immovable property, in forms other than what is known as the English form, over a large part of India, by reason of the recent decision of the Judicial Committee of the Privy Council in the case of *Vasudeva v. Srinivasa*, (11 C W N 1005). In that case their Lordships, overruling the decisions of the High Courts of Bombay, Madras and Allahabad, have advised that the period of limitation prescribed by the Indian Limitation Act, 1877, for suits to enforce payment of money secured by such mortgages, is twelve years as provided in article 132 of the second schedule of that Act, and not the longer period of sixty years prescribed by article 147. In the opinion of the Privy Council the latter article applies only to the class of mortgages in which a suit may be brought for "foreclosure or sale," that is, only to English mortgages. Previous to this decision, for nearly a quarter of a century, the law had been held by the High Courts of Bombay and of Allahabad to be that every suit by a mortgagee either for foreclosure or for sale was governed by the sixty years' rule of limitation enacted in article 147, and the same view of the law had been accepted by the High Court of Madras and by some other High Courts. The effect of the decision of the Privy Council has been that in the territories within the jurisdiction of the above High Courts a number of suits for the enforcement of mortgages, which, before the decision of the Privy Council, would have been within time, have been and must be dismissed by the Courts on the grounds that they are barred by limitation, and that the claims under a still larger number of mortgages have become unenforceable owing to the construction thus put on the Statute of Limitation. This result is undoubtedly hard on mortgagees who have relied on the view of the law taken by the High Courts of their Provinces and now find themselves debarred of all remedy because that view has been decided to be incorrect. The Government of India are of opinion that some provision should be made to meet these cases, and it is accordingly proposed in the Bill to allow to these mortgagees a period of two years within which to bring their suits, provided that the whole period from the date when the money secured by the mortgage became due does not exceed sixty years in all. Provision is also made for the continuance of pending suits and for the restoration of suits which have been dismissed on the ground of limitation since the date of the Privy Council decision.

2. Legislation is also necessary to give effect to the recommendations of the Committee on the Code of Civil Procedure. These have been incorporated in the present Bill.

3. It seems desirable also to take this opportunity of setting at rest some doubts on other provisions of the Limitation Act which have been caused by conflicting deci-

* Gazette of India, 1908, Part V, page 22.

sions of the different High Courts. These relate for the most part to matters of detail rather than to questions of principle, and a sufficient account of the amendments proposed in respect of them will be found in the Notes on Clauses annexed to this statement.

4. It would be possible to enact the proposed alterations by an amending Act. But the Limitation Act of 1877, has been already amended by no less than eleven different enactments. It is clearly desirable to have the whole of the statutory law on the subject dealt with in one Act and to clear the Statute-book of these scattered enactments. It is proposed for this reason to introduce an amending and consolidating Bill, embodying the alterations to which attention has been called, re-enacting the present Act in other respects and repealing the various Acts and provisions in which the law is now contained.

The 2nd January 1908.

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Clauses 7 and 8. — The last clause of section 7 with some verbal modifications has been placed as a separate clause after clause 8 so as to make it clear that its provisions are applicable to cases governed by either of the clauses 7 or 8.

Cases of a person entitled to institute a suit or make an application being under any legal disability are dealt with by sections 7 and 8 of the Act.

It has been held in a series of decisions of the Madras High Court that section 7 applies only to cases where the right to bring a suit or to make an application is vested either —

- (i) in a single individual who is under a disability, or
- (ii) in a number of individuals, all of whom are under a disability.

These cases are, *Seshan v. Rajagopala*, I L R 13 Mad 236, where there was a decree in favour of three persons of whom two only were minors, and it was held that section 7 did not apply to an application for the execution of the decree; *Vigneswara v. Bapayya*, I L R 16 Mad 436, and *Moidin v. Beevi*, I L R 18 Mad 38, which were cases of suits where some only of several persons entitled to institute them were under disability, and it was held, following the case in I L R 13 Mad 236, that the suits were not governed by section 7; *Ahinsa v. Abdul*, I L R 25 Mad 26, where Benson and Bhashyam Ayyangar, JJ., adopted the same construction of section 7 and held that, apart from section 8, the protection afforded by section 7 would extend only to cases where each and all of the persons jointly entitled to sue were affected by disability at the time from which the period of limitation was to be reckoned, and that if any one of them was then free from disability, section 7 cannot be availed of by all or any of them; and *Periasami v. Krishna*, I L R 25 Mad 431, where a Full Bench of the Madras High Court upheld the same view.

On the construction put upon section 7 by the Madras High Court, cases in which the right is vested jointly in a number of persons of whom some only are under any disability must be left to be governed by section 8 alone, and under the latter part of that section, if there is no one among these persons who can give a discharge without the concurrence of those who are under disability, time would commence to run only from the date when the last of them becomes free from disability and then, apparently, they would have in every case the full period prescribed for the suit or application in question, there being nothing in section 8, corresponding to the last clause of section 7, to limit the period to three years from the cessation of disability or to exclude suits for pre-emption from its scope.

Clause 8.—There is conflict between the Calcutta, Bombay and Allahabad High Courts on the one hand and the Madras High Court on the other on the question, whether an application for the execution of a decree can be saved from limitation by the fact of some only of the decree-holders being under a disability. In *Anando v. Anando*, ILR 14 Cal 50; *Surja v. Arun*, ILR 28 Cal 465; *Govindram v. Tatia*, ILR 20 Bom 383 and *Zamir v. Sundar*, I L R 22 ALL 199 (FB), it has been held that a disability of some only of several joint decree-holders would save an application for the execution of the decree from being barred; while the Madras High Court, in *Seshan v. Rajagopala*, I L R 13 Mad 236, and in *Periasami v. Krishna*, I L R 25 Mad 431 (FB), has held the contrary. The High Courts of Calcutta, Bombay and Allahabad hold that the case comes under section 7, but the Madras High Court holds that it comes neither under section 7 nor under section 8. If the right view of section 7 is that it deals only with cases, where the person, or all the persons if there are more than one, entitled to bring a suit or make an application, is or are under disability, the case in question should properly be dealt with by section 8; all the High Courts are agreed that one of several joint decree-holders cannot give a valid discharge without the concurrence of the others; but the Madras High Court in the Full Bench case felt a difficulty in bringing the case under section 8, for the reason that applications are not mentioned in that section while they

are in section 7. In the course of his judgment in the case *Bhashyam Ayyangar, J.* observed that the addition of words suggested in this amendment would bring the case in question within the operation of section 8 (I L R 25 Mad 431 at p. 442).

Clause 9. — This is the last paragraph of section 7.

Clause 11. — The proposed amendment is intended to remove certain doubts.

It has been held in some cases that this section does not include a suit for an account of the trust property.

In *Saroda v. Brojo*, I L R 5 Cal 910, property had been vested in the defendant upon trust to manage it and maintain the plaintiff out of the profits during his minority and to make it over to the plaintiff on his attaining the age of majority; the suit was for a decree directing the defendant to account for all such property, and the profits, receipts and disbursements connected therewith. It was held by White and Maclean, JJ., that the object of the suit not being to recover any property in specie, section 10 did not apply. A similar view was adopted in *Advocate-General v. Bai Punjabai*, I L R 18 Bom 551 (at pp. 566, 567), where the claim was against a trustee for an account of income and disbursements in respect of trust property and for the balance if any. In *Hurro v. Tarini*, I L R 8 Cal 766, however, Wilson, J., directed an account and in a manner doubted the correctness of the rule laid down in I L R 5 Cal 910, and in *Nistarini v. Nundo Lal*, I L R 30 Cal 369 (at p. 384), a trustee was directed to render accounts irrespective of any question of limitation. In *Ranga v. Baba*, I L R 20 Mad 398, the question whether section 10 applied to a suit charging breaches of trust and claiming an account was regarded as a somewhat doubtful question and was left open.

Section 8, clause 1 of the Trustee Act, 1888 (51 & 52, vict., c. 59), saves from the bar of limitation a claim against a trustee "to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by him and converted to his use." It has been held that actions against express trustees claiming an account of such property cannot be barred by the Statute of Limitation: *Roche foucauld v. Boustead*, (1897) 1 Ch 196 at p. 208; *North American Co. v. Watkins*, (1904) 1 Ch 242.

Clause 15.—This is section 14 of the Act. The second paragraph of this section is omitted as it is proposed in the Civil Procedure Code Bill to leave out the provision relating to staying proceedings contained in section 20 of the present Code of Civil Procedure.

Clause 16. — Words are proposed to be inserted in the clause so as to make its provisions applicable to cases where the execution of a decree has been stayed by injunction or order.

This section is not applicable to cases of applications for execution of decrees: *Rungiah v. Nanjappa*, I L R 26 Mad 780, 782, although in *Beni v. Sarju*, I L R 26 ALL 140, the High Court of Allahabad in computing the period of limitation for an application for execution of a decree allowed the period, during which an injunction staying the execution was in force, to be excluded; it is not, however, clear upon the judgment under what provision of the Act this exclusion was allowed.

The Courts have in many cases, where the execution of a decree has been stayed by an injunction or order relieved the decree-holder from the bar of limitation by treating the application made after the withdrawal of the injunction or order as an

application to revive or continue some previous application: *Kalyanbhai v. Ghanashamlal* I L R 5 Bom 29, p. 34 *et seq.*; *Narayan v. Sono*, I L R 24 Bom 345; *Issuree v. Abdool*, I L R 4 Cal 415; *Hurronath v. Chuni*, I L R 4 Cal 877; *Ashraf v. Bepin*, I L R 30 Cal 407 at pp. 411, 413; *Gurudeo v. Amrit*, I L R 33 Cal 689; *Lakhmi v. Ballam*, I L R 17 ALL 425, and *Qamaruddin v. Jawahir*, I L R 27 ALL 334 (P C), may be cited as instances.

But it is not always possible by this method to relieve an applicant for execution, in cases where execution has been stayed by reason of an order of Court, from the bar of limitation; as for instance in cases where there was no pending application for execution at the date of the injunction or order (*Sarup v. Watson*, 6 C W N 735); or where the previous application had been dismissed after the removal of the bar but before the date of the fresh application (*Dukhiram v. Jagendra*, 5 C W N 347).

In the course of their judgment in *Rungiah v. Nanjappa*, I L R 26 Mad 780, Benson and Bhashyam Ayyangar, JJ., observed as follows: "It is only reasonable and proper that in computing the period of limitation prescribed for an application for execution of a decree, the time during which the attaching decree-holder prosecutes a suit under section 283, or during which execution of the decree or a portion of it has been stayed by injunction or otherwise, should be excluded." (At p. 783).

Clause 18. — The addition of this clause was recommended in the Civil Procedure Bill of 1903. In their report the Select Committee observed as follows:

"In proposing an additional section (16A) we have acted on the view that the purpose of clause 424 (section 424 of the Code of Civil Procedure) is to give notice and facilitate compromise, but not to shorten the period of limitation. Where, for example, the period of limitation is only thirty days, the deduction of two months on account of notice negatives the right of suit."

Clause 21. — There is a conflict between the Madras High Court and the other High Courts on the question whether the provisions of section 19 apply to applications for execution of decrees; the Madras High Court has answered the question in the negative: *Rama v. Venkatesa*, I L R 5 Mad 171 (FB); *Sreenivasa v. Ponnusawmy*, I L R 28 Mad 40; and the other High Courts have answered it in the affirmative: *Trimbak v. Kashinath*, I L R 22 Bom 722, 727; *Venkatrav v. Bijesing*, I L R 10 Bom 108; *Ram v. Jakur*, I L R 8 Cal 716; *Toree v. Mahomed*, I L R 9 Cal 730; *Norendra v. Bhupendra*, I L R 23 Cal 374, 387; *Ramhit v. Satgur*, I L R 3 ALL 247 (FB); *Janki v. Ghulam*, I L R 5 ALL 201; *Fateh v. Gopal*, I L R 7 ALL 424; *Muhammad v. Payag*, I L R 16 ALL 228; *Bhagat v. Chint*, Punj. Record No. 28 of 1885; *Bhagabutty v. Ashutosh*, 8 C W N 470.

It may be observed that under section 8, 37 & 38 vict., c. 57, the right to take proceedings to enforce a judgment may be saved by acknowledgment or payment: *Jay v. Johnstone*, (1893) 1 Q. B., p. 25 on appeal, p. 189, where at p. 190, Lindley, L. J., opened his judgment with the following remark: "The question raised by this appeal is a very important one, namely, whether proceedings can be taken to enforce a judgment after twelve years, there having been no payment or acknowledgment in the meantime."

The proposed amendment is intended to make it clear that the provisions of the clause apply to applications for the execution of decrees.

Clause 22. — The expression "produce of land" may not include rent paid by tenants in occupation of the land. (See *Ummer v. Abdul*, I L R 2 Mad 165.) The proposed amendment will remove the doubt.

There is a conflict between the Calcutta and the Madras High Courts on the one hand and the Allahabad High Court on the other on the question whether the word "debt" in this section includes what may be called a judgment-debt; the Calcutta and the Madras High Courts answering the question in the negative: *Kader Buksh v. Gour*, 6 C W N 766; *Periasami v. Krishna*, I L R 25 Mad 481 (FB) at p. 442; *Kuppu v. Renga*, I L R 27 Mad 608; *Srinivasa v. Ponnu*, I L R 28 Mad 40 and the cases of *Kally v. Heera*, I L R 2 Cal 468 and *Mungol v. Shama*, I L R 4 Cal 708, decided under sections 20 and 21 of Act IX of 1871; and the Allahabad High Court answering it in the affirmative: *Roshan v. Mata*, I L R 26 ALL 36; *Janki v. Ghulam*, I L R 5 ALL 201; *Ramhit v. Satgur*, I L R 3 ALL 247; *Muhammad v. Payag*, I L R 16 ALL 228; *Ashanullah v. Dakkhini*, I L R 27 ALL 575. It seems that acknowledgments and payments should in this respect have the same effect, and it may be observed that under section 8, 37 & 38 Vict. c. 57, a payment would save the right to take proceedings to enforce a judgment: *Jay v. Johnstone*, (1893) 1 Q B 189.

The explanation is added to remove this conflict.

Clause 23 (I). — There is a conflict of authority on the question whether a guardian of a minor is an agent within the meaning of these sections. In *Tilak v. Chhutta*, I L R 26 ALL 598, it was held that a payment made by a natural guardian of certain minors of interest due on a bond executed by their deceased father did not meet the requirements of section 20; in *Wajibun v. Kadir*, I L R 13 Cal 292, it was held that an acknowledgment given by the natural guardian of a minor was not enough to give the creditor a fresh period of limitation, and the same view was taken in *Maharana v. Vadilal*, I L R 20 Bom 61. On the other hand, in *Annapagauda v. Sanga*, I L R 26 Bom 221 (FB), it was held that a payment made or acknowledgment given by a guardian appointed under Act VIII of 1890, if it was within the powers of the guardian under section 27 of the Act, would be sufficient; payment made by such a guardian who had borrowed money on a bond for the benefit of the minor was held to be a good payment under section 20: *Narendra v. Rai Charan*, I L R 29 Cal 647; and an acknowledgment made in the course of certain execution proceedings by the pleader of a minor judgment-debtor was held to be within the requirements of section 19 in *Norendra v. Bhupendra*, I L R 23 Cal 374 at p. 387; and in *Sobhanadri v. Sriramulu*, I L R 17 Mad 221, an acknowledgment made by a natural guardian was held to meet the requirements of section 19. In *Beti Maharani v. Collector of Etawah*, I L R 17 ALL 198 (P C), an acknowledgment made by the Court of Wards on behalf of a person who had been declared disqualified on her own application was held to be sufficient; it may be doubted, however, whether such a disqualified proprietor is a person under disability in the same sense as a minor or an idiot or an insane person.

It may be observed that acknowledgments and payments made by guardians and managers are almost always made for some benefit to the estate of the person under disability, *e. g.*, to avert an impending suit; it would be manifestly unfair after a creditor has, at the request of the guardian, accepted a payment or an acknowledgment and refrained from suing at once, to allow the minor afterwards to say that the creditor's remedy has become barred.

The addition of this sub-clause will remove the conflict.

Clause 24. — The proposed amendment is recommended in the fourth schedule annexed to the Civil Procedure Code Bill, 1907. In the notes annexed to their report,

the Special Committee made the following observation with reference to this amendment :

"The Committee have amended section 22 of the Limitation Act to supply an omission which has been noticed by the High Courts, namely, the absence of any provision with regard to a devolution of interest *pendente lite* where it takes place otherwise than by reason of death. The section as amended will include not only cases in which a devolution of interest takes place *pendente lite* owing to death but also other cases in which such devolution occurs."

It is also proposed to save cases where plaintiff has been made a defendant or *vice versa* from the operation of this clause : *Jibanti v. Gokool*, 1 L R 19 Cal 760; *Khadir v. Rama*, 1 L R 17 Mad 12.

Clause 28.—A clause has been added to provide a rule for the acquisition of easements against the Government.

It is the last clause of section 15 of the Indian Easements Act, v of 1882. There is a conflict on the question whether section 26 applies against the Government. In *Arzan v. Rakhal*, 1 L R 10 Cal 214, 219, Garth, C. J., went on the assumption that it did; whereas in *Secretary of State v. Mathurabhai*, 1 L R 14 Bom 213, and *Viresa v. Tataya*, 1 L R 8 Mad 467, it has been held that it does not.

Sixty years is the period of limitation applicable against the Government.

Illustration (b) has been omitted as it has been pointed out that it goes beyond the terms of the section which does not require "actual user" : *Koylash v. Sonatun*, 1 L R 7 Cal 132.

This illustration does not occur under section 15 of the Indian Easements Act, v of 1882.

Clause 31. — Portions of section 2 have been omitted as unnecessary, having regard to the provisions of the General Clauses Act, 1897, section 6 (a), (c) and section 8.

Sub-clause (2) (b) — The Madras Regulation, VI of 1831, has been repealed except as to the scheduled districts in Madras by the Madras Hereditary Village-offices Act (Mad. Act III), 1895. This Act, however, clearly provides special rules of limitation for suits, appeals and applications, making certain sections of the Limitation Act applicable thereto. Sub-clause (1) (b) will therefore save the periods prescribed by this Act from being altered or affected by anything herein contained and it need not be specifically mentioned.

Sub-clause (3).—The sections of the Act corresponding to clauses 28 and 29 of the Bill were repealed by the Indian Easements Act, v of 1882, in the Provinces to which it applies; this sub-clause is added to provide that these provisions of the Bill shall not affect the Easements Act.

Clause 32. — This clause provides for cases in respect of which the period of limitation has been shortened by the Bill. It proceeds on the lines of the last clause in section 2 of the Act (now repealed by the repealing and Amending Act, 1891).

Clause 33 (1). — The Privy Council has held in the recent case of *Vasudeva v. Srinivasa*, 11 C W N 1005, that article 147 (providing a period of sixty years) is applicable only to suits on English mortgages, and that suits on all other mortgages are

governed by the twelve years' rule contained in article 132. Previous to this decision, the law, as laid down in the decisions of the High Courts of Bombay, Madras and Allahabad, was that article 147 applied to every suit by a mortgagee in which he asked either for foreclosure or for sale: *Motiram v. Vitai*, I L R 13 Bom 90 (F B); *Datto v. Vithu*, I L R 20 Bom 408 (F B); *Narayana v. Venkata*, I L R 25 Mad 220 (F B); *Shib v. Ganga*, I L R 6 ALL 551 (F B).

The result has been that in the said territories a large number of mortgage suits for which the period of limitation had hitherto been believed to be sixty years would be found to be barred by limitation.

This sub-clause is meant to provide for these suits, as also for the continuance of pending suits.

Clause 33 (2). — This sub-clause is supposed to provide for the restoration of suits of the description mentioned above which have been dismissed on the ground of limitation since the date of the Privy Council decision. It proceeds on the lines of section 12, Act XXIII of 1861.

Clause 34 and Schedule III. — The Indian Limitation Act, 1877, and the several general enactments amending it are proposed to be repealed.

NOTES ON SCHEDULES.

SCHEDULE I.

This is Schedule II of the Act. The existing numbering has been retained as far as possible.

Article 5. — This amendment has been proposed in the fourth schedule of the Civil Procedure Code Bill, 1907. Clause 128 (f) of the Civil Procedure Code Bill proposes to authorise the framing of rules extending the summary procedure to the trial of suits other than suits on negotiable instruments.

Article 11. — The article is proposed to be amended so as to provide for all cases in which the Civil Procedure Code Bill proposes to give a right of suit to challenge orders passed in proceedings relating to resistance and obstruction to the delivery of possession of property to a decree-holder or to a purchaser of property sold in execution of a decree and to dispossession in such delivery of possession.

Article 33 has been divided in order to preserve the numbering of the present Act.

Article 34 of the Act is proposed to be omitted.

A wife, even if a minor, should not be looked upon by the law as a chattel and an object of possession. The Civil Procedure Code Bill of 1907, has left out the provision relating to decree for the recovery of a wife (O. XXI, R. 32).

Article 35 of the Act is also proposed to be omitted.

The scope of this article is very limited. It does not apply to cases arising under the Indian Divorce Act. The Allahabad High Court has held that it does not apply to Hindus or Muhammadans, as their personal law does not require an antecedent demand to sustain a suit for restitution of conjugal rights, nor make restitution unenforceable against a minor, and it has further held that the withholding of conjugal rights by either party is a continuing wrong, and that a claim for restitution cannot be barred

by limitation : *Binda v. Kaunsilia*, I L R 13 ALL 126, 146. The same view was taken in *Bai Sari v. Sankla*, I L R 16 Bom 714. These views have been so far modified by the rulings of the Calcutta and Madras High Courts and by the later rulings of the Bombay High Court as to make the article applicable to Hindus and Muhammadans in cases of suits preceded by demand and refusal as mentioned in the third column : *Dhanjibhoy v. Hirabai*, I L R 25 Bom 644 (FB); *Asirunnessa v. Buzloo*, I L R 34 Cal 79 ; *Saravanai v. Poovayi*, I L R 28 Mad 436. The operation of the article may be easily avoided by a party if he simply refrains from making a demand which, it may be noted, is not under the Hindu or Muhammadan law necessary to give rise to a cause of action. It is a very usual thing in Hindu and Muhammadan families for a wife to go and stay with her parents or brothers and the effect of this article is that if owing to any domestic quarrel the wife should in a fit of temper refuse to return, the husband would be compelled to take the matter into Court within two years.

Article 44.—The article is proposed to be amended so as to be applicable to all transfers of property.

It has been held in one case that the word "sale" does not include a mortgage or a lease : *Ramausar v. Raghubar*, I L R 5 ALL 490.

Article 60.—There is conflict on the question whether money deposited with a banker is a loan or a deposit.

In *Ishur v. Jibun*, I L R 16 Cal 25, Wilson, J., held that it is a deposit and not a loan within the meaning of article 59.

In *Ichha v. Natha*, I L R 13 Bom 338, it was held that a deposit with a banker is ordinarily a loan.

In *Dharam v. Ganga*, 4 Allahabad Law Journal 628, it has been held that ordinary dealings between native bankers and their customers are matters of loan within the meaning of article 59.

In *Muncherji v. Dorabji*, I L R 19 Bom 775, and *Perundevi v. Nammalvar*, ILR 18 Mad 390 at p. 394, it was held that whether a particular transaction was a loan or a deposit would depend on the facts of each case.

The amendment suggested would bring the law into conformity with the view taken by ordinary men of business in this country.

Article 99. — It was held in *Pattabhi v. Ramayya*, I L R 20 Mad 23 that this article could not apply to a case where not the *whole* but only a *part* of the money due under a joint decree was realized from the plaintiff by the sale of his property by the Court and that it was doubtful whether such a case fell under article 61 or under the general article 120.

In *Rajah of Vizianagram v. Rajah Setrucherla*, I L R 26 Mad 686 at p. 716, Bhashyam Ayyangar, J., pointed out that a strictly grammatical and literal interpretation of this article would lead to anomalous, if not absurd, consequences, and observed that he would be strongly inclined to read the section as if after the words "had paid" there were the words "on account of." He held that each time that an amount is paid by or levied from the party seeking contribution in excess of his share, he has a right of suit for contribution in respect of such payment. Referring to this case Stanley, C. J., in *Ibn Hasan v. Brijbhukan*, I L R 26 ALL 407, observed as follows : "It seems to me

very questionable whether the learned Judge has not taken too great a liberty of interpolation with the article in question"—page 425.

The question whether the word 'paid' in article 100 of Act IX of 1871 (which corresponded to the present article 99) covered a case where money was realized by the sale of plaintiff's property was left in doubt by Mitter and Maclean, JJ., in *Fuckoruddeen v. Mohima*, I L R 4 Cal 529.

The amendments proposed would meet the points indicated above.

Article 111. — The amendment proposed will make it clear that this article is applicable only to suits to enforce the personal liability of the purchaser.

It has been held by the High Courts of Bombay, Madras and Allahabad that a suit by an unpaid vendor to enforce his charge on the land for the unpaid purchase-money is governed by article 132 and not by this article : *Chunilal v. Bai Jethi*, I L R 22 Bom 846; *Virachand v. Kumaji*, I L R 18 Bom 48; *Har v. Muhamdi*, I L R 21 ALL 454; *Ramakrishna v. Subrahmania*, I L R 29 Mad 305 (FB), overruling *Natesan v. Soundra*, I L R 21 Mad 141 and *Avuthala v. Dayumma*, I L R 24 Mad 233.

Article 116. — It is proposed to amend this article so as to exclude from its operation suits for arrears of rent payable under a registered lease.

There is conflict on the question whether a suit for arrears of rent due under a registered lease is governed by this article or by article 110 which provides three years for suits for arrears of rent. The Calcutta High Court has held that such suits, if not governed by the Bengal Tenancy Act (that is, if the rent is not due in respect of agricultural lands) would come under article 116 and not under article 110 : *Umesh v. Adarmoni*, I L R 15 Cal 221; *Raniganj Coal Company v. Jadunath*, I L R 19 Cal 489; suits for rent due under a registered contract are also held to be governed by article 116 by the Madras High Court : *Vythilinga v. Thetchana*, I L R 3 Mad 76. The Allahabad High Court has, however, held that such suits are governed by article 110, which specifically deals with suits for arrears of rent : *Ram Narain v. Kamta*, I L R 26 ALL 138.

The ruling of the Calcutta and Madras High Courts would reduce the scope of article 110 to cases of tenancies for a term not exceeding one year and monthly tenancies, as all other tenancies must be created by registered instrument.

Article 118.—The amendment is proposed to remove a conflict of authority, and it adopts the view taken by Bhashyam Ayyangar, J.

In a suit to set aside an adoption where but for the adoption the estate would be in a Hindu female, a remote reversioner has been held to claim through the presumptive reversioner in the following cases : *Ayyadorai v. Solai*, I L R 24 Mad 405; *Chiruvolu v. Chiruvolu*, I L R 29 Mad 390 (F B); *Harnath v. Mandil*, I L R 27 Cal 379 at p. 403; *Srinivasa v. Hanmant*, I L R 24 Bom 260 at p. 266; *Siddhassar v. Sham Chand*, 23 W R 285 (decided under Act IX of 1871); *Mrino Moyee v. Bhoobun*, 23 W R 42 (decided under Act XIV of 1859).

The contrary view has been taken in the following cases : *Abinash v. Harinath*, ILR 32 Cal 62 at p. 71; *Bagwanta v. Sukhi*, I L R 22 ALL 33 at pp. 44, 45.

In the case of *Chiruvolu v. Chiruvolu*, I L R 29 Mad 390 (FB), however, the Court observed that in suits relating to the alienations by a qualified owner (such as a

Hinda widow) the presumptive reversioner cannot, on the current of authority, be held to represent remote reversioners (at p. 411). The conflict, therefore, is limited to suits relating to adoption.

Article 163.—The amendment is recommended by the Special Committee on the Civil Procedure Code Bill, 1907.

Article 166.—The amendment is recommended by the same Committee. In the Notes on Schedules annexed to their report they observe as follows :

"The Code [s. 312] contemplates the confirmation of a sale of immovable property immediately on the expiration of the thirty days allowed by article 166 of the Limitation Schedule. But the period allowed for an application to set aside a sale on the ground that the judgment-debtor had no saleable interest therein is sixty days [article 172]. The result is that in some Provinces the confirmation of a sale is delayed for sixty days; whilst in other Provinces, sales, which have been already confirmed are liable to be set aside. The Committee think that in the matter of limitation an application under section 313, should be brought into line with an application under section 312, and they therefore propose to repeal article 172 and to amend article 166 so as to include application under section 313."

Articles 171, 172.—Article 171 of the Act has been broken up into these two articles. References to the sections have been omitted and words have been added to describe the order of dismissal referred to.

Article 172 of the Act is omitted from the Bill.

Article 174 of the Act is omitted as it has been repealed by the Provincial Insolvency Act, 1907, with effect from the 1st January, 1908.

Articles 176, 177.—These two articles have been substituted for the three articles in the Act. Article 177 is recommended by the Special Committee of 1907.

Article 179 —In article 177 of the Act the description of the application intended to be governed by it does not seem to be accurate.

Section 598 of the Code deals with the application to be made by an intending appellant; section 603 deals with the admission of the appeal. Section 598 requires that the application should pray for a certificate that the case is a fit one for appeal; section 603 does not require that any application should be made for the admission of the appeal.

It may be noted that the word *may* in section 603 of the present Code has been replaced by the word *shall* in O. XLIV, R. 8 of the Code of Civil Procedure Bill, 1907.

Article 181, third column, clause 2.—There is conflict on the question whether, where an appeal has been withdrawn, time would run from the date of withdrawal of the appeal or from the date of the original decree.

In *Peria v. Lakshmi*, 1 L R 30 Mad 1 (F B), it has been held by the Madras High Court that in case of an appeal which has been withdrawn, time should run from the date of the order of the Appellate Court dismissing the appeal on such withdrawal.

The Bombay High Court has on the other hand held that when an appeal is withdrawn time would run from the date of the original decree : *Abdul v. Maidin*, 1 L R 22 Bom 500 at p. 506.

Article 181, third column, clause 4.—There is conflict on the question whether when a decree has been amended, time for an application for execution would run from the date of the decree or from the date of the amendment.

In *Kali Prosunno v. Lal Mohun*, 1 L R 25 Cal 258, the application for amendment (to include in the decree certain costs which had been awarded by the judgment) was regarded as an application for review; the same view was taken in *Venkata v. Venkata*, 1 L R 24 Mad 25, where the application was to amend the amount of costs entered in decree; and in *Amar v. Asad*, 1 L R 32 Cal 908, it was held that time would run from the date of amendment as the amended decree was the final decree to be executed.

The Allahabad High Court on the other hand has held that an application under section 206 of the Code of Civil Procedure to amend a decree so as to bring it into conformity with the judgment is not an application for review, and that time will run from the date of the decree as originally drawn up : *Ahsanullah v. Dakkhini*, 1 L R 27 ALL 575; *Kallu v. Fahiman*, 1 L R 13 ALL 124; *Muhammad v. Muhammad*, 1 L R 17 ALL 39 and *Daya v. Nanhi*, 1 L R 20 ALL 304.

Article 181, third column, clause 6.—There is conflict on the question whether the date referred to in this clause is the date of the order of the Court directing notice to issue or the date on which the notice actually issues from the Court, some time being usually taken in the drawing up and signing of the notice.

The Calcutta and the Madras High Courts have held that the date of actual issue is meant : *Kedaressur v. Mohim*, 6 C W N 656; *Ratan v. Deb*, 10 C W N 303; *Cheruvath v. Nerath*, 1 L R 30 Mad 30.

The Bombay and the Allahabad High Courts have held that where notice has been issued time would run from the date of the Court's order to issue the notice : *Govind v. Dada*, 1 L R 28 Bom 416; *Damodar v. Sonaji* 1 L R 27 Bom 622; *Udit v. Rampertab*, (1881) 1 ALL W N 120.

SCHEDULE II.

This schedule specifies the territories in which previous to the recent decision of the Privy Council (11 C W N 1005) the law was held to be that the period of limitation for every suit by a mortgagee, whether he asked for foreclosure or for sale, was sixty years as provided by article 147 and not twelve years as provided by article 132.

The list is not exhaustive as it is not definitely known whether there are not other Provinces or Districts where the same view of the law prevailed.

SCHEDULE III.

The enactments proposed to be repealed are specified in this schedule.

THE SELECT COMMITTEE'S REPORT.*

The following Report of the Select Committee on the Bill to consolidate and amend the law for the limitation of Suits, and for other purposes, was presented to the

* Gazette of India, 1908, Part V, page 223.

Council of the Governor-General of India for the purpose of making Laws and Regulations on the 20th March, 1908 : —

LEGISLATIVE DEPARTMENT.

WE, the undersigned, Members of the Select Committee to which the Bill to consolidate and amend the Law for the Limitation of Suits, and for other purposes was referred, have considered the Bill and the papers noted in the appendix, and have now the honour to submit this our Report, with the Bill as amended by us annexed thereto.

2. This Bill does not purport to be a general amendment of the Law of Limitation and we have not treated it in that sense. The objects of it are to consolidate the law, which at present is scattered throughout a series of enactments, to clear up some points of doubt on which conflicts exist between the various High Courts, to make some amendments which are ancillary to the Code of Civil Procedure Bill lately passed by Council, and to remove the hardship caused by a recent decision of the Privy Council in regard to the period of limitation for certain suits on mortgages. The criticisms on the Bill raise a number of other points and make various suggestions for wider reforms, but we have rejected these criticisms and confined ourselves to the objects stated.

3. In the *Notes on Clauses* in the following paragraph we have dealt with the amendment of the law contained in the Bill as circulated for opinion, but there are two points on which after the fullest consideration we suggest further amendments and to them we desire to invite particular attention. The first of them relates to clause 6 of the Bill, which corresponds with section 7 of the existing Act. Under that clause a minor is entitled to claim the benefit of his minority in respect of any application and he can make an application on attaining his majority in any matter whatever. In our opinion this provision leads to great hardship. It is possible for a minor to make an application to set aside a sale in execution of a decree or an order for abatement twenty years after the occurrence and this although he has been represented by a guardian *ad litem* at the time of the sale or abatement. We think that this clause should be limited to applications for the execution of decrees, and that in regard to other applications the minor should be bound by the acts of his representatives. The same observation applies to clause 7. We desire to point out in this connection that in regard to those applications which are now governed by periods of limitation enacted in the Code of Civil Procedure, minors cannot at the present time claim the benefit of this section. These provisions have now been removed from the Code of Civil Procedure to this Bill. It is clear that in regard to those applications the minor ought not to have the benefit of this clause and we can see no distinction between applications in this respect. The second point arises in regard to clause 14. There is a conflict of opinion as to whether misjoinder of parties or of causes of action is a "cause of a like nature" with defect of jurisdiction within the meaning of this clause. There is much to be said for the view that there is a distinction between defects of jurisdiction and misjoinder of parties or of causes of action; but on the whole we think that the clause should be extended to cover these latter cases, and we have inserted an explanation for that purpose.

4. We have somewhat re-arranged the clauses in order to preserve the existing numbering.

NOTES ON CLAUSES.

Clause 2. — We have omitted sub-clause 6; the definition of moveable property contained in it has been objected to, and we think on the whole that it should be omitted.

Clause 3. — The illustrations have been omitted. We think that they are not necessary, and are liable to misconstruction.

Clause 5. — It has been suggested that the scope of clause 5 should be enlarged, and a doubt has been expressed by high authority as to whether the expression "Code of Civil Procedure" would include rules which may be made under it. We have accordingly altered this clause so as to make its provisions extend to applications for leave to appeal and to all applications to which it may be made applicable by "any enactment or rule for the time being in force."

Clause 6 of the Bill as introduced is, in our opinion, merely explanatory of clause 5; we have accordingly omitted the former and embodied its purport in an explanation to the latter clause.

Clauses 6, 7 and 8. — We have already referred to the principal alteration we have made in clauses 6 and 7.

Adopting a suggestion of the Chief Justice of Bombay we have slightly altered the language of clause 7 so as to bring it more into conformity with that of clause 6.

Clause 12 (2). — We have struck out the words "as a pauper" from this sub-clause so as to make its provisions applicable to all applications for leave to appeal.

Clause 14. — We have re-drafted sub-clause (2) so to bring it into line with sub-clause (1), and have made Explanation II more comprehensive.

We have added Explanation III to remove the conflict to which we have referred to above.

Clause 15. — We have altered clause 18 of the Bill as introduced so as to allow the period of notice to be excluded in the case of all suits of which notice is required to be given by any enactment for the time being in force, and we have brought it up as sub-clause (2) to clause 15.

Clause 16. — We have enlarged the scope of this clause. The right to apply to set aside an execution sale is not limited to the judgment-debtor.

Clause 19. — We have struck out the words in *italics*; we think that the object with which they were inserted would be better carried out by the explanation which we have added.

We have struck out the words "according to the nature of the original liability" in sub-clause (1) as unnecessary and added the words "subject to the provisions of the Indian Evidence Act, 1872" in sub-clause (2) to remove a conflict.

Clause 20. — We have omitted the words "according to the nature of the original liability."

Clause 24. — We have struck out illustration (b).

Clause 31.—We have re-drafted this clause so as to make its provisions of wider application. We think it will now be found to provide for all the classes of cases which have been brought to our notice.

SCHEDULE I.

We approve of the proposal to omit Articles 34 and 35 of the Second Schedule of the Indian Limitation Act, 1877.

Article 34 provides for suits for the recovery of a wife; we fully agree in the opinion expressed by the Special Committee on the Civil Procedure Code that there can be under the law no such decree as a decree for the recovery of a wife, and there would be no point in providing a period of limitation for a suit for that purpose.

Article 35 provides for suits for the restitution of conjugal rights.

After giving the matter our best consideration we have arrived at the conclusion that this article should also be omitted. The High Court of Allahabad and the Chief Court of the Punjab hold that these suits are not subject to any rule of limitation on the ground, amongst others, that the withholding of conjugal rights is to be regarded as a continuing wrong within the meaning of section 23 of the Act, while the Bombay High Court, whose view has been adopted by the High Courts of Calcutta and Madras, has applied the bar of limitation on the ground that the specific provisions of this article must be taken to override the general provisions of section 23. The omission of the article would remove this conflict.

Suits for the restitution of conjugal rights brought under the Indian Divorce Act are not governed by any rule of limitation, and we can see no reason why similar suits brought under any other law should be differently treated in this respect.

Article 99.—We have omitted the explanation.

Article 109. — We have struck out from the third column all the words except "when the profits are received." Those words refer to suits for restitution consequential on the reversal of a decree and would no longer be needed, as the Code of Civil Procedure, 1908, provides that no suit would lie to claim such restitution.

Article 116.—We have restored the article of the present Act.

Article 118.—We have not attempted to remove the conflict which exists as to the construction of this article, and we have thought it right not to make any alteration in it. We have accordingly struck out the words proposed to be added in the third column.

Article 134. — The word "purchase" in this article has been held to include mortgages and leases. We have used the general word "transfer" in its place.

Article 138.—We think that the starting point for the running of time should be the date when the sale becomes absolute; the purchaser would not be in a position to sue for possession before that date.

Article 153.—This article has been re-drafted so as to include certain provisions relating to limitation which have been removed from the Code of Civil Procedure, 1908.

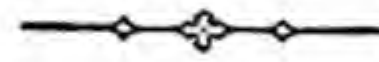
Article 163.—We understand that an application for a certificate that a case is a fit one for appeal to His Majesty in Council is in ordinary legal language spoken of

as an application for leave to appeal. We have used the expression leave to appeal in this article and elsewhere to include this meaning.

Articles 164, 169.—In these two articles we have altered the time from which the period would begin to run.

Under the Code of Civil Procedure a defendant or a respondent against whom a decree has been passed *ex parte* may have it set aside either on the ground that the summons in the suit or the notice of appeal had not been duly served on him or on the ground that he had sufficient cause for not appearing on the day fixed for trial. We think that in cases where a person claims to have a decree passed against him set aside notwithstanding that summons or notice was duly served on him, time should run against him from the date of the decree and that where there has been no due service of summons or notice, time ought not to run against him until he has knowledge of the decree.

We have added a new article No. 180 incorporating certain provisions as to limitation which have been removed from the Code of Civil Procedure Bill.



THE INDIAN LIMITATION ACT, IX OF 1908.

CHRONOLOGICAL TABLE OF ENACTMENTS.

| Year | No. of Act. | Short title. | How affected. |
|------|-------------|---|----------------------------------|
| | | English Statute of Limitations, 21 Jac. 1, cap. 16 | Repealed by Act 9 of 1871. |
| 1793 | III | Bengal Regulation | |
| 1795 | VII | " " | |
| 1803 | II | " " | |
| 1805 | II | " " | |
| 1831 | VIII | " " | |
| 1800 | I | Bombay Regulation | |
| 1827 | V | " " | |
| 1802 | II | Madras Regulation | |
| 1859 | XIV | An Act to provide for Limitation of Suits | Amended by Act 11 of 1861. |
| | | | " " " 32 of 1861. |
| | | | " " " 14 of 1862. |
| | | | Repealed by Act 9 of 1871. |
| 1871 | IX | The Indian Limitation Act | Repealed by Act 15 of 1877. |
| 1877 | XV | The Indian Limitation Act | Amended by Act 17 of 1877. |
| | | | " " " 12 of 1879. |
| | | | " " " 8 of 1880. |
| | | | " " " 5 of 1881. |
| | | | " " " 5 of 1882. |
| | | | " " " 9 of 1887. |
| | | | " " " 7 of 1888. |
| | | | " " " 8 of 1891. |
| | | | " " " 12 of 1891. |
| | | | " " " 6 of 1892. |
| | | | " " " 10 of 1899. |
| | | | " " " 6 of 1900. |
| | | | " " " 11 of 1900. |
| | | | " " " 4 of 1906. |
| | | | " " " 3 of 1907. |
| | | | Repealed by " 9 of 1908. |
| 1908 | IX | The Indian Limitation Act | |
| 1914 | XVII | Second Repealing and Amending Act | Repealing S. 32 and Sch. III. |
| 1919 | XVIII | Repealing and Amending Act | Amending Art. 158. |
| 1920 | XXVI | Indian Limitation and Code of Civil Procedure (Amendment) Act | Amending Articles 176, 178, 179. |
| 1922 | X | Indian Limitation (Amendment) Act | Amending S. 5 and S. 29. |

| Year | No. of Act. | Short title. | How affected. |
|------|-------------|---|--|
| 1923 | XI | Repealing and Amending Act | Amending Articles 4, 5, 7 to 81, 33 to 36, 38 to 115, 117 to 120, 122 to 144, 146, 146A, 148, 149, 153, 154, 159, 161, 164 to 170, 172, 174, 177, 181. |
| 1923 | XII | Criminal Law Amendment Act | Adding Art. 150A. |
| 1925 | XXX | Indian Limitation (Amendment) Act | Amending Articles 5, 159. |
| 1926 | XXXIV | Sind Courts (Supplementary) Act | Amending Art. 162. |
| 1927 | I | Indian Limitation (Amendment) Act | Amending S. 20, S. 21 and Articles 132, 166. |
| 1927 | IX | Indian Limitation (Second Amendment) Act | Amending Art. 182. |
| 1927 | X | Repealing and Amending Act | Amending Art. 162. |
| 1929 | I | Indian Limitation (Amendment) Act | Amending S. 10 and Art. 134.
Inserting Articles 48A, 48B, 134A, 134B, 134C. |
| 1929 | XXI | Transfer of Property (Amendment) Supplementary Act | Omitting Art. 133.
Amending Art. 132. |
| 1930 | VIII | Repealing and Amending Act | Amending Articles 43, 151. |
| 1935 | VIII | Central Provinces Courts (Supplementary) Act | Repealing S. 30, S. 31 and Sch. II.
Amending Art. 162. |
| 1937 | XIV | Indian Limitation (Amendment) Act | Amending Art. 149. |
| 1937 | XX | Repealing and Amending Act | Repealing Art. 4. |
| 1937 | | Government of India (Adaptation of Indian Laws) Order | Amending S. 13, S. 26 and Articles 149, 151, 162. |
| 1938 | IV | Insurance Act | Amending Art. 86. |
| 1939 | XI | Insurance (Amendment) Act | Amending Art. 86. |
| 1939 | XXXIV | Repealing and Amending Act | Amending Art. 7. |
| 1940 | X | Arbitration Act | Amending Articles 159 and 179.
Substituting new Articles for Articles 158 and 178. |
| 1941 | IV | Berar Laws Act | Amending Art. 161. |
| 1941 | XIII | Insurance (Amendment) Act | Amending Art. 86. |
| 1942 | XVI | Indian Limitation (Amendment) Act | Amending S. 20. |
| 1943 | XXVI | Criminal Procedure Amendment Act | Amending Art. 150. |
| 1948 | | Indian Independence (Adaptation of Central Acts and Ordinances) Order | Adapting Ss. 2 (6), 13 and Articles 149, 151, 162. |
| 1949 | XVII | Criminal Law (Removal of Racial Discriminations) Act | Omitting Art. 150A. |
| 1949 | | (Pakistan) Adaptation of Central Acts and Ordinances Order | Adapting Ss. 1, 2 (7), 19 and Arts. 47, 149, 151, 162. |
| 1950 | | Adaptation of Laws Order | Inserting S. 2 (9A) and Adapting Arts. 149, 153, 179, 183. |
| 1951 | III | Part B States (Laws) Act | Adapting Ss. 1 and 2; Inserting S. 30. |

THE
INDIAN LIMITATION ACT
ACT IX of 1908

—
Volume I.
—

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL
ON THE 7TH AUGUST 1908.

*An Act to consolidate and amend the law for the limitation
of suits, and for other purposes.*

*Whereas it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts; and whereas it is also expedient to provide rules for acquiring by possession the ownership of easements and other property; It is hereby enacted as follows :—

Preamble

For general topics, see Authors' Commentaries on the
Code of Civil Procedure.

*Act XV of 1877.

Same as that in Act IX of 1908.

Act IX of 1871.

Preamble. WHEREAS it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts; and whereas it is also expedient to provide rules for acquiring ownership by possession : It is hereby enacted as follows :

Act XIV of 1859.

Preamble. WHEREAS it is expedient to amend and consolidate the laws relating to the limitation of suits : It is enacted as follows :

3.Lim. 1.

Preamble Note 1

Synopsis

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. Preamble — General. 2. History of the law of limitation in India. 3. Act deals with limitation and prescription. 4. Reason and object of the law of limitation and prescription. 5. Doctrine of limitation distinguished from the doctrine of laches. 6. Doctrine of limitation distinguished from the doctrine of acquiescence. 6a. Reference to English Law. 6b. Interpretation of statutes of limitation. 7. Acts in pari materia. 8. Technical terms 9. Harmonious construction. 10. Construction in favour of right to sue. 11. Sections and Articles. 12. Residuary Article. 13. Where more than one provision applicable. | <ol style="list-style-type: none"> 14. Columns of the Schedule. 15. Retrospective operation of the Act. 16. Limitation bars remedy but does not destroy right. 17. Limitation and defence. See Note 15 to S. 3. 18. "Consolidate and amend." 19. Act, if exhaustive. 20. "Certain applications to Courts." 21. Criminal proceedings and limitation. 22. Damdupat and the Limitation Act. 23. Application of periods of limitation to facts. 24. Applicability of the Act to arbitrations. See Note 27 to S. 3. 25. Applicability of the Act to special or local laws. See Note 6 to S. 29. 26. "Rules for acquiring by possession the ownership of easements and other property." See Notes to Ss. 26 and 28. |
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TOPIC INDICATOR.

- | | |
|---|--|
| <p>Applicability to suits. See Note 20.</p> <p>Civil Procedure Code and Limitation Act. See Notes 7, 8 and 20.</p> <p>Conflict of Articles. See Note 13.</p> <p>Construction of Articles. See Notes 9 and 11.</p> <p><i>Ejusdem generis</i> — Applicability. See Note 12.</p> | <p>Laches and acquiescence — Difference. See Note 6.</p> <p>Law of limitation is law of procedure. See Note 15.</p> <p>Pending proceedings. See Note 15.</p> <p>Prescription — Different significations. See Note 3.</p> <p>Statute of repose. See Note 4.</p> |
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1. Preamble — General. — The purpose of a Preamble is to indicate, in general terms, the object and the intention of the legislature in passing an enactment.¹ It cannot, however, be availed of to control the provisions of the enactment so as to restrict or widen the import of the express terms of a section when such terms are clear

Preamble — Note 1

1. ('02) 26 Bom 757 (764) (D B), *Narandas v. Parshottam*.
 - ('94) 18 Bom 636 (656, 657) (D B), *Altar Kaufman v. Government of Bombay*.
 - ('85) 9 Bom 333 (343) (D B), *Queen-Empress v. Edwards*.
 - ('79) 2 All 218 (225) (F B), *Empress v. Sarmukh Singh*.
 - (1865) 4 Suth W R P C 109 (109) (P C), *Nga Hoong v. Queen*.
 - ('33) 20 AIR 1933 Bom 51 (57) (DB), *Official Assignee of Bombay v. Chimniram*.
 - ('84) 7 Mad 197 (200) (F B), *Queen-Empress v. Subbanna*.
 - ('32) 19 AIR 1932 Oudh 152 (153) (F B), *Kedar Nath v. Peary Lal*.
 - ('13) 19 Ind Cas 197 (201, 202) (F B), *Har Prasad v. Emperor*.
 - ('10) 8 Ind Cas 123 (124) (D B) (Cal), *Govinda v. Apkar*.
 - ('89) 11 All 262 (266), *Queen-Empress v. Indarjit*.
- [See ('78) 2 All 74 (90) (D B), *Uda Begam v. Imam-Ud-Din*. (The language of the preamble was considered as indicating the intention of the Legislature.)]

and unambiguous.² The reason is that so far as an enactment deals specifically with a point it must be deemed to be exhaustive and the law must be ascertained with reference to its provisions³ which, when clear and unambiguous, must always prevail against the Preamble.⁴ But when the language of a particular section or article is ambiguous or doubtful,⁵ or where there is nothing in the provisions of the Act to the contrary,⁶ the Preamble may be taken into consideration in interpreting the enactment.

2. History of the law of limitation in India. — Before the year 1862, there was no law of limitation applicable to the whole of India. The Supreme Courts of India established by the Royal Charter adopted the English law of limitation as contained in 21 James I, c. 16 and 4 Anne, c. 16,¹ while the Provincial Courts in each presidency which were established by the East India Company were

2. ('33) 20 AIR 1933 Bom 51 (58) (D B), *Official Assignee of Bombay v. Chimniram*.

('32) 19 AIR 1932 All 617 (618) (FB), *Bhola Umar v. Mt. Kausilla*.

('27) 14 AIR 1927 Cal 763 (765) (D B), *Nepura v. Sajer Pramanick*.

('98) 22 Bom 321 (331) (FB), *Vithu v. Govinda*.

('13) 21 Ind Cas 538 (540) (Cal) (DB), *Keshav Panda v. Bhobani Panda*.

('19) 6 AIR 1919 Cal 551 (560) (F B), *Mani Lal v. Trustees for the Improvement of Calcutta*.

('89) 11 All 262 (266), *Queen-Empress v. Indrajit*.

('92) 14 All 145 (154) (DB), *Kadir Baksh v. Bhavani Prasad*. (Speeches of legislators not to be referred for guidance.)

(1865) 4 Suth W R P C 109 (109) (P C), *Nga Hoong v. Queen*.

('31) 18 AIR 1931 Lah 706 (707) (DB), *Sahib Singh v. Data Ram*.

('31) 18 AIR 1931 Mad 629 (630) (DB), *Kannammal v. Kanakasabai Mudaliar*.

('77) 3 Cal 63 (82) (FB), *Empress v. Burah*.

(1846) 4 Moo Ind App 190 (200) (PC), *Attorney-General v. Brodie*.

3. ('23) 10 AIR 1923 Cal 724 (725) (DB), *Rahim v. Emperor*.

('02) 29 Cal 707 (715) (PC), *Gokul v. Pudmanund*.

[See ('76) 2 Bom 19 (38) (DB), *Baban v. Nagu*. (Preamble not part of statute.)]

4. ('19) 6 AIR 1919 P C 52 (53) (PC), *Secretary of State v. Maharajah of Bobbili*.

('28) 15 AIR 1928 Lah 35 (38) (DB), *Rajmal v. Harnam Singh*. (AIR 1919 P C 52, followed.)

5. ('33) 20 AIR 1933 Bom 51 (57, 58) (DB), *Official Assignee of Bombay v. Chimniram*.

('32) 19 AIR 1932 All 617 (618) (FB), *Bhola Umar v. Mt. Kausilla*.

('28) 15 AIR 1928 Lah 35 (38) (DB), *Rajmal v. Harnam Singh*.

('31) 18 AIR 1931 Lah 706 (707) (DB), *Sahib Singh v. Data Ram*.

('31) 18 AIR 1931 Mad 629 (630) (DB), *Kannammal v. Kanakkasabai*.

('26) 13 AIR 1926 Mad 381 (382), *Kesavalu Naicken v. Corporation of Madras*.

('74) 22 Suth W R Cr 20 (21) (DB), *Queen v. Jackson*.

(1864) 2 Mad H C R 322 (324) (DB), *Chinna v. Md. Fakruddin*.

6. ('90) 12 All 409 (418) (FB), *Shankar v. Din Diyal*.

Preamble—Note 2

1. (1849) 5 Moo Ind App 43 (64) (PC), *The East India Company v. Odit-churan*.

(1852) 5 Moor Ind App 234 (248, 249) (PC), *Ruckmatoyee v. Lulloobhoy*.

Preamble
Note 2

governed by certain Regulations² and Acts³ particularly applicable to them. The non-regulation provinces were governed by Codes of their own and sometimes by certain Circular Orders of the Judicial Commissioner.⁴

The Regulations and Acts applicable to the mofussil Courts of each of the presidencies differed from each other and from the English law of limitation applicable to the Supreme Courts, with the result that there was a good deal of uncertainty and confusion in applying the laws.

In order to avoid this uncertainty and anomaly, a draft Act of Limitation applicable to the whole of India was prepared in 1841 which was later on substituted by another draft in 1842 which again was finally succeeded by Act XIV of 1859. This Act, however, provided for the limitation of *suits* only, though the previous drafts had also included provisions as to acquisition and extinction of rights by *prescription*. The rules of prescription which had been in force before were left untouched.

The Act of 1859 was repealed in the year 1871 and a new Limitation Act (Act IX of 1871) was passed providing for the limitation of *suits*, *appeals* and *certain applications* to Courts and also providing for the *acquisition of easements* and the *extinguishment of rights to land and hereditary office* at the determination of a specified period. The Act, thus, dealt with both *limitation* and *prescription*. It was drafted in the form in which we find it at present, that is to say with sections and a schedule containing a tricolunnar tabular statement of different sorts of suits, appeals, and applications, the periods of limitation applicable to them and the time from which such periods begin to run.

The Act of 1871 again was repealed by Act XV of 1877. This Act provided for the extinguishment of rights not only to *land and hereditary office* but also to *any* property including moveable property. It also defined "easement" as including profits *a prendre*. After a number of amendments in various years,⁵ Act XV of 1877 was finally replaced by the present Act, IX of 1908, repeating in substance the

2. *Bengal* : Reg. III, 1793 ; Reg. VII, 1795 extending Reg. III, 1793 to Benares and certain Provinces therein ; Reg. II, 1803 extending Reg. III, 1793 to Ceded Provinces ; Reg. II, 1805 ; Reg. VIII, 1831.

Madras : Reg. II, 1802.

Bombay : Reg. I, 1800 ; Reg. V, 1827.

[See ('40) 27 AIR 1940 All 29 (31) (DB), *Asharfilal v. Zamir Fatima Bi Bi*.
(Bengal Regulation III of 1793, S. 14.)

('29) 16 AIR 1929 Cal 149 (153) (DB), *Khantamoyee Debi v. Hridayananda*.
(Suits instituted before January 1862 were governed by Reg. III of 1793 and Reg. II of 1805.)]

3. Act I of 1845 ; Act XIII of 1848 ; Act XI of 1859.

4. (1864) 10 Moor Ind App 114 (120) (PC), *Saligram v. Mirza Azim Ali*.

('66) 5 Suth W R P C 18 (18) (PC), *Shah Mukkam v. Nawab Imtiazood Dowlah*.

5. Act XVII of 1877 ; Act XII of 1879 ; Act VIII of 1880 ; Act V of 1881 ; Act V of 1882 ; Act IX of 1887 ; Act VII of 1888 ; Act VIII of 1891 ; Act XII of 1891 ; Act VI of 1892 ; Act X of 1899 ; Act VI of 1900 ; Act XI of 1900 ; Act IV of 1906 ; Act III of 1907.

provisions of that Act, the alterations being confined to matters of detail. The Act of 1908 has subsequently been amended on several occasions. For these amending Acts, see *supra* under the title "Acts Amending the Limitation Act, IX of 1908."

3. Act deals with limitation and prescription. — As has been seen in Note 2, this Act deals with the law of *prescription* as well as with the law of *limitation*. A law of *prescription* prescribes the period at the expiry of which not only the judicial remedy is barred but a substantive right is *acquired* or *extinguished*. A prescription by which a right is *acquired*, such as that referred to in section 26, is called an *acquisitive* prescription. A prescription by which a right is *extinguished*, such as that dealt with by section 28, is called an *extinctive* prescription. The distinction between the two is, however, not of much practical importance. For, the extinction of the right of one party is often the mode of acquiring it by another; the right extinguished is virtually transferred to the person who claims it by prescription. It may be noted in this connection that the latter part of the Preamble says, "and whereas it is also expedient to provide rules for *acquiring* by possession the ownership of easements and other property . . ." This shows that even cases coming under S. 28 are treated by the Act as cases of *acquisitive* prescription.

"Prescription" implies that the thing prescribed is the property of *another* and that it is enjoyed *adversely* to that other. In this respect it must be distinguished from acquisition by mere *occupation* as in the case of *res nullius*. The acquisition in such cases does not depend upon occupation for any particular length of time.

The law of limitation is, historically, of a later growth than the law of prescription. It is the procedural equivalent of the prescription of rights and is, in fact, a kind of *imperfect* prescription in that it destroys, not the principal substantive right itself, but the *accessory right of action only*. In other words, a law of limitation limits the time after which a suit or other proceeding cannot be maintained in a Court of justice; it does not affect the *substantive rights* of the parties which remain and continue to be available in other ways. Thus, where A owes B a certain sum of money, but B fails to institute a suit within the specified period, his *judicial remedy* by way of suit is barred, but the right to the amount remains and if A happens to pay B subsequently, the payment cannot be recalled on the ground of want of consideration. See Note 16.

4. Reason and object of the law of limitation and prescription. — The doctrine of limitation and prescription is based upon two broad considerations. The *first* is that there is a presumption that a right not exercised for a long time is non-existent. Thus, where a person has not been in possession of a particular property for a long time, the presumption is that he is not the owner thereof. The reason is that owners are usually possessors and possessors are usually owners, possession thus being normally evidence of ownership. The longer the

Preamble
Note 4

possession has continued the greater is its evidentiary value. The law, therefore, has deemed it expedient to confer upon such evidence of possession for a particular time, a *conclusive force*. "It (the law) has established," observes Sir John Salmond in his work on *Jurisprudence*, "a conclusive presumption in favour of the rightfulness of long possession and against the validity of claims which are vitiated by long want of possession. Lapse of time is thus recognized as creative and destructive of rights, instead of merely as evidence for and against their existence The conclusive presumption on which prescription is thus founded falls, like all other conclusive presumptions, more or less wide of the truth. Yet, in the long run, if used with due safeguards, it is the instrument of justice. It is not true, as a matter of fact, that a claim unenforced for a long time is always unfounded, but it may be wise for the law to act as if it were true. For, the effect of thus exaggerating the evidentiary value of lapse of time is to prevent the persons concerned from permitting such delays as would render their claims in reality doubtful. In order to avoid the difficulty and error that necessarily result from lapse of time, the presumption of the coincidence of fact and right is rightly accepted as final after a certain number of years. Whoever wishes to dispute this presumption must do so, within that period ; otherwise his rights, if any, will be forfeited as a penalty for his neglect. *Vigilantibus non dormientibus jura subveniunt* — Laws come to the assistance of the vigilant, not of the sleepy."¹

The other consideration on which the doctrine of limitation and prescription may be said to be based is that it is necessary that title to property and matters of right in general should not be in a state of constant uncertainty, doubt and suspense. This is in accordance with the maxim *Interest reipublicae ut sit finis litium* — The interest of the State requires that there should be an end to litigation.² Statutes of limitation and prescription are thus statutes of peace and repose.³

Preamble — Note 4

1. Salmond's *Jurisprudence*, 8th Edition, pages 468, 469.
(1904) 27 Mad 143 (150) (P C), *Rangayya v. Bobba Sriramulu*.
(1966) 6 Suth W R P C 24 (25, 27) (P C), *Imdad Ali v. Kootby Begam*.
(1929) 16 AIR 1929 Nag 74 (75), *Nandu v. Bhuwanoo*. (Statutes of limitation are intended to check dilatoriness.)
[See also (1918) 5 AIR 1918 Mad 1187 (1192) (FB), *Aiyasamier v. Venkatachela*. (The essence of the law of limitation is to provide against dilatoriness and negligence in the enforcement of a man's right.)]
2. (1852) 5 Moor Ind App 234 (251) (P C), *Ruckmoboyee v. Lulloobhoy*.
(1946) 1946 A M L J 13 (15), *Ram Swarup v. Dulraj*. (Limitation laws are very necessary, otherwise no person could remain certain that he would not be dragged before the Courts to answer for a debt allegedly incurred by some earlier ancestor of his.)
(1911) 11 Ind Cas 164 (166) (Cal) (DB), *Tara Nath v. Iswar Chandra*.
(1981) 5 Bom 68 (72) (DB), *Chhaganlal v. Bapubhai*.
3. (1943) 30 AIR 1943 Sind 33 (36), *John v. Soomar*. (The object of limitation is to quiet long possession and to extinguish stale demands. Statutes of limitation are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proof arising from the ambiguity or the antiquity of transactions.)

"A statute of limitation," observed Story, J., in *Bell v. Morrison*,⁴ "instead of being viewed in an unfavourable light as an unjust and discreditable defence, should have received such support from Courts of justice as would have made it, what it was intended emphatically to be, a statute of repose." In his *Conflict of Laws*, the same learned Judge observed as follows :

"Laws, thus limiting suits, are founded in the noblest policy. They are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity or the antiquity of transactions. They proceed upon the presumption that claims are extinguished, or ought to be held extinguished, whenever they are not litigated in the proper *forum* within the prescribed period. They take away all solid grounds of complaint, because they rest on the negligence or neglect of the party himself. They quicken diligence by making it, in some measure, equivalent to right. They discourage litigation by bringing in one common receptacle all the accumulations of past times which are unexplained, and have now, from lapse of time, become inapplicable. It has been said by John Voet with singular felicity that controversies are limited to a fixed period of time lest they should be immortal while men are mortal — *Ne autem lites immortales essent, dum litigantes mortales sunt*."⁵

5. Doctrine of limitation distinguished from the doctrine of laches. — The doctrine of laches is an application of the maxim of equity "Delay defeats equities." In the case of equitable reliefs, Courts of Equity in England refused to grant such reliefs to an applicant who had wilfully slept over his rights. This principle is applicable in this country also in so far as *discretionary orders* of the Court are claimed, such as specific performance, permanent or temporary injunction, appointment of receiver. In such cases Courts can still refuse relief where the delay on the applicant's part has prejudiced the defendant even though the applicant might have come to Court within the period prescribed by the Limitation Act.¹

But the basis of the doctrine of limitation and prescription is not the same as that of the doctrine of laches. As has been seen in Note 4, the former is based upon *public policy* and *utility* rather than upon *equity* alone, while the latter is based upon equity. Laches, like limitation, no doubt, deprives the plaintiff of his remedy but it depends upon general principles while limitation depends upon *express law*. Again, laches may be adapted to the facts of a particular case but limitation is a matter of inflexible law. A positive rule of limitation

(¹⁴) 1 AIR 1914 Mad 526 (528, 529) (DB), *Ramana Reddy v. Babu Reddy*. (Referring to observations of Lord St. Leonards, Lord Kenyon, Lord Coke and Lord Blackburn, and citing Banning and Angell.)

[See (⁸⁶) 8 All 475 (481) (DB), *Manghu Lal v. Kandhai Lal*.]

4. 7 Peters (U. S.) R. 360 cited in (⁸⁶) 8 All 475 (482) (DB), *Manghu Lal v. Kandhai Lal*.

5. Cited in (⁸⁶) 8 All 475 (483) (DB), *Manghu v. Kandhai*.

Preamble—Note 5

1. (⁷⁵) 1 All 82 (86, 87) (DB), *Uda Begum v. Imam-ud-din*.

[See also (⁰³) 27 Bom 515 (532) (DB), *Fatesingji v. Bamanji*.

(³⁶) 23 AIR 1936 Bom 423 (428), *Kissondas v. Jivatlal*. (Delay in seeking an equitable remedy is technically called laches and will disentitle the claimant to come in and establish his claim even though the claim is not disputed.)]

Preamble Notes 5-6

cannot depend upon whether there is laches or not,² and, except in the case of discretionary orders, the defence of laches or acquiescence cannot prevail when a statutory period of limitation is prescribed for an action.³ In other words, in cases where the Court is *bound* to grant a relief if the plaintiff proves his case, there is no question of laches affecting the plaintiff's rights, provided the suit is instituted within the time limited by law.⁴

6. Doctrine of limitation distinguished from the doctrine of acquiescence. — If a party having a right stands by and sees another acting in a manner inconsistent with that right and makes no objection while the act is in progress, he cannot afterwards complain. This is the proper sense of the word *acquiescence*.¹ Acquiescence may be direct or indirect. Direct acquiescence is where the act complained of is done with the *express approbation* of another. Indirect acquiescence is where a person having a right to set aside a transaction stands by and is quiescent under circumstances from which assent may be reasonably inferred.² In either case *assent*, express or

2. ('14) 1 AIR 1914 Mad 526 (529), *Ramana Reddy v. Babu Reddy*.

('18) 5 AIR 1918 Low Bur 131 (133, 134) *Appan Charan v. Kyause Ma*.

3. ('40) 27 AIR 1940 Mad 281 (284), *Krishnamachari v. Chengalraya*. (Objection as to laches or delay cannot be allowed to prevail where legal and not equitable relief is sought and the only question is whether a right is barred by the statute of limitation.)

('29) 16 AIR 1929 Lah 679 (680) (DB), *Allah Ditta v. Jamna Das*. (Mere delay short of the prescribed period in suing for specific performance is no bar to plaintiff's right unless there is waiver or acquiescence.)

('23) 10 AIR 1923 Sind 50 (52) (DB), *Begraj v. Alisher*. (Specific performance—Delay short of the prescribed period of limitation does not operate as a bar to relief unless defendant is prejudiced.)

('98) 21 Mad 42 (44) (DB), *Athikarath v. Erathanikat Komu*. (Mere lapse of time short of the prescribed period is not per se good ground for refusing the relief.)

('75) 23 Suth W R 99 (101) (PC), *Juggurnath v. Shah Mahomed Hossein*. (The period of limitation prescribed for a suit cannot be diminished on the ground of laches of a party.)

('15) 2 AIR 1915 Cal 13 (15) (DB), *Osmond Beeby v. Khitish Chandra*. (Laches.)

('74) 22 Suth W R 267 (267) (DB), *Taruk Chunder v. Huro Sunkur* (Acquiescence.)

('30) 17 AIR 1930 Mad 364 (369) (DB), *Ramaswami v. Palaniappa*.

(1864) 2 Mad H C R 114 (116) (DB), *Rama Rau v. Raja Rau*.

('26) 13 AIR 1926 Nag 416 (422, 423), *Murarilal v. Balkishan*.

(1864) 2 Mad H C R 270 (273) (DB), *Peddammuthulaty v. Timma Reddy*.

('89) 3 C P L R 162 (163, 164), *Khetsingh v. Radha*.

[See also ('33) 20 AIR 1333 Lah 18 (21), *Secretary of State v. Balwant Singh*.

(1865) 3 Suth W R P C 31 (32) (PC), *Government of Bengal v. Shuruffutoonissa*.

('10) 7 Ind Cas 568 (570) (DB) (Lah), *Barkhurdar v. Munawar Din*. (Suit for specific performance of contract of sale—Suit dismissed as the circumstances of the case were such that the Court did not feel justified in exercising in favour of the plaintiff its discretionary power of decreeing specific performance of the contract in question.)]

4. ('75) 1 All 82 (86) (DB), *Uda Begum v. Ima-ud-din*.

Preamble—Note 6

1. (1878) L R 8 Ch Div 286 (314), *De Bussche v. Alt*.

(1846) 2 Ph 117 (123), *Duke of Leeds v. Earl of Amherst*.

2. (1878) 8 Ch Div 286 (314), *De Bussche v. Alt*.

implied, underlies the doctrine of acquiescence. It is thus an instance of the law of estoppel by conduct. It differs from laches in that *firstly* the latter is merely passive without any implication of assent, and *secondly* the latter like limitation affects the party's *remedy* while acquiescence like prescription practically destroys the party's *right*. It differs from limitation in that acquiescence like laches depends upon general principles and is a conclusion drawn from the facts of each particular case while limitation like prescription is a matter of express and inflexible rules of law and applies independently of the existence of laches or acquiescence. Acquiescence and laches again may be pleaded either against the plaintiff or the defendant, while limitation can be pleaded generally, against the plaintiff only.³

6a. Reference to English Law. — Where the law is codified the Courts must construe the Code according to the wording thereof. It is not open to them to ignore the enacted law and apply a rule or principle derived from the English law.¹

The proper meaning, therefore, of a positive enactment of the Indian Legislature must be ascertained from the language of that statute uninfluenced by the English law on which it may be founded,² or by decisions of Courts in England which are based upon statutes altogether different in language³ and upon a different system of the law.⁴ The policy of the law of limitation in England is different from that adopted in S. 3, Indian Limitation Act. Thus, in England the law of limitation comes under the category of those rules, whether created by statutes or by the Common Law, which exist for the benefit of the parties and which, like the plea of minority, may be waived by the persons entitled to the benefit thereof. But according to the Indian Act the rule of limitation cannot be waived.⁵ Again the law of limitation in England is variable. A distinction in its operation is recognized between the Equity side and at Common Law. The question varies also with the nature of property. Laches or acquiescence forms sufficient bar to actions in proper cases. In India, however, the law of limitation

3. U. N. Mitra's Limitation, 6th Edn., p. 68.

Preamble — Note 6a

1. ('25) 12 AIR 1925 P C 1 (8) (P C), *Barindra Kumar v. Emperor*.

('32) 19 AIR 1932 All 18 (22) (DB), *Emperor v. Joti Prasad*.

2. ('28) 15 AIR 1928 P C 2 (4) (PC), *Ramanandi v. Kalavathi*. (Especially so in testamentary cases.)

[See (1851) 5 Moo Ind App 234 (250) (PC), *Ruckmaboyee v. Lullobhoy*. (Before enactment of Indian statutes of limitation, the English statute was held to be applicable.)]

3. ('33) 20 AIR 1933 Cal 325 (327) (DB), *Umesh Chandra v. Hemanga Chandra*. (Sections 19 and 20 of Indian Limitation Act.)

('29) 16 AIR 1929 Sind 140 (143, 144), *Nenomal v. Chandumal*. (There is no warrant for importing into Limitation Act provisions of special English statute of limitation such as Ss. 3 and 4, Real Property Limitation Act, 1833.)

4. ('32) 19 AIR 1932 Mad 516 (518) (DB), *Muthu Chettiar v. Muthuswami*. (Except for discovery of general principles English decisions cannot be applied to Indian cases.)

5. ('86) 8 All 475 (484) (DB), *Manghu Lal v. Kandhai Lal*.

Preamble
Notes 6a-7

is definite and inflexible and mere laches is no bar.⁶ It therefore follows that rules and principles derived from the English law are not to be generally applied in interpreting the Indian Limitation Act.

6b. Interpretation of statutes of limitation. — Statutes of limitation, like all others, ought to receive such a construction as the language in its plain meaning imports. Equitable considerations are out of place in construing the provisions of a statute of limitation and the strict grammatical meaning of the words is the only safe guide.¹ For a fuller discussion of the principles with reference to which the Limitation Act should be construed and applied, see Notes under S. 9. For a discussion of the general principles of interpretation of statutes, see the Authors' Commentary on the Civil Procedure Code, Notes under Preamble.

7. Acts in pari materia.—Acts *in pari materia* may be treated as forming one Code and read together, but when the Acts are not *in pari materia* the construction put upon the one cannot be relied upon as a guide to the construction of the other.¹ The Civil Procedure Code and the Indian Limitation Act are the two great procedural Codes in India and being *in pari materia* are, generally speaking, to be taken

6. (1864-65) 2 Mad H C R 270 (272, 273) (DB), *Peedamuthulaty v. Thimma Reddy*.

(179) 4 Cal L R 577 (580) (DB), *Allij Hossain v. Muzhur Hossain*.

Preamble — Note 6b

1. ('50) 37 AIR 1950 Orissa [C N 21] 125 (Paras 14, 22) (FB), *Ramchandra v. Bhalu*.

('47) 34 AIR 1947 Nag 239 (241) (DB), *Khaja Allawali v. Kesharimal*. (('32) 19 AIR 1932 P. C. 165 (PC), *Nagendra Nath v. Sureshchandra Dey, Rel. on.*)

('41) 28 AIR 1941 PC 6 (9) (PC), *General A. F. and L. Assurance Corporation Ltd. v. Janmahomed*.

('32) 19 AIR 1932 PC 165 (167) (PC), *Nagendra Nath v. Sureshchandra*.

('09) 4 Ind Cas 449 (451) (PC), *Abhiram Goswami v. Shyama Charan*.

('41) 28 AIR 1941 Mad 449 (460) (FB), *Venkateswara v. Venkatesa*. (Krishnaswami Iyengar, J., however, pointed out that the words of a statute if sufficiently flexible, must be construed in a sense which though less correct grammatically, is more in harmony with the intention of the Legislature. His Lordship held that for this purpose it was permissible to take into consideration the circumstances in which an enactment came to be passed.)

See also Note 10.

Preamble — Note 7

1. ('41) 28 AIR 1941 Nag 236 (237) (DB), *Ganpatrao v. Rama*. (The Court-fees Act and Lim. Act are not *in pari materia*.)

('15) 2 AIR 1915 Mad 889 (391) (DB), *Vairavan v. Avicha*. (The Contract Act and the Limitation Act are not *in pari materia*.)

('86) 9 Mad 134 (135) (DB), *In re Kota*. (Court-fees Act and Limitation Act not *in pari materia*.)

('80) 4 Bom 515 (526) (FB), *Dayachand v. Hem Chand*. (Do.)

('99) 22 Mad 494 (502) (DB), *Assan v. Fathuma*. (Do.)

[See however ('10) 8 Ind Cas 512 (515, 516) (Mad) (FB), *Rangiah v. Subramania*. (The words "to enforce the right to share in any property on the ground that it is joint family property" in S. 7, clause (iv) (b) of the Court-fees Act construed in the same sense as used in Art. 127, Limitation Act.)]

as forming one system, interpreting and enforcing each other.² Where, however, the definition of a word in the Limitation Act is by law governed by the General Clauses Act, it is not competent to import a meaning of the same word from other statutes like the Civil Procedure Code.³

8. Technical terms. — There is a distinction between the interpretation to be put on popular language and the interpretation to be put on technical expressions used in legislative enactments. Words not used in technical sense must receive their popular and ordinary meaning.¹ In the latter case, the expressions being terms of art must be construed in the light of the meaning given to them in cognate or contemporary enactments. The words “a suit to obtain a declaration” in Art. 118 of the Limitation Act of 1877, for instance, relate to S. 42 of the Specific Relief Act enacted previously in the same year as the Limitation Act, and have to be construed in the same way as they have been in cases under the latter Act.² Similarly, the word “person” in Art. 165 of the Limitation Act, 1908, should be construed to include only such persons as are covered by O. 21, Rr. 100 and 101 of the Code of Civil Procedure, 1908, to which the Article impliedly and by context refers.³ So also it was held, before the passing of the General Clauses Act, that the term “immoveable property” might be considered to bear the meaning which could be gathered from the Hindu Law in the case

2. ('50) 37 AIR 1950 Orissa (CN 21) 125 (para 6) (FB), *Ramchandra v. Bhalu*. (Similar words and expressions occurring in two statutes should be given same meaning unless there is something repugnant in the subject or context.)

('39) 26 AIR 1939 All 403 (405, 412) (FB), *Durag Pal Singh v. Pancham Singh*. (The provisions of the Civil Procedure Code are subject to the provisions of the Limitation Act.)

('26) 13 AIR 1926 Mad 159 (159), *Kawan Mada v. Malli*. (Section 3 of the Limitation Act to be read along with O. 33, R. 8, Civil P. C.)

('25) 12 AIR 1925 Pat 1 (8) (FB), *Balmukand v. Basanta Kumari*. (Per Das, J.—Overruled in ('34) 21 AIR 1934 Pat 246 (FB), *Bhaunath v. Kedar Nath* on another point.)

('31) 18 AIR 1931 Pat 241 (246) (FB), *Tribini Prasad v. Ramasray Prasad*. (Per Jwala Prasad, J.)

[See also ('82) 5 Mad 141 (143, 144) (DB), *Kunhi v. Seshagiri*.]

[See however ('24) 11 AIR 1924 Rang 145 (147) (DB), *Ahmad Sahib v. Pakir Mohammad*. (“Cause of action” in Civil Procedure Code should not be construed as in the Limitation Act, or English law.)]

3. ('15) 2 AIR 1915 Nag 69 (69), *Murlidhar v. Mulu*. (“Moveable property” in Article 29 not to be defined as in the Civil Procedure Code.)

Preamble—Note 8

1. See ('86) 12 Cal 559 (563) (DB), *Goluck Chandra v. Harafriah*.

('72) 9 Bom H C R 99 (112) (FB), *Balvantrao v. Purshotam*. (The term ‘immoveable property’ is not a term of art of the English law and as such should receive the construction which that term ordinarily bears in common parlance.)

2. ('24) 11 AIR 1924 P C 137 (142) (PC), *Kalyandappa v. Chanbassappa*.

[See ('77) 2 Cal 336 (339) (FB), *Dhonesur Kooer v. Roy Gooder*. (Word ‘suit’ as used in Limitation Act, 1871, does not include ‘application’.)]

3. ('16) 3 AIR 1916 All 104 (105, 106) (DB), *Abdul Karim v. Islamunnissa Bibi*. (It does not include a judgment-debtor who is excluded from the scope of O. 21, R r. 100 and 101. See also Art. 165 Note 3.)

Preamble
Notes 8-10

of the Hindus,⁴ more especially if the meaning can only be determined by reference to Hindu law and usage.⁵ When words have been used in an Act in a technical sense, and they have been judicially construed to have a certain meaning prior to the statute and have been adopted by the Legislature in that sense, the rule of construction of statutes will require that those words should be construed in that sense, although the sense may vary from the literal meaning of those words.⁶

9. Harmonious construction. — It is one of the primary rules of construction of statute that the various statutory provisions should be read so as to harmonize and not so as to conflict with one another, unless it is manifest and apparent that there is conflict between them.¹ Thus, where a later Act does not purport or affect to supersede an earlier Act, the two enactments must, if possible, be read together so as to avoid conflict.² The same rule would apply to different provisions of the same Act, *e. g.*, the sections and the articles of the Limitation Act.³ In construing the Limitation Act where there are a variety of articles dealing with a variety of particular cases, the Courts must try to so construe the articles as to make them harmonious and consistent with one another.⁴

10. Construction in favour of right to sue. — Where the language of a statute is clear, the Court is bound to give effect to its plain meaning uninfluenced by extraneous considerations but that where the language of the enactment is not itself precise or is ambiguous or of doubtful import, recourse may be had to extraneous considerations. No exception can be recognised to these rules of construction in the case of the Limitation Act.¹ There is thus no room

4. ('81) 5 Bom 322 (328, 329, 336) (DB), *The Collector of Thana v. Krishnanath*.

5. ('74) 21 Suth W R 178 (181) (PC), *Futtehsanghji v. Desai Kullianraji*. (Suit to establish right to 'toda giras hak'.)

6. ('51) 5 Moo Ind App 234 (250) (PC), *Ruckmaboyee v. Lulljobhoy*.

Preamble—Note 9

1. ('93) 15 All 65 (69), *Jainti Prasad v. Bachu Singh*.

2. ('13) 19 Ind Cas 387 (390) (DB), *Rangacharya v. Dasacharya*. (Section I of Bombay Regulation, V of 1827 conferring rights by Prescription and Limitation Act, XIV of 1859.)

3. See ('85) 9 Bom 373 (400), *The New Fleming, Spinning and Weaving Co, Ltd. v. Kessowji*. (Section 10 and Article 98.)

4. ('04) 31 Cal 681 (684) (FB), *Sati Prasad v. Jogesh Chandra*. (Articles 136, 137 and 138.)

('87) 11 Bom 133 (137, 138), *Essoo v. Steam-Ship "Savitri"*. (Articles 36, 48 and 49.)

[See ('81) 5 Bom 673 (677, 678) (FB), *Bhikambhat v. Joseph Fernandez*. (The general words 'decree or order' in Art. 167 of the Act of 1871 must be read as including only such decrees and orders as have not been already specially provided for in Art. 166.)]

Preamble — Note 10

1. ('48) 35 AIR 1948 Mad (C N 126) 246 (250). *Lakshminarasiam v. Suryanarayana*. (Words clear—Comparison with earlier Acts not permissible.)

('44) 31 AIR 1944 Mad 67 (69) (DB). *Chidambaram v. Meyyappa*. (The provisions of the Lim. Act must be construed strictly. Hardship is no consideration.)

for an equitable construction of the provisions of the Act, where the language of such provisions is *plain and clear*.² But where the

- (1941) 28 AIR 1941 P C 6 (9) (P C), *General A. F. and L. Assurance Corpn. Ltd. v. Janmahomed*. (Considerations of hardship should not be taken into account.)
- (1939) 26 AIR 1939 Nag 150 (154) (DB), *Balkrishna v. Baijnath*. (However startling, fantastic or absurd it may appear to be, the Courts cannot refuse to give effect to the plain meaning of the words used by the Legislature.)
- (1973) 20 Suth W R 375 (376, 377) (PC), *Lachmee Buksh v. Runjeetram*.
- (1909) 4 Ind Cas 449 (451) (PC), *Abhiram v. Shyama Charan*.
- (1986) 8 All 475 (483, 484) (DB), *Manghu Lal v. Kandhai Lal*.
- (1928) 15 AIR 1928 Cal 646 (647) (S B), *Hari Mohan v. Parameshwar*. (Courts are not warranted in introducing savings or exceptions not found in statute.)
- (1902) 24 All 218 (220), *Durga v. Bisheshur*. (Order 7, R. 11, C. P. C., does not give power to extend prescribed period of limitation.)
- (1934) 21 AIR 1934 All 626 (633) (FB), *Parameshwar v. Sitladin*. (Interpretation following logically from language should not be rejected on the ground that it creates hardship.)
- (1933) 20 AIR 1933 Cal 124 (126, 127) (DB), *Nilratan v. Emperor*. (Another meaning not to be given on grounds of hardship.)
- (1919) 6 A I R 1919 Mad 972 (979, 981) (F B), *Setti Kutti v. Kunhi Pathumma*. (Case covered by article —It is not permissible to depart from article itself.)
- (1990) 12 All 129 (137) (FB), *Bal Karan v. Gobind Nath*. (Courts cannot read into Limitation Act an article which is not there.)
- (1849) 5 Moo Ind App 43 (69) (P C), *The East India Company v. Oditchurun*. (Hard cases should not make bad law.)
- [See (1988) 10 All 587 (595, 596) (D B), *Ramjiwan v. Chendmal*. (In interpreting Acts of limitation Courts are not bound by rules in England.)
- (1990) 12 All 79 (90, 91) (DB), *Parbati v. Bhola*. (Do.)
- (1991) 13 All 282 (287) (FB), *Amme v. Zia*. (Do.)
- (1988) 10 All 524 (529) (DB), *Jag Lal v. Har Narain*. (Do.)
- (1929) 16 AIR 1929 Nag 74 (75), *Nandu v. Bhuwanoo*. (Object being to check dilatoriness, Statute of Limitation should be strictly construed.)
- (1938) 25 A I R 1938 Bom 281 (282) (D B), *Achut v. Parashram*. (Act must be construed strictly.)
- (1936) 23 A I R 1936 Bom 322 (326), *Kaikhusroo v. Gangadas*. (The Statute of Limitation the object of which is to prevent stale demands must be construed strictly.)]
2. (1947) 34 AIR 1947 Nag 239 (241) (DB), *Khaja Allawali v. Kesharimal*.
- (1945) 32 AIR 1945 Lah 324 (324) (FB), *Mohd. Sadaat Ali v. Lahore Corpn.*
- (1933) 20 AIR 1933 Lah 615 (618), *Basheshar v. Dewan Chand*. (No extension of time on equitable considerations unless expressly provided by statute.)
- (1904) 1904 Pun L R No. 133 at p. 472 (DB), *Bhagwan v. Collector, Lahore*.
- (1932) 19 A I R 1932 P C 165 (167) (P C), *Nagendra Nath v. Suresh Chandra*. (Meaning of word "appeal" in Art. 182.)
- (1933) 20 AIR 1933 Cal 422 (424) (DB), *Ashutosh v. Kumud*.
- (1930) 17 AIR 1930 Pat 455 (472) (DB), *Naurangi v. Ram Charan*. (Idol or mutt cannot be brought under the same category as a minor, lunatic or idiot.)
- (1929) 16 AIR 1929 All 677 (679) (D B), *Maqbul Ahmad v. Partab Narain*. (A I R 1921 Bom 379, *Basavanappa v. Krishnadas* not approved.)
- (1927) 14 AIR 1927 Cal 117 (122) (DB), *Panna Lal v. The Adjai Coal Co.* (Reversed in A I R 1930 P C 113 (P C), *Adjai Coal Co., Ltd. v. Panna Lal* on another point.)
- (1919) 6 AIR 1919 Cal 1078 (1079), *Deutsch Asiatische Bank v. Hiralal Burdhan & Sons*. (Meaning of word 'disability' in S. 9.)
- (1864-1865) 2 Mad H C R 268 (269) (D B), *Kambinayani Javaji v. Venkataraya*. [See (1973) 21 Suth W R 318 (319, 320) (PC), *Mohammud v. Collector of Bareilly*.]
- (1904) 31 Cal 519 (538) (D B), *Administrator General of Bengal v. Krishto Kamini*. (Per Hill, J.)

**Preamble
Note 10**

language is not precise or is of doubtful import, the provision should be construed equitably. In the case of the Limitation Act which takes away a right to sue, an equitable construction, where the language is not clear, would be to adopt a construction in *favour* of the right to proceed rather than one *barring* such right.³ It is in this view that it is generally observed that the Limitation Act must be construed in *favour of the right to sue*.⁴

(’27) 14 AIR 1927 All 177 (179), *Munawar Ali v. Jagmilan Ram*. (Applicability of Art. 134.)

(’35) 22 AIR 1935 Lah 115 (118) (D B), *Mayadevi v. Diwan Chand*. (Statute of Limitation must be construed with reasonable strictness.)

(’87) 11 Bom 524 (525, 526) (DB), *Motichand v. Krishnarao*.

(’87) 11 Bom 599 (601, 602) (D B), *Sidlingapa v. Karibasappa*. (Words are to be construed *also* with reference to the general purpose of statute.)

(’83) 9 Cal 711 (721) (FB), *Mamtazul Huq v. Nirbhai Singh*. (Per Garth, C. J.)
[See also (’46) 1946 A M L J 13 (15, 16), *Ram Swarup v. Dulraj*. (“ Application ” in Art. 182 (5) does not include “ plaint ”.)

(’81) 7 Cal 127 (132) (DB), *Gurceebullah v. Mohun Lall* (Per Princep, J.)

(’34) 21 AIR 1934 All 661 (664, 665), (FB), *Jawaharlal v. Mathura Prasad*. (Per Sulaiman, C. J.)]

3. (’49) 36 A I R 1949 Bom (C N 33) 104 (105) (DB), *Madhavprasad v. Chandavarkar*. (The scope of the Limitation Act cannot be extended by implication, and a party’s rights to go to Court cannot be taken away unless the Act expressly provides that his right is so barred.)

(’48) 35 AIR 1948 Mad (O N 126) 246 (250) (DB), *Lakhminarasimham v. Suryanarayana*. (A construction which is other than literal and which would have the effect of depriving the party entitled to a right of the benefit arising by a literal construction is not to be preferred.)

(’45) 32 A I R 1945 Lah 324 (324) (FB), *Mohd. Sadaat Ali v. Lahore Corpn.* (Even if two interpretations are found to be equally possible, the Court must impute a reasonable intention to the Legislature and hold the suit not to be falling within shorter period of limitation.)

(’39) 26 AIR 1939 Nag 150 (153) (DB), *Balkrishna v. Baijnath*. (Per Stone, C. J.)

(’12) 16 Ind Cas 167 (169) (DB) (Cal), *Pochya Milay v. Emperor*. (In case of doubt upon a question of limitation benefit of longer period is to be given.)

(’18) 5 AIR 1918 Mad 492 (493) (DB), *Venkanna v. Venkatakrishnayya*.

(’30) 17 AIR 1930 Mad 991 (994) (DB), *Seshayya v. Subbadu*.

(’34) 21 AIR 1934 All 626 (639) (FB), *Parameshwar v. Sittadin*.

(’01) 5 Cal W N 356 (359) (DB), *Jogeshur v. Ghanasham*.

(’97) 24 Cal 382 (384) (DB), *Latifunneesa v. Dhan Kunvar*.

(’83) 7 Bom 542 (545) (DB), *The Collector [of Broach v. Rajaram]*, (’75-77) 1 Bom 19, *Umiashankar v. Chhotalal*, followed.)

(’27) 14 AIR 1927 Nag 10 (11), *Secretary of State v. Bagmal*.

[See (’96) 20 Bom 408 (420) (FB), *Datto v. Vithu*.

(’17) 4 A I R 1917 Bom 210 (211) (D B), *Kurgodigouda v. Ningangauda*. (Section 6 of Limitation Act is enabling section – Liberal construction in favour of persons under disability should be put.)

(’05) 28 Mad 557 (559) (DB), *Pachiappa v. Poojali*. (The provisions of the Act should receive a fair and not too technical construction.)

(’04) 1904 Pun L R No. 133 at pp. 472, 473 (DB), *Bhagwan Das v. Collector, Lahore*. (The principle, that the Limitation Act being restrictive of the legal rights should be construed in favour of the right to sue, should be applied only where the language is doubtful or ambiguous.)]

4. (’37) 24 A I R 1937 Nag 305 (308) (D B), *Vishwanath v. Mahabir*. (Limitation ought to be interpreted liberally in favour of decree-holder.)

(’82) 6 Bom 719 (724) (FB), *Lallubhai v. Naran*.

It is no part of the duty of the Court to deprive a litigant of the benefit of any exemption under the Act or make the Limitation Act more stringent than it is⁵ by unduly restricting its language,⁶ or straining it beyond its natural meaning,⁷ or by importing words of limitation not found in the statute.⁸ A construction having the effect

('20) 7 A I R 1920 Lah 447 (448, 449) (D B), *Anant Ram v. Iyayat Ali*. (In case of doubt, a construction in favour of the right to proceed should be adopted.)

('76) 1 Bom 19 (22) (DB), *Umiashankar v. Chhotalal*. (9 Bom H C R 99 relied on.)

('29) 16 A I R 1929 Lah 513 (514) (DB), *Asa Ram v. Darba Mal*. (Unless article distinctly bars, construction must be in favour of continuation of suit.)

('85) 9 Bom 373 (402), *The New Fleming Spinning and Weaving Company, Ltd. v. Kessowji*.

('86) 10 Bom 483 (487), *Parrell Spinning and Weaving Company, Ltd. v. Manek*. (9 Bom H C R 99 followed.)

('11) 9 Ind Cas 300 (302) (FB), *Sundar v. Saligram*. (('03) 1903 Pun Re No 56, *Dheru v. Sidhu*, followed.)

('79) 3 Cal L R 440 (442) (DB), *In re Ramshankar Bhadoory*. (('72) 9 Bom H C R 99, *Balwant Rao v. Purshotam*, relied on.)

('07) 31 Bom 162 (165) (DB), *Ramchandra v. Lakshman*. (Execution petition defective in minor details—Not barred by limitation on that ground.)

('31) 18 AIR 1931 Sind 146 (149) (DB), *Municipality of Hyderabad v. Allahdino*. [See ('21) 8 A I R 1921 Cal 67 (71), *Narendra Lal v. Tarubala Dassi*. (The Limitation Act being an Act of a restrictive character must be strictly construed.)]

('18) 5 AIR 1918 Bom 73 (74) (DB), *Hargovind v. Naja Sura*. (Limitation Act must be construed strictly and any provision in the nature of an exception should be liberally construed.)

('98) 25 Cal 496 (503) (FB), *Purno Chunder v. Sassoon*.]

[See also ('05) 29 Rom 480 (498), *Balwant v. Secretary of State*. (Pensions Act.)]

5. ('78) 2 Bom 294 (298), *Jamna Das v. Lalitaram*.

6. ('39) 26 AIR 1939 Nag 150 (153) (DB), *Balkrishna v. Baijnath*. (The day on which copy is applied for should not be excluded in computing the 'time requisite' under S. 12 simply because that happens to be the day on which judgment was pronounced.)

('07) 29 All 264 (266), *Ram Kishen v. Kashibai*. (Meaning of words 'time requisite for obtaining a copy' in S. 12.)

('06) 33 Cal 1278 (1281), *Domi Lal v. Roshan*. (There is nothing in S. 20 to indicate that new period is to operate only against person making payment.)

('04) 27 Mad 343 (345) (DB), *Bank of Madras v. Multan Chand*. ("Other relief" in Art. 95 not to be restricted to relief on ground of fraud.)

7. ('14) 1 AIR 1914 Cal 50 (51) (DB), *Rudra Narain v. Natabarjana*. (The language of an article should not be extended by figures of speech and metaphors.)

('81) 7 Cal 333 (336), *Roberts v. Harrison*. (Handing in an award to proper officer by arbitrator for filing is not 'application' within meaning of this Act.)

('79) 3 Cal L R 440 (442) (DB), *In re Ram Shankar Bhadoory*. (Applicability of Article 172.)

[See ('91) 15 Bom 299 (305) (DB), *Parashram v. Rakhma*. (Statutes of limitation are not to be extended by construction to cases not clearly included within their terms.)]

8. (1865) 2 Suth W R 263 (264) (DB), *Mahomed Afzul v. Kanhyalal*. (Claim suit when claim petition has been rejected without enquiry—One year limitation does not apply.)

('21) 8 AIR 1921 Cal 277 (278) (DB), *Maharajah of Cooch Behar v. Mahendra Ranjan*. (Order under S. 41, Bengal Survey Act—Suit instituted more than three years after—It is not barred by Art. 46, Limitation Act.)

('08) 32 Bom 14 (22, 25) (FB), *Chunilal v. Dahyabhai*. (No rule of High Court can add or modify conditions and limitations in Limitation Act.)

**Preamble
Notes 10-11**

of destroying a right before it has effectively arisen⁹ or of dating the cause of action before the remedy is available¹⁰ should be avoided if possible.

11. Sections and Articles. — The section in the body of the Limitation Act govern and control the application of the articles in the schedule except so far as the language of a particular article clearly precludes the application of any such section.¹

When words are employed which are merely intended to be declaratory or enabling, a legislative *mandate* cannot be evolved from *inferences* based upon the use of such words without any express enacting terms, particularly where to do so would take the matter out of the scope and purview of the Act as set out in the Preamble.² The words of the articles of the Act should be construed strictly.³ In construing the words of a particular article, it is not always safe to rely on the meaning of similar language in all other articles.⁴

(‘32) 19 AIR 1932 Mad 19 (20), *Chinna v. Venkatarama*. (Article 182 — Step-in-aid.)

[See (‘01) 1901 Pun Re No. 18, *Imami v. Saddam*.

(‘36) 23 AIR 1936 Mad 782 (783), *Meghavaranam v. Mahomed Mohideen*. (It is not right to read into the Limitation Act words which are not there when the words which are there have themselves clear and unmistakable meaning.)]

9. (‘33) 20 AIR 1933 Bom 439 (441) (DB), *Ganpat v. Hanamgouda*. (Article 135 — Mortgagor must have actual possession or the right to possession before time can start against him.)

(‘19) 6 AIR 1919 Mad 972 (981, 984) (FB), *Setti Kutti v. Kunhi Pathumma*. (Article 134 does not apply where possession is not taken by transferee.)

(‘24) 11 AIR 1924 Cal 600 (609) (DB), *Dwijendra Narain v. Joges Chandra*, (Statute of limitation does not attach to a claim till there is right of action for it.)

[See (‘69) 12 Suth W R 167 (169) (DB), *Khuruckdharee v. Rewatlall*. (Statute never begins to run until there has been cause of action.)

(‘17) 4 AIR 1917 Nag 187 (193) (DB), *Baxiram v. Bhikaji*. (Ignorance of facts giving right to sue — Limitation does not operate.)

(‘24) 11 AIR 1924 Nag 256 (257), *Ram Bux v. Moti*.

(‘16) 3 AIR 1916 Low Bur 79 (80), *Ma Shwe On v. Maung Kywet*.]

10. (‘35) 22 AIR 1935 Cal 333 (335) (DB), *Jateendra Chandra v. Rebatee Mohan*.

(‘18) 5 AIR 1918 Mad 1187 (1192) (FB), *Aiyasamier v. Venkatachela*. (Limitation does not run against party seeking to enforce his rights till he can avail himself of the remedy.)

(‘28) 15 AIR 1928 Cal 646 (648) (SB), *Hari Mohan v. Parameshwar Shau*. (Interpretation of language of third column of schedule.)

(‘20) 7 AIR 1920 Mad 1 (13) (FB), *Muthu Korakki v. Mohammad Madar*. (Do.)

Preamble—Note 11

1. (‘11) 12 Ind Cas 695 (697) (DB), *Doraisawmy v. Nandisawmi*. (Per Abdur Rahim, J.)

2. (‘91) 13 All 126 (144) (DB), *Binda v. Kaunsilia*. (Per Mahmood, J.)

3. (‘22) 9 AIR 1922 Mad 150 (166) (FB), *Yerukola v. Yerukola*. (Per Devadoss, J.)

4. (‘34) 21 AIR 1934 All 661 (664, 665) (FB), *Jawahar Lal v. Mathura Prasad*. (In a sense Limitation Act is a purely arbitrary enactment.)

(‘16) 3 AIR 1916 Cal 488 (495) (FB), *Chutterput v. Sumari Mal*. (The scheme and scope of Arts. 182 and 183 are radically distinct and no useful purpose will be served by interpreting the one by reference to the other.)

12. Residuary Article.

1. A residuary article can be applied only if no other article is applicable to the case.¹
2. It must be construed *ejusdem generis* with the other articles providing for specific proceedings.

**Preamble ·
Notes 12-13**

13. Where more than one provision applicable. — In giving effect to a statute of limitation, if two articles are wide enough to include the same cause of action and neither of them can be said to apply more specifically than the other, that which keeps *alive*, rather than that which *bars* the right to sue, should generally, apart from other equitable considerations, be preferred.¹ It is also an established rule of construction that where there are two articles, the general article does not govern the case where there is a particular article covering it.²

Preamble—Note 12

1. ('33) 20 AIR 1933 Lah 615 (616), *Bashesar v. Dewan Chand*. (Article 120 will not apply when Art. 109 applies.)
 - ('24) 11 AIR 1924 Mad 137 (137) (DB), *Paramasiva v. Pulukaruppa*. (Article 181.)
 - ('99) 26 Cal 564 (567) (FB), *Sharoop v. Joggessur*. (Article 120.)
 - ('02) 25 Mad 507 (510) (DB), *Seshamma v. Chickaya*. (Article 144.)
 - [See ('03) 26 Mad 780 (789) (DB), *Rungiah v. Nanjappa*. (Article 181 applies only where an execution application does not fall under Art. 182.)]
- See also Note 20 and Art. 181 Note 2.

Preamble—Note 13

1. ('25) 12 AIR 1925 Pat 765 (768) : 4 Pat 448 : 93 Ind Cas 129 (DB), *Tofa Lall v. Moinuddin*. (Articles 62 and 92.)
- ('34) 21 AIR 1934 Bom 491 (495), *Kasturchand v. Hari*. (Articles 62, 113 or 120.)
- ('30) 17 AIR 1930 Nag 300 (303, 304), *Jairam v. Bhilaji*. (Articles 148 and 144.)
2. ('26) 13 AIR 1926 Pat 401 (403) (DB), *Rameshwar v. Mahabir*. (Articles 95 and 12.)
- ('25) 12 AIR 1925 Mad 1255 (1256) : 48 Mad 925 : 91 Ind Cas 151 (DB), *Ramiah v. Sadashiva*. (Articles 96 and 62.)
- ('90) 1890 Pun Re No. 112 (FB), *Ram Saran v. Mehtab*. (Article 132 held to apply in preference to Art. 147.)
- ('15) 2 AIR 1915 Cal 681 (685) (DB), *Madras Steam Navigation Co. Ltd. v. Shalimar Works Ltd.* (Articles 36, 49 or 29.)
- ('20) 7 AIR 1920 Cal 357 (359) (FB), *Narendra Nath v. Bhusan Chandra*. (Articles 29, 36 or 42.)
- ('31) 18 AIR 1931 Nag 47 (18), *Krishna v. Sitaram*.
- ('27) 14 AIR 1927 Nag 402 (404), *Ram Rao v. Gulabrao*. (Even where the particular article is in a special or local Act—Schedule II, Article 1, C. P. Tenancy Act and Art. 47, Limitation Act.)
- ('02) 26 Bom 430 (432) (DB), *Narmadabai v. Bhavani*. (Articles 48, 49 or 145.)
- ('25) 12 AIR 1925 Lah 478 (479) (DB), *Secretary of State v. Dunlop Rubber Co.* (Articles 31 and 49.)
- ('23) 10 AIR 1923 Cal 507 (508) (DB), *Mahamed Mozaharal v. Mahamed Azimaddin*. (Articles 103, 104 or 116.)
- ('21) 8 AIR 1921 Lah 335 (336) (DB), *Kunj Lal v. Gulab Ram*. (Articles 81 and 61.)
- ('16) 3 AIR 1916 Mad 314 (318) (FB), *Jaldu Venkatasubba Rao v. Asiatic Steam Navigation Co., Calcutta*. (Articles 31 and 49.)
- ('17) 4 AIR 1917 Pat 404 (406) (DB), *Kunti Dai v. Jharu Lal*. (Likewise special provisions of limitation in Rent Acts exclude the general provisions of the Limitation Act.)

**Preamble
Note 13**

Generalia specialibus non derogant^{2a} This is based on the principle that there is always only one article applicable to a case though more than one may seem to apply, the duty of the Court being on proper consideration, to find out that article.³ On the same principle Courts should not, where the suit naturally falls within a particular article, strain the construction so as to bring it under a category which gives a more favourable period of limitation.⁴

Where, however, there is a conflict between two periods of limitation, one of which, the longer, is applicable to all circumstances and the other, the shorter, to special circumstances only, the longer term given by the statute ought to be applied unless there is clear proof of the circumstances which would make the shorter term applicable.⁵ Generally the correct article applicable will have to be determined by ascertaining the exact frame of the suit.⁶ Where a suit, as framed, falls under an article with a longer period of limitation, it cannot be contended in defence that the suit ought to have been framed so as to fall under an article providing a shorter period.⁷

(25) 12 AIR 1925 Pat 765 (767) (DB), *Tofa Lal v. Moinuddin*. (Articles 96 and 62.)

(04) 26 All 482 (487, 488) (DB), *Municipal Board of Mussooree v. Goodall* (Articles 2 and 28)

(98) 25 Cal 692 (698, 699) (FB), *Mangun v. Dolhin*.

(99) 26 Cal 564 (567) (FB), *Sharoop v. Joggessur*. (Articles 32 and 120.)

(08) 4 Nag L R 49 (54), *Nagoba v. Madholala*.

[See (35) 22 AIR 1935 Lah 645 (646), *Shanti Lal v. Lyallpur Bank Ltd.* (Special provision of limitation in the rules framed under the Companies Act must prevail over the Limitation Act.)

(99) 23 Bom 725 (736) (PC), *Runchordas v. Parvatibai*.

(89) 16 Cal 25 (29) (DB), *Ishur Chunder v. Jibun Kumari*. (Articles 59 and 60.)]

[See also (06) 4 Cal L Jour 553 (554) (DB), *Kalicharan v. Harendra Lal*. (Special period of limitation in Tenancy Act cannot be extended by ordinary rules of limitation in Limitation Act.)

(73) 19 Suth W R 5 (6) (PC), *Unnoda Persaud v. Kristo Coomar*. (General and Special Acts.)

(26) 13 AIR 1926 Cal 757 (761), *Albert v. Imperial Tobacco Company (India) Ltd.*]

2a. (98) 21 Mad 141 (142) (DB), *Nutesan v. Sundarraja*.

3. (21) 8 AIR 1921 Mad 272 (275) (DB), *Sesha v. Periaswami*.

4. (91) 13 All 282 (284) (FB), *Amme Raham v. Zia Ahmad*. (Per Straight J.)

5. (11) 11 Ind Cas 164 (166) (Cal) (DB), *Tara Nath v. Iswar Chandra*.

6. (35) 22 AIR 1935 Mad 709 (710, 712) (DB), *Chennamma v. Mangamma*. (The form of remedy which the plaintiff seeks and not some other claim which he might have made determines the article applicable.)

(29) 16 AIR 1929 Lah 208 (209), *Tulsi v. Guran Ditta*. (The question of the particular law of limitation applicable to a case must depend upon the form of the suit and the relief claimed and not on what might be the ultimate effect of the relief claimed.)

(03) 27 Bom 363 (368) (DB), *Dattagiri v. Dattatraya*.

[See however (42) 29 AIR 1942 Oudh 33 (37) (DB), *Mohd. Bakhsh v. Allah Din*. (For considering which article applies regard should be had to the suit as it ought to have been framed and not to the suit as framed : AIR 1923 Bom 62, *Nagabhata v. Nagappa*, Rel. on.)]

7. (32) 19 AIR 1932 All 358 (359, 360) (DB), *Zia Uddin v. Akbar Ali*.

See also Section 3 Note 8.

14. Columns of the schedule. — The first and the third columns of the schedule should be read together and the same words appearing in both the columns should be given the same meaning.¹

Unless a particular suit as brought and the particular relief asked for therein strictly come within the wording of the first column of an article in the schedule, the limitation prescribed therein cannot be made applicable.² If, in any case, the first column of an article be applicable but not the third column containing the starting point of limitation, that article must be rejected.³

The function of the third column of the schedule is not to define causes of action but to fix the starting point from which the period of limitation is to be computed.⁴

15. Retrospective operation of the Act. — It is a general principle of law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction.¹ This rule is embodied in the well known maxim *Omnes nova constitutio futuris temporibus formam imponere debet non praeteritis*—Every new enactment should affect future and not past times. A statute which takes away or affects *vested* rights or imposes a new liability or confers a new right must be *presumed* not to have a

Preamble — Note 14.

1. ('19) 6 AIR 1919 Mad 972 (980, 981) (FB), *Setti Kutti v. Kunhi Pathumma*. (Word 'transfer' in Art. 134.)

2. ('27) 14 AIR 1927 Nag 10 (12), *Secretary of State v. Bagmal*.

3. ('10) 8 Ind Cas 882 (882) (Mad), *Kothandarama v. British India Steam Navigation Co. Ltd.* ('03) 26 Mad 780, *Rungiah Gounden v. Nanjappa*, Relied on.)

[See ('41) 28 AIR 1941 Mad 449 (460) (FB), *Venkateswara v. Venkatesa*. (In this case, a suit was brought by the manager of a mutt for possession of mutt properties alienated by his predecessor in office—It was contended on his behalf that Art. 134B did not apply to the suit as at the time mentioned in the third column, viz., the death of the previous manager, nobody had been appointed to succeed him and there was no one who could have sued and consequently there was no cause of action at that time—The contention was rejected by the majority of the Full Bench though Abdur Rahman and Krishnaswamy Iyengar, JJ., agreed with the contention.)]

See also S. 9 Note 8.

4. ('11) 11 Ind Cas 540 (542) (DB) (Cal), *Jailam Singh v. Choonee Lal*.

Preamble — Note 15

1. (1892) 3 Ch D 402 (421), *Laurie v. Renad*.

('31) 18 AIR 1931 Cal 91 (91) (DB), *Suresh Chandra v. Mohendra Chandra*. (Bengal Tenancy Act.)

('10) 6 Ind Cas 188 (189) (DB), *Konsilla v. Ishri Singh*. (Retrospective effect is not to be given unless such intention appears from the terms of the statute or by necessary implication.)

('01) 1901 Pun L R No. 153 p. 388 (DB), *Ram Ditta v. Tehlu*.

(1901) 1901 App Cas 297 (305), *Smith v. Callander*.

('31) 18 AIR 1931 Cal 25 (25) (DB), *Jnanendranarayan v. Saradasundari*.

('31) 18 AIR 1931 Cal 321 (322) (DB), *Kanak Kanti v. Kripa Nath*. (Bengal Tenancy Act—Retrospective operation extends only to the extent the language permits.)

('30) 17 AIR 1930 All 706 (709) (DB), *Sheopujan v. Bishnath*. (Agra Pre-emption Act, 1922.)

**Preamble
Note 15**

- retrospective operation.² Enactments dealing with *procedure*, however,
- (31) 18 AIR 1931 Nag 60 (63), *Bana Bai v. Chandrabhaga*. (Transfer of Property Act—Amending statute itself laying down as not retrospective.)
- (32) 19 AIR 1932 Rang 197 (198), *Ko Po Kun v. C. A. M. A. L. Firm*. (Transfer of Property Act—Certain sections expressed to be not retrospective does not mean that others are retrospective.)
- (32) 19 AIR 1932 Mad 734 (736) (DB), *Kanji v. Shunmugham Pillai*. (Transfer of Property Act.)
- (29) 16 AIR 1929 Bom 262 (263, 264) (DB), *Pandarinal v. Thakoredas*.
- (30) 17 AIR 1930 Pat 61 (62) (DB), *Ramjhari Koer v. Gokhul Singh*. (Legal Practitioners' Act.)
- (31) 18 AIR 1931 Mad 83 (85, 91) (DB), *Panerselvam v. Veeriah*. (Madras Local Boards Act.)
- (29) 16 AIR 1929 Nag 41 (41), *Balaji v. Sarfraykhan*. (C. P. Land Revenue Act.)
- (28) 15 AIR 1928 Lah 627 (631) (FB), *Kripa Singh v. Ajaipal Singh*, (Sikh Gurdwaras Act, 1925—Some sections retrospective—Act silent as to other sections—Particular section to be examined to see if it is retrospective.)
- (22) 9 AIR 1922 Nag 227 (228), *Lahani v. Bala*. (C. P. Tenancy Act.)
- (21) 8 AIR 1921 Mad 126 (128) (DB), *N. Viswanatha Sastri v. Seethalakshmi Ammal*. (Transfer of Property Act.)
- (77) 2 Bom 148 (159) (FB), *In re Ratansi Kalianji*. (Civil Procedure Code.)
- (16) 3 AIR 1916 Cal 446 (449) (DB), *Ananda v. Secretary of State*. (Statute is not retrospective simply because a part of the requisites for its action is drawn from a time antecedent to its passing.)
- (17) 4 AIR 1917 Mad 937 (939) (DB), *Frederick v. Emperor*. (Penal statute never retrospective.)
- (31) 18 AIR 1931 Lah 145 (151) *Pars Ram v. Emperor*. (Do.)
- (19) 6 AIR 1919 Cal 210 (211) (DB), *Promathanath v. Sourav Dasi*.
- (13) 20 Ind Cas 689 (691) (DB) (Mad), *Muthiah v. Ramaswami*. (Madras Estates Land Act.)
- (1900) 1900 Pun L R No. 18 p. 41 (44) (FB), *Narsingh Das v. Dholandass*. (Punjab Courts Act.)
- (10) 5 Ind Cas 980 (981) (DB) (Low Bur), *Mashedee Khan v. Mohomed Azim*. (Lower Burma Courts Act.)
- (14) 1 AIR 1914 Lah 345 (346) (DB), *Karar Hassan v. Mustafa*. (Punjab Pensions Act.)
- (28) 15 AIR 1928 P C 128 (130) (PC), *Municipal Council of Sydney v. Margaret*. (The Sydney Corporation Act.)
- (34) 21 AIR 1934 Pesh 30 (31) (DB), *Jada Ram v. Faizullah Khan*. (Provincial Insolvency Act.)
- (31) 18 AIR 1931 Cal 92 (93), *Asikannessa v. Dwijendrakrishna*. (Bengal Tenancy Act.)
- (32) 19 AIR 1932 All 614 (616) (DB), *Ram Sahai v. Debi Din*. (Bundelkhand Land Alienation Act, 1929.)
- (1903) 1903 App Cas 355 (357, 363), *Commissioner of Public Works v. Logan*. (Cape of Good Hope Act, 1874.)
- (34) 21 AIR 1934 Mad 138 (139) (DB), *Krishnan v. Manickkammal*. (Succession Act, 1929.)
- (32) 19 AIR 1932 Sind 71 (72) (DB), *Gurmukhdas v. Hassomal*. (Provincial Insolvency Act, 1920.)
- (87) 14 Cal 553 (555, 556) (DB), *Jogessur v. Aisani Koyburto*. (Bengal Tenancy Act, 1885.)
- (88) 15 Cal 376 (382) (FB), *Tupsee v. Ram Saran*. (Do.)
- (31) 18 AIR 1931 Nag 138 (140), *Harlal v. Lala Prasad*. (Transfer of Property (Amendment) Act, 1929.)
- (33) 20 AIR 1933 All 20 (21), *Parmeshar v. Bakhtawar*. (Court-fees (Amending) Act, 1932.)
- (31) 18 AIR 1931 All 317 (317) (DB), *Amjad Ali v. Saadat Begum*.
2. (39) 26 AIR 1939 Pat 282 (283) (DB), *Biranchi v. Nand Kumar*.

- (1938) 25 AIR 1938 Mad 688 (700) (DB), *Girdharilal v. Kappini Gowder*. (The real test to determine whether a statute is retrospective is to see whether it affects existing rights including rights of action which are substantive rights.)
- (1931) 18 AIR 1931 Cal 25 (26) (DB), *Jnanendra Narayan v. Saradasundari Dasi*.
- (1929) 16 AIR 1929 Bom 262 (264, 265) (DB), *Pandarath v. Thakoredas*.
- (1923) 10 AIR 1923 Cal 13 (17, 18) (DB), *Lalit v. Manoranjan*. (Public Demands Recovery Act, retrospective effect of.)
- (1898) L R 2 Q B 547 (552), *In re Athlumney*.
- (1981) 5 Bom 653 (658) (DB), *Ichharam v. Govindram*.
- (1911) 9 Ind Cas 805 (806) (DB) (Cal), *Kalanand v. Bhekh Dhari*.
- (1977) 2 Bom 148 (171) (FB), *In re Ratansi Kalianji*.
- (1999) 16 Cal 267 (272) (FB), *Deb Narain v. Narendra Krishna*. (Bengal Tenancy Act, 1885.)
- (1904) 26 All 119 (130) (PC), *Mohammad Abdus v. Aurban Hussain*. (Oudh Estates Act, 1869.)
- (1914) 1 AIR 1914 P C 66 (67) (PC), *Chandri v. Jawahir Lal*.
- (1921) 8 AIR 1921 Nag 170 (170), *Lakshmichand v. Baji Rao*. (C. P. Tenancy Act, 1920.)
- (1921) 8 AIR 1921 Oudh 121 (122), *Municipal Board, Fyzabad v. Vidyadhari*. (Bye laws and rules framed under Oudh Municipalities Act, 1916.)
- (1921) 8 AIR 1921 Pat 185 (186) (DB), *Kedar Nath v. Tarini Prasad*.
- (1922) 9 AIR 1922 Cal 491 (492) (DB), *Ajit Singh v. Bhagabati Charan*.
- (1922) 9 AIR 1922 Nag 227 (229), *Lahani v. Bala*. (C. P. Tenancy Act, 1898.)
- (1923) 10 AIR 1923 Cal 85 (90) (DB), *Makar Ali v. Sarfaddin*. (Repeal does not affect even contingent rights.)
- (1925) 12 AIR 1925 Nag 377 (377), *Durga Prasad v. Thakur Prasad*. (Decree already passed cannot be invalidated by subsequent Acts.)
- (1925) 12 AIR 1925 Nag 249 (250), *Champalal v. Kanji Lal*. (C. P. Tenancy Act, 1920.)
- (1928) 15 AIR 1928 Lah 627 (630, 631) (FB), *Kirpa Singh v. Rasalldar*.
- (1928) 15 AIR 1928 Mad 1194 (1194) (DB), *Sri Rajah Satrucherla v. Maharaja of Jaipur*. (Change in law cannot affect execution order already passed.)
- (1928) 15 AIR 1928 Pat 109 (110) (DB), *Sukul Lakhpatt Ram v. Raghu*. (Chota Nagpur Tenancy Act, 1908.)
- (1910) 34 Bom 260 (266) (DB), *Mugapa v. Mohammad*. (Change in law cannot affect decree already obtained.)
- (1912) 16 Ind Cas 1002 (1003) (Bom), *Lakshman v. Balkrishna*. (Vested rights under decrees cannot be affected.)
- (1986) 12 Cal 583 (586) (FB), *Bhobo Sundari v. Rakhal Chunder*. (T. P. Act, 1882.)
- (1914) 1 AIR 1914 Cal 806 (810) (FB), *Gopeshwar v. Jibanchandra*. (Bengal Tenancy Act, 1908.)
- (1920) 7 AIR 1920 Cal 435 (437) (DB), *Promotha Nath v. Saurav Dasi*.
- (1904) 27 Mad 538 (539) (DB), *Vedavali Narasiah v. Mangamma*.
- (1916) 3 AIR 1916 Mad 607 (608, 609) (DB), *Ramakrishna v. Subraya*.
- (1915) 2 AIR 1915 Mad 1022 (1027), *Venkata v. Ramudu*. (Per Kumaraswami Sastri and Napier, JJ.; Sadasiva Aiyar, J. dissenting.)
- (1876) 1 Ch D 48 (50), *In re Suche & Co*.
- (1918) 5 AIR 1918 Mad 162 (163) (DB), *Subramania v. Namasivaya*. (Right to treat decree as final is vested right.)
- (1916) 3 AIR 1916 Nag 22 (23), *Nilkant v. Ghulya*. (C. P. Tenancy Act, 1898.)
- (1932) 19 AIR 1932 Sind 71 (72) (DB), *Gurmukhdas v. Hassomal*. (Provincial Insolvency Act, 1920.)
- (1919) 6 AIR 1919 Pat 202 (202) (DB), *Brajalall v. Kenarampal*. (Chota Nagpur Tenancy Act, 1908.)
- (1917) 4 AIR 1917 Pat 171 (173) (DB), *Ganpat v. Chhottan Ram*.
- (1971) 6 Mad H C R 122 (126) (DB), *Lee Morris v. Sambamurthi*.
- (1904) 28 Bom 105 (114) (DB) *Secy. of State v. Balwant*.
- (1865) 2 Suth W R 205 (206) (FB), *Sonaton Ghose v. Moulvie Abdul Turrub*.
- [See also (1977) 3 Cal 47 (56, 57) (PC), *Delhi & London Bank Ltd. v. Orchard*.]

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are an exception to this general rule and are always retrospective in the sense that these provisions will apply to proceedings already commenced at the time of their enactment.³ The reason is that no one can have a

3. ('39) 26 AIR 1939 Pat 282 (283) (DB), *Biranchi v. Nand Kumar*.
- ('38) 25 AIR 1938 Mad 688 (694, 695) (DB), *Girdharilal v. Kappini*. (Law of Procedure is retrospective except in cases where it tends to destroy the right or the remedy.)
- ('35) 22 AIR 1935 Mad 245 (245), *Krishnaswami v. Thiruvengada*. (The statute of limitation being a law of procedure is generally retrospective in its operation.)
- ('27) 14 AIR 1927 PC 242 (244) (PC), *Delhi Cloth & General Mills Co. v. Income-tax Commr., Delhi*.
- ('01) 1901 Pun L R No. 153, p. 586 (DB), *Ram Ditta v. Tehlu*.
- ('89) 11 All 408 (412) (FB), *Chajmal v. Jagdamba*.
- ('31) 18 AIR 1931 All 635 (639) (FB), *Ram Karan v. Ram Das*. (Choice of forum and limitation is a matter of procedure.)
- ('31) 18 AIR 1931 All 735 (736) (DB), *Bunni v. Brahmdeo*. (Do.)
- ('29) 16 AIR 1929 Lah 761 (762) (DB), *Shib Narain v. Lachmi Narain*.
- ('33) 20 AIR 1933 Cal 435 (437) (SB), *Jiban Krishna v. Abdul Kaair*.
- ('33) 20 AIR 1933 All 846 (849) (DB), *Sohan Lal v. Atal Nath*.
- ('32) 19 AIR 1932 All 30 (31) (DB), *Hazari v. Maktula*.
- ('29) 16 AIR 1929 Bom 262 (264, 265) (DB), *Pandarath v. Thakoredas*.
- ('34) 21 AIR 1934 All 253 (255) (DB), *Laiq Ram v. Har Prasad*.
- ('30) 17 AIR 1930 Cal 34 (36, 37), *Khondkar Mahomed v. Chandra Kumar*.
- ('33) 20 AIR 1933 Oudh 274 (275), *Naqi Ahmed v. Sheo Shankarlal*.
- ('30) 17 AIR 1930 Cal 422 (423) (DB), *Janakinath v. Nirodbaran*.
- ('29) 16 AIR 1929 Mad 881 (882) (DB), *Thayammal v. Muthukumaraswami*. (Evidence Act S. 68; amendment by Act XXXI of 1926.)
- ('30) 17 AIR 1930 All 561 (567) (DB), *Parasram v. Mewa Kunwar*.
- ('30) 17 AIR 1930 All 706 (709) (DB), *Sheopujan v. Bishnath*.
- ('29) 16 AIR 1929 Nag 282 (283), *Gokal Prasad v. Govindrao*. (Amendment giving jurisdiction in election petitions to Civil Courts—Change in forum operates retrospectively.)
- ('31) 18 AIR 1931 All 489 (490) (FB), *Pitam Lal v. Kalla Ram*.
- ('13) 19 Ind Cas 793 (798) (Cal), *Manjuri v. Akkel Mohammad*.
- ('10) 5 Ind Cas 980 (980) (DB) (Low Bur), *Mashedee Khan v. Mahomed Azim*.
- ('10) 7 Ind Cas 11 (14) (DB) (All), *Shamsheryar Khan v. Gopal Chand*.
- ('84) 8 Bom 511 (523) (DB), *In re Bhagwandas Hurjeevan*.
- ('94) 18 Bom 429 (432) (DB), *Akramnissa v. Valiulnissa*.
- ('97) 21 Bom 822 (825, 826) (DB), *Gangaram v. Punamchand*.
- ('86) 12 Cal 583 (589) (FB), *Bhobo Sundari v. Rakhal Chunder*.
- ('04) 27 Mad 538 (539) (DB), *Vedavalli Narasiah v. Mangamma*.
- ('21) 8 AIR 1921 Mad 650 (651) : 62 Ind Cas 795 (DB), *Vaithinatha v. Govindaswami*. (Rules of limitation.)
- ('24) 11 AIR 1924 Cal 983 (984) (DB), *Rajib Lochan Dhar v. Jogesh Chandra Das*.
- ('24) 11 AIR 1924 Mad 657 (657) (DB), *Nataraja v. Rangaswami*. (Criminal Procedure Code.)
- ('24) 11 AIR 1924 Nag 24 (25, 26) (DB), *The Commissioner of Income-tax, C. P. v. Dharamchand*.
- ('26) 13 AIR 1926 All 667 (668), *Kharag Singh v. Kiddha*.
- ('26) 13 AIR 1926 Pat 561 (563) (DB), *Chote Lal v. Tula Singh*.
- ('27) 14 AIR 1927 Nag 127 (128), *Kedarnath v. Netram*.
- (1878) 3 App Cas 582 (603), *Gardener v. Lucas*.
- (1876) 1 Ch D 48 (50), *In re Suche & Co*.
- ('18) 5 AIR 1918 Mad 919 (920) (DB), *Nimmala Mahankali v. Kallakuri Subba Rao*. (Civil Procedure Code.)
- ('11) 11 Ind Cas 912 (913) (DB) (Nag), *Shankargir v. Ramchandra*.
- ('21) 8 AIR 1921 Pat 185 (186) (DB), *Kedar Nath v. Tarini Prasad*.

vested right in any particular form of, much less in an older form of procedure.⁴ But, where some of the provisions of the enactment of procedure do affect vested rights, whether substantive⁵ (e. g., rights to property or under contract), or remedial⁶ (e. g. right of appeal or of reference), retrospective operation of such provisions will apply.

Rules of limitation are, *prima facie*, rules of procedure and consequently no one has any vested right *in a period of limitation*, unless the contrary follows from the rules themselves.⁷ When the Act

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- (10) 6 Ind Cas 1015 (1016) (Oudh), *Gokul Prasad v. Ali Baksh*.
 (10) 8 I. C. 999 (1039) (DB) (Lah), *Nahal Devi v. Kishore Chand*.
 (90) 14 Bom 516 (525) (DB), *Javanmal v. Mukta Bai*.
 (95) 19 Bom 204 (206) (DB), *Bal Krishna v. Bapu*.
 (12) 13 Ind Cas 264 (266) (Sind), *Hemandas v. Chellaram*. (Declaratory enactments also retrospective.)
 (08) 12 Cal W N 987 (989) (DB), *Rahimuddin v. Jagatkishore*.
 (27) 14 AIR 1927 All 657 (659) : (DB), *Nissar Hussain v. Sundar Lal*. (Procedural law has immediate effect.)
 (11) 10 Ind Cas 823 (823) (Lah), *Zaibunnissa v. Ghulam Fatima*.
 (69) 11 Suth W R 100 (100) (DB), *Shamee Mohammad v. Brinda Mundle*.
 (1864) 1864 Suth W R (Gap) Act X Rul 19 (20, 21) (DB), *Watson & Co. v. Rutno-kanth*.
 (1865) 2 Suth W R Misc 17 (17) (DB), *Collector of Beerbhoom v. Raj Coomaree Dassia*.
 (1865) 4 Suth W R 13 (14) (DB), *Mohammad Buseeroodeen v. Hazeer Mohammad*.
 (04) 1904 Pun Re No. 90 (FB), *Shaib Dad v. Rahmat*.
 (31) 18 AIR 1931 Mad 83 (85) : (DB), *Pannirselvam v. Veeriah*.
 [See (20) 7 AIR 1920 Cal 588 (592) (DB), *Habibullah v. Soleman*. (Mussalman Wakf Validating Act, 1913, not declaratory.)
 (16) 3 AIR 1916 Cal 861 (863) (DB), *Jotiram v. Jonaki Nath (Do.)*
 (30) 17 AIR 1930 Lah 1004 (1007), *Skinner v. Veronico Skinner*. (Alteration in procedure may have retrospective effect.)
 (28) 15 AIR 1928 Mad 1173 (1174), *Muthukrishna v. Ayyasami*. (Act I of 1926 being declaratory Act is retrospective — Right to attachment mere processual right.)]
4. (39) 26 AIR 1939 Pat 282 (283) : (DB), *Biranchi Singh v. Nand Kumar*.
 (29) 16 AIR 1929 Bom 262 (265) (DB), *Pandari Nath v. Thakoredas*.
 (09) 4 Ind Cas 492 (493) (All), *Inderjit v. Arshad Ali*.
 (10) 7 Ind Cas 11 (14) (DB) (All), *Shamsheryar Khan v. Gopal Chand*.
 (11) 9 Ind Cas 800 (801) (All), *Payne v. Brahmdeo*.
 (14) 1 AIR 1914 Qudh 125 (125, 126), *Sankatha Prasad v. Raja Krishna*.
 (30) 17 AIR 1930 Cal 422 (423) (DB), *Janakinath v. Nirodbaran Ray*.
 (21) 8 AIR 1921 Pat 185 (186) (DB), *Kedar Nath v. Tarini Prasad*.
 (84) 6 All 262 (268) (FB), *Ganga v. Kishen*.
5. (25) 12 AIR 1925 Lah 446 (447, 448) (DB), *Crown v. Fitzmaurice*. (Right of trial by jury.)
 (10) 6 Ind Cas 188 (189) (DB) (All), *Kounsilla v. Ishri Singh*. (Right to execute decree is a substantive right.)
6. (27) 14 AIR 1927 P C 242 (244) (PC), *Delhi Cloth & General Mills Co. v. Income-tax, Commr., Delhi*. (Right of finality of orders.)
 (14) 1 AIR 1914 Cal 806 (810) (FB), *Gopeswar v. Jiban Chandra*.
 (21) 8 AIR 1921 Mad 126 (128) (DB), *Viswanatha v. Seetalakshmi*.
 (24) 11 AIR 1924 Nag 24 (25, 26) (DB), *The Commissioner of Income-tax, C. P. v. Dharmchand*.
 (11) 9 Ind Cas 55 (55) (Mad), *Venkatachellaya v. Subramania Aiyar*. (81) 6 Bom 26, *Khushalbai v. Kabhai*, followed.)
7. (50) 3 Sau L R 120 (122) (DB), *Jagmohanlal v. Jyotilal*.

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prescribes a period of limitation for the institution of a particular suit, it does not create any *right* in favour of any person or define or create causes of action, but simply prescribes that the remedy can be exercised only within a limited period and not subsequently.⁸ Nor does the law of limitation create any *obligation* to sue where none exists. Thus, where a sale is *void*, and it is not necessary to sue to have it set aside, the Limitation Act should not be so construed as to create an obligation to sue.⁹

It follows that in respect of any particular suit or proceeding the law of limitation applicable is the law which is in force on the day on which such suit or proceeding is instituted notwithstanding that the cause of action may have arisen before such Act came into force.¹⁰

(‘38) 25 AIR 1938 Mad 688 (693, 699) (DB), *Giridharilal v. Kappini* (Per Venkataramana Rao, J. — See however the observations of Pandrang Raw, J., to the effect that the law of limitation is retrospective if it is clearly intended to be retrospective and not because it is merely a matter of procedure.)

(‘37) 24 AIR 1937 Pat 605 (606), *Badri Narayan v. Ganga*. (In absence of express intention of Legislature affecting vested rights change of limitation is to be taken as a matter of procedure.)

(‘26) 13 AIR 1926 All 93 (94) (DB), *Begam Sultan v. Sarvi Begam*.

(‘28) 15 AIR 1928 All 708 (708), *Baijnath v. Doolarey*.

(‘16) 3 AIR 1916 Pat 300 (303) (DB), *Krishna Dayal v. Sakina Bibi*.

(‘30) 17 AIR 1930 Cal 422 (423) (DB), *Janakinath v. Nirodbaran* (Matters of procedure apply to pending suit if law is changed during pendency.)

(‘30) 17 AIR 1930 Cal 34 (38) (DB), *Mahomed Saleh v. Chandra Kumar*.

(‘11) 11 Ind Cas 635 (636) (DB) (Mad), *Krishna v. Alambu*.

(‘31) 18 AIR 1931 All 635 (639, 640) (FB), *Ram Karan v. Ramdas*. (Question of limitation should be decided as per Act in force at institution of suit.)

[See (‘78) 1878 Pun Re No 59, *Mehtab v. Nanak Chand*. (Limitation is not a question of jurisdiction.)]

8. (‘94) 21 Cal 8 (18) (PC), *Harinath v. Mothoor Mohun*.

(‘31) 18 AIR 1931 All 635 (649) (FB), *Ram Karan v. Ramdas*. (Per Bajpai, J.)

(‘32) 19 AIR 1932 All 543 (544) (DB), *Bhajja v. Mohammad Said*.

(‘24) 11 AIR 1924 Pat 721 (728) (DB), *Keshu Prasad v. Madho Prasad*. (Article 141 cannot be construed as altering law of the land.)

(‘79) 3 Bom 207 (209) (DB), *Jivi v. Ramji*. (Act does not define or create causes of action.)

(‘01) 28 Cal 37 (46) (DB), *Surjyamani v. Kali Kanta*.

(‘23) 10 AIR 1923 Mad 462 (465) (DB), *Aiyaparaju v. Veera Venkatakrishnayya*. (Per Venkatasubbarao, J.)

(‘30) 17 A I R 1930 Rang 228 (230, 231) (F B), *Abdul Ganny v. Mrs. Russel*. (It restricts remedies, not substantive rights.)

(‘12) 16 Ind Cas 742 (744) (DB) (Cal), *Kumeda Charan v. Ashutosh*.

(‘16) 3 AIR 1916 Cal 661 (663) (DB), *Kalicharan v. Sukhada Sundari*.

(‘25) 12 AIR 1925 Oudh 400 (401), *Ram Narain v. Barkandi*.

[See (‘97) 24 Cal 1 (7) (PC), *Hurri Bhusan v. Upendra Lal*.]

[See also (‘46) 33 AIR 1946 Cal 500 (505) (FB), *Ranglal v. Shyamlal*. (Substantive rights of parties under a bond or a decree cannot be derived from, or sought for in the Limitation Act.)]

(‘15) 2 A I R 1915 Cal 173 (175) (DB), *Mohini Mohun v. Surendra Narain*. (Limitation Act does not give a party a right of suit unless such a right exists independent of the Limitation Act.)]

See also Article 122, Note 1.

9. (‘15) 2 AIR 1915 Mad 1196 (1197) (DB), *Narayanan v. Lakshmanan*.

10. (‘40) 27 A I R 1940 P C 116 (121) (PC), *Masjid Shahid Ganj v. Siromani Gurudwara Parbandhak Committee, Amritsar*. (By the Punjab Laws Act, 1872,

the Mahomedan law is made applicable to the religious institutions of Muslims but only in so far as it has not been modified by legislation — Thus the Limitation Act applies though limitation is not an original principle of Mahomedan law.)

- ('47) 34 AIR 1947 Lah 117 (145) (DB), *Mohd. Afzal v. Din Mohammad*.
- ('46) 33 AIR 1946 All 58 (61), *Pearay Lal v. Solu Gir*.
- ('46) 33 A I R 1946 Pat 60 (62) (DB), *Jagadish v. Saligram*. (S. 20 as amended applies only to suits instituted after it came into force.)
- ('44) 1944 Oudh W N (H C) 242 (243), *Beni Rai v. Gaya Prasad*.
- ('43) 30 AIR 1943 All 393 (403) (DB), *Gur Saran v. Shib Singh*.
- ('42) 29 AIR 1942 P C 54 (56) (PC), *Ramayya v. Lakshmayya*.
- ('39) 26 AIR 1939 Pat 282 (283) (DB), *Biranchi Singh v. Nand Kumar*.
- ('39) 26 AIR 1939 Pat 122 (125) (DB), *Reyasat v. Gopinath*.
- ('37) 24 AIR 1937 Pat 605 (606), *Badri Narayan v. Ganga Singh*.
- ('37) 24 AIR 1937 Pat 311 (313), *Rameshwar v. Mangar Kahar*.
- ('37) 24 AIR 1937 Lah 9 (10) (DB), *Abdul Kadir v. Siraj-ud-Din*. (Unless there is a distinct provision to the contrary.)
- ('18) 5 A I R 1918 Cal 841 (842) (DB), *Badial Alam v. Abdul Hakim*. (Except in cases where the effect of such construction would be to take away the plaintiff's right of suit altogether.)
- ('17) 4 AIR 1917 Lah 144 (145) (DB), *Manohar Lal v. Sadiqa Begam*.
- ('17) 4 AIR 1917 Pat 485 (487) (DB), *Krishna Dayal v. Sakina Bibi*.
- ('15) 2 AIR 1915 Lah 73 (74), *Mahia Mal v. Ghulam Kadir*. (A person is entitled to the benefit of the new law of limitation extending the period if on the date of its coming into force his right to sue subsists.)
- ('13) 21 Ind Cas 43 (45) (DB) (Cal), *Barhanuddi v. Lal Khan*.
- ('09) 2 Ind Cas 981 (981) (Lah), *Arura Mal v. Kesar Singh*.
- ('09) 2 Ind Cas 962 (963) (DB) (Lah), *Jiwanath v. Abdulla*. (Right not barred under the old Act when new Act came into force — New Act applies even if it extends the period of limitation.)
- ('28) 15 AIR 1928 All 708 (708), *Baijnath v. Doolarey*.
- ('13) 19 Ind Cas 291 (294) (PC), *Soni Ram v. Kanhaiya Lal*. (Unless there is a distinct provision to the contrary.)
- ('09) 3 Ind Cas 725 (728) (DB) (All), *Shib Shankar v. Soni Ram*. (Following ('83) 7 Bom 459, *Gurupadapa v. Virbhadrappa*.)
- ('21) 62 Ind Cas 100 (100) (DB) (Pat), *Myers v. Divakar Manilal & Co*. (Law of limitation governs all proceedings taken after the date of its enactment—A I R 1917 Pat 485 followed.)
- ('27) 14 AIR 1927 Sind 270 (271) (DB), *Ganga Ram v. Secretary of State*.
- ('30) 34 Cal W N 733 (734), *Kanai Lal v. Purnachandra*.
- ('77) 1 Mad 264 (265) (DB), *Teagaraya v. Mariappa*.
- ('74) 11 Bom H C R 117 (119) (DB), *Reg v. Dorabji*.
- ('77) 1 Bom 305n (307n) (DB), *Ramchandra v. Soma*. (Act IX of 1871 applies to a suit instituted after the Act came into force though the cause of action arises under the Act of 1859.)
- ('76) 1 Mad 52 (53), *Latchmia v. Muthambhatlu*.
- ('16) 3 AIR 1916 Cal 754 (755), *Biswessor v. Immamuddi*.
- ('15) 2 AIR 1915 All 392 (393), *Jia Bibi v. Ilahi Baksh*.
- ('81) 6 Cal 340 (347) (DB), *Mohesh Lal v. Busunt Kumaree*.
- [See ('02) 1902 Pun Re No 4, *Ram Ditta v. Tehlu*. (Case under Punjab Limitation Act, 1900.)
- (1864) 1 Suth W R 52 (52), *Radhamonee v. Goluck Chunder*.
- ('25) 12 AIR 1925 Bom 326 (326) (DB), *Gulabrao v. Magan*. (The limitation provided by S. 48, C. P. C., 1908, applies to application filed after the date when the new Code came into force though the decree itself is passed before new Code came into force.)]
- [See also ('46) 33 AIR 1946 Pat 59 (60) (DB), *Saraledeva v. Dwarka Prasad*, (Limitation (Amendment) Act (XVI of 1942) amending S. 20 has no retrospec-

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Where a particular Limitation Act is *repealed* by another Act, the following positions may arise :

- (1) Where, at the time of the new Act, a suit is barred according to the repealed Act.
- (2) Where the suit is within time according to the old Act but the new Act prescribes a shorter term of limitation than the former Act.
- (3) Where the suit is within time according to the old Act but barred according to the new Act and a future date is fixed for its coming into operation.
- (4) Where the suit is within time according to the old Act but barred by the new Act, and the new Act comes into force at once.

In order to discuss these positions properly, it will be necessary to refer to section 6 of the General Clauses Act, X of 1897, which enacts as follows :

"Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then unless a different intention appears, the repeal shall not —

- (a) revive anything not in force or existing at the time at which the repeal takes effect ; or
- (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder ; or
- (c) affect any right, privilege, obligation or liability acquired, accrued, or incurred under any enactment so repealed ; or
- (d)
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, as aforesaid ; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced as if the Repealing Act or Regulation had not been passed."

It follows that, in the *first case*, the right of action which is barred by limitation at the time when the new Act comes into force cannot be revived by the change in the law subsequently.¹¹ [Clause (a) of S. 6 of Act X of 1897.]

tive operation in the sense that it can apply to a suit which had already been instituted.)

('43) 30 AIR 1943 Nag 178 (181) (DB), *Prabhakar v. Chandrakant*. (S. 20 as amended does not apply to suit filed before amendment.)

('81) 3 All 340 (341, 342) (DB), *Bansidar v. Har Sahai*.

('31) 18 AIR 1931 All 635 (643, 645) (FB), *Ram Karan v. Ram Das*. (Per Mukerji J.)

('09) 3 Ind Cas 389 (390) (DB) (Cal), *Thakomoni v. Mohendra Nath*.

(1864) 1864 Suth W R (Gap) 280 (280, 281) (DB), *Indoo Bhoosun v. Hurro Nath*. (New Act coming into operation when plaint presented to proper Court on return - New Act governs the suit.)

(1864) 1864 Suth W R (Gap) Misc 6 (6) (DB), *Bishonath v. Kripa Narain*.

('29) 16 AIR 1929 Lah 877 (878), *Surat Singh v. Nihal Kaur*. (New Act coming into force when plaint presented to proper Court on return — New Act governs the suit.)

[See however ('74) 7 Mad HCR 392 (394) (DB), *Chinnasami v. Gopalacharry*.]

11. ('51) 38 AIR 1951 Mad (CN 80) 314 (Prs 3, 6) (DB), *Ramanathan v. Kandappa*.

('50) 3 Sau L R 120 (122) (DB), *Jagmohanlal v. Jyotilal*.

('46) 33 AIR 1946 All 58 (60, 61), *Peareylal v. Solu Gir*.

- (143) 30 AIR 1943 All 393 (403) (FB), *Gur Saran v. Shib Singh*.
 (143) 30 AIR 1943 Mad 691 (697) (DB), *S. C. V. Devasthanam v. Chidambaram*,
 (Suit once barred cannot be revived by subsequent change in the law.)
 (142) 29 AIR 1942 P C 54 (56) (PC), *Ramayya v. Lakshmayya*.
 (141) 28 AIR 1941 Bom 178 (182) (DB), *Haji Yoonus v. Shekh Hasan*.
 (140) 27 AIR 1940 Cal 115 (131) (DB), *Narendra Nath v. Madinapore Zamindari Co. Ltd.* (Extension of limitation by new Act cannot revive right barred under repealed Act.)
 (139) 26 AIR 1939 Bom 342 (343), *Karbali Gulam v. Haji Ebrahim*. (Suit barred under Art. 5 — Right not revived by Bombay amendment of 1938, coming into force after suit became barred, under which a longer period is provided for such suits.)
 (135) 22 AIR 1935 Mad 245 (245), *Krishnaswami v. Thiruvengada*. (There is no provision in Limitation Act so retrospective in its effect as to revive and make effective a barred right.)
 (125) 12 AIR 1925 Bom 339 (340) (DB), *Indurai v. Shivalal*.
 (115) 2 AIR 1915 Mad 749 (749) (DB), *Akkamma v. Kopparam*. (New Act cannot revive barred rights without express words.)
 (115) 2 AIR 1915 Mad 637 (639) (DB), *Venkoba v. Nataraja*.
 (106) 1906 Pun L R No. 15, p. 47, *Khan Singh v. Hakim Singh*. (Suit barred under the Limitation Act, 1877 — Right is not revived by the Punjab Loans Limitations Act, 1904.)
 (80) 5 Cal 894 (896) (DB), *Shumbhoonath v. Guruchurn*. (Execution of decree barred under the Act of 1871 would not be revived under the Act of 1877.)
 (76) 1 Bom 286 (291) (DB), *Sitaram v. Khanderao*. (Suit for share of immovable property barred under Reg. V of 1827 before Act IX of 1871 came into force — Art. 123 of Act of 1871 will not apply.)
 (74) 7 Mad H C R 298 (300) (DB), *Venkataramanier v. Manche Reddy*.
 (74) 7 Mad H C R 288 (290) (DB), *Najanna v. Narappa*.
 (12) 16 Ind Cas 236 (237) (DB) (Mad), *Sakkarai Ambalagaran v. Sundilapathi*. (But where the right of suit is subsisting at the time when the new Act comes into force the plaintiff gets the extension under the new Act.)
 (93) 20 Cal 487 (497) (PC), *Mohesh Narain v. Taruck Nath*.
 (89) 12 Mad 26 (33) (P C), *Appasami v. Subramanya*.
 (22) 9 AIR 1922 P C 187 (190, 191) (PC), *Sachindra Nath v. Maharaja Bahadur Singh*. (There is nothing in Act of 1908 so retrospective as to revive and make effective a judgment or decree which before that date had become unenforceable by lapse of time.)
 (80) 4 Bom 230 (234) (DB), *Vinayak v. Babaji*.
 (84) 8 Bom 99 (103) (DB), *Dharma v. Govind*.
 (93) 17 Bom 173 (183) (DB), *Bhogilal v. Amritlal*. (Per Telang, J.)
 (78) 3 Cal 331 (335) (DB), *Krishna Mohan v. Okhilmoni*. (Per Markby, J.)
 (04) 31 Cal 314 (317, 318) (DB), *Jagamba v. Ram Chandra*.
 (12) 39 Cal 506 (509, 510) (DB), *Nepal Chandra v. Niroda Sundari*.
 (10) 8 Ind Cas 689 (691) (DB) (All), *Mod. Faiaz Ali v. Kallu*.
 (11) 10 Ind Cas 477 (480) (PC), *Khunnilal v. Govind Krishna*.
 (13) 20 Ind Cas 465 (466) (Oudh), *Raja Ram v. Parag Narain*.
 (12) 17 Ind Cas 629 (632) (DB) (Bom), *Mohammad Mehdi v. Sakinabai*.
 (30) 17 AIR 1930 Bom 55 (57) (DB), *Dhondi v. Lakshman*.
 (28) 15 AIR 1928 Bom 28 (30, 31) (DB), *Narayan v. Govind*. (13) 35 All 227 (P C), *Soni Ram v. Kanhaiya Lal*. (Distinguished.)
 (18) 5 AIR 1918 Mad 86 (88) (DB), *Raman Kurup v. Chapan Nair*. ((82) 5 Mad 182, *Mukkanni v. Manan Bhatta* and 27 Cal 1004 (PC) followed.)
 (77) 1877 Bom P J 85 (DB), *Vasudevabhat v. Krishnabhat*.
 (82) 1882 Bom P J 224 (DB), *Bapuji v. Kasinath*.
 (83) 1883 Bom P J 125, *Vithu v. Narayan*.
 (84) 1884 Bom P J 73, *Rustomji v. Kuvarbai*.
 '97) 2 Cal W N 162 (164) (DB), *Mohema Chunder v. Gouri Nath*.

Preamble Note 15

In the *second case*, the general rule stated above with regard to the law of limitation applies, namely, the new Act applies to the proceeding notwithstanding that the period of limitation is shortened by the new Act. The reason is, as has been seen already, that no one has got a vested right in a period of limitation which is but a rule of procedure. When, therefore, at the time the new Act comes into force there is time even according to the new Act within which the suit can be instituted, the new Act will apply.¹² In such cases the fact that the new Act postpones the date of its coming into force becomes unimportant in deciding the question of its retrospective effect.¹³

In the *third case*, the fact that the Legislature has postponed the operation of the new Act shows that it has provided for all possible hardships and consequently the rule is that the new Act applies from the date of its taking effect.¹⁴

('80) 1880 Pun Re No. 85, *Devi Dayal v. Prab Dayal*.

('01) 1901 Pun L R No. 53 p. 175, *Teka v. Sohnu*. (Case under Punjab Limitation Act, 1900.)

('80) 5 Cal 897 (900, 901) (DB), *Nursing v. Hurryhur*.

('74) 7 Mad H C R 283 (283) (DB), *Venkatachella v. Sashagherry*.

[See ('77) 1 Mad 228 (234, 235) (DB), *Tambaratti v. Vira Rayan*. (A contractual right was existing when new Act came into force.)

('15) 2 AIR 1915 All 314 (315), *Amir Shah v. Tula Pande*. (Section 10 of Act of 1871 cannot be applied to a suit already barred before the Act of 1871 came into force.)]

[See also ('22) 9 AIR 1922 Lah 398 (398) (DB), *Hakumat v. Wadhawa*.

(1900) 27 Cal 1004 (1011) (PC), *Fatimatunnissa v. Sunder Das*.

('76) 1 Cal 328 (330), *Nocoor Chunder v. Kally Coomar*. (Overruled in ('81) 6 Cal 340, *Mohesh Lal v. Busunt Kumaree* on another point.)

('14) 1 AIR 1914 Mad 15 (16) (DB), *Ramamma v. Narayanswami*.

('18) 5 AIR 1918 Mad 794 (798, 799), *Somasundaram v. Vaithilinga*.

[See however ('12) 16 Ind Cas 124 (125) (DB), *Ayesha v. Faiz Husain*. (Section 9 of the General Clauses Act not referred to.)]

12. ('21) 8 AIR 1921 Bom 40 (43) (DB), *Gopaldas v. Tribhovan*. (Section 48, C. P. C., has retrospective effect in regard to decree obtained before the Code of 1908.)

('26) 13 AIR 1926 All 93 (94) (DB), *Begam Sultan v. Sarvi Begam*.

13. ('30) 17 AIR 1930 Cal 34 (37) (DB), *Mahomed Saleh v. Chandra Kumar*. (Observation of Lord Campbell, C. J., in *Queen v. Leeds*, (1852) 18 Q B 343, referred to.)

14. ('39) 26 AIR 1939 Pat 282 (283, 285) (DB), *Biranchi v. Nand Kumar*. (Bihar Tenancy Act, VIII of 1934 — Retrospective intention inferred from the fact of its postponement of operation.)

('39) 26 AIR 1939 Pat 122 (125) (DB), *Reyasat v. Gopinath*. (The Bihar Tenancy Amending Act of 1934 applies to all suits instituted after 10th June 1935, whether the cause of action had accrued or not before that date.)

('37) 24 AIR 1937 Pat 311 (313, 314), *Rameshwar Prasad v. Mangar Kahar*, (Bihar Tenancy (Amendment) Act, VIII of 1934.)

('85) 9 Bom 475 (477) (DB), *Baiva v. Bhiku*. (Section 2 of the Act of 1877 extended the benefit of the Act of 1871 for a period of two years.)

('79) 4 Bom 87 (89) (DB), *Ichhashankar v. Killa*. (Do.)

('82) 6 Bom 26 (29, 30) (DB), *Khushalbhai v. Kabhai*.

('13) 20 Ind Cas 821 (822) (DB) (Cal), *Budhu Kumar v. Hafiz Hussain*.

('22) 9 AIR 1922 Mad 417 (419) (DB), *Ganapathi v. Krishnamachari*. (Retrospective intention may be inferred when new statute postpones its coming into effect.)

('21) 8 AIR 1921 Mad 650 (651) (DB), *Vaithinatha v. Govindaswami*.

In the *fourth case*, it will be observed that the result of applying the new Act would be to destroy the right to sue which was vested in the plaintiff on the date the new Act came into force. As has already been seen, even an enactment relating to procedure will not operate retrospectively so as to destroy *vested rights*, whether substantive or remedial. It follows that the suit in such cases can be filed within the time fixed by the old Act.¹⁵ In *Rajah of Pittapur v. Gani Venkatasubba*

('10) 7 Ind Cas 982 (985) (DB) (Bom), *Hope Mills Ltd. v. Vithaldas*.

('23) 10 AIR 1923 Nag 166 (167), *Nimba v. Janki*.

(1865) 2 Mad H C R 42 (42), *Mohidin v. Khadir*.

('80) 2 Mad 397 (399) (DB), *Sabapathi v. Chidambaran*.

('81) 3 Mad 96 (97) (DB), *Subbayya v. Subanna*.

('82) 8 Cal 51 (61) (PC), *Mungul Pershad v. Grija Kant*. (Limitation Act, IX of 1871 – Section 1 expressly provided that portions of the Act did not affect suits instituted before 1st April 1873.)

('77) 1 Mad 301 (302) (DB), *Madhavan v. Achuda*.

('80) 3 Ind Jur 415 (DB), *Appasami v. Aghulanda*.

[See ('78) 1878 Bom P J 269, *Ramachandra v. Gunwantrao*.

(1865) 4 Suth W R Misc 24 (24) (DB), *Mudoosoodan v. Dinomoonnee*.

('81) 5 Bom 673 (679) (FB), *Bhikambhat v. Joseph Fernandez*. (Act XIV of 1859 and not Act IX of 1871 applied to application in suits instituted before 1st April 1873.)

[See also ('10) 5 Ind Cas 421 (422) (Mad), *Palaniappa v. Valayuta*.]

[But see ('21) 8 AIR 1921 Mad 126 (129), *Viswanath v. Sitalakshmi*. (Inference of non-retrospectiveness made from the fact of the new statute postponing the date of its coming into effect is unsound—Per Oldfield J.)]

15. ('51) 38 AIR 1951 Kutch (C N 14) 15 (Prs 4, 6, 10), *Maganlal v. Mulji*. (Where a suit is within time under the Indian Limitation Act as applied by the Kutch (Application of Laws) Order 1949, but is barred under the new Limitation Act as applied by the Merged States (Laws) Act, 1950, the suit must be governed by the old Limitation Act inasmuch as the result of applying the new Act would be to destroy the right to sue which was vested in the plaintiff at the time the new Act came into force. The repeal of the earlier enactment cannot have the effect of barring the suit. Unless the new enactment has stated in unequivocal terms that it should destroy vested rights it cannot be applied retrospectively so as to prevent the plaintiff from exercising his right to bring a suit which he had under the repealed Act.)

('23) 10 AIR 1923 Lah 642 (643) (DB), *Sarup Singh v. Pal Singh*. (A right to sue acquired before the Punjab Limitation Act, 1900, came into force will not be affected by that Act.)

('16) 3 AIR 1916 Mad 912 (913) (DB), *Raja of Pittapur v. Gani Venkatasubba*, (AIR 1916 Mad 607 followed.)

('24) 11 AIR 1924 Pat 183 (184), *Gokaran v. Waris Ali*. (Intention to defeat vested rights without compensation is not to be imputed to Legislature.)

('13) 19 Ind Cas 793 (807) (DB) (Cal), *Manjuri v. Akkel Mahmud*.

('27) 14 AIR 1927 P C 242 (244) (PC), *Delhi Cloth & General Mills Co. Ltd. v. Income-tax Commissioner, Delhi*.

('11) 11 Ind Cas 401 (402) (DB) (Cal), *Fazil Karim v. Ananda Mohan*.

('82) 6 Bom 26 (29, 30) (DB), *Khushalbai v. Kabhai*.

('16) 3 AIR 1916 Mad 607 (608), *Ramakrishna v. Subraya*.

[See ('22) 9 AIR 1922 Cal 491 (492) (DB), *Ajit Singh v. Bhagabati Charan*. (In this case, though the Amending Act introduced a shorter period of limitation the application in question did not become barred according to that Act on the date of its coming into operation—Still the Court held the old Act applied—This cannot be considered to be right.)

('10) 8 Ind Cas 189 (189) (Bom), *Gajanan v. Waman*.

Preamble
Note 15

Row,¹⁶ Wallis, C. J., observed as follows :

"The principle to be applied is that where an Act contains provisions for the limitation of suits which take away altogether a *vested right of suit* without providing any equivalent remedy, then according to the approved rule of construction, the provisions must be considered to have been enacted subject to the implied exception that they were not to extend to such vested rights of suit which were to continue subject to the rules of limitation in force at the passing of the Act. This rule of construction was adopted to give effect to the presumed intention of the Legislature not to take away vested rights in this fashion."

Of course it is always open to the Legislature, by express words, to apply a new statute of limitation so as to *take away* a right of suit or other proceeding; but in that case it will be simply an instance of the *express intention* of the Legislature overriding the ordinary rule of construction.¹⁷ See also the undermentioned cases.¹⁸

An alteration of the law of limitation *during the pendency* of a suit or proceeding does not, in any event, affect such suit or proceeding.¹⁹

('33) 20 AIR 1933 Oudh 38 (40), *Ragunandan v. Mahadeo*. (Amendment to Art. 134 by Act I of 1929 cannot have retrospective effect so as to displace rights acquired by prescription.)

('30) 17 AIR 1930 Pat 455 (467) (DB), *Naurangi Lal v. Ram Charan*.

('76) 1 Bom 286 (291) (DB), *Sitaram v. Khandarav*.

16. ('16) 3 AIR 1916 Mad 912 (913).

17. ('37) 24 A I R 1937 Pat 605 (606), *Badri Narayan v. Ganga Singh*. (In absence of express intention change of limitation is to be taken as a matter of procedure.)

('12) 14 Ind Cas 184 (186) (DB) (Mad), *Sundaram v. Muthu Ganapathi*. (Per Abdur Rahim, J. - S. 210 of Madras Estates Land Act is retrospective.)

('10) 5 Ind Cas 420 (421) (DB) (Mad), *Kali Amma v. Pelappakkara Manakal*.

('21) 8 AIR 1921 Bom 40 (43) (DB), *Gopaldas v. Tribhawan*. (Section 48, C. P. C., 1908, has retrospective effect.)

('13) 21 Ind Cas 113 (114) (DB) (Cal), *Narendra Lal v. Upendra Nath*.

('17) 4 AIR 1917 Lah 144 (147) (DB), *Manohar v. Sadiqa Begum*.

('10) 8 Ind Cas 543 (544) (DB) (Mad), *Chidambarm v. Karuppan*.

[See ('23) 72 Ind Cas 989 (991) (Pesh), *Ghulam Haider v. Bazid Shah*. (The Legislature has power to revive even a lapsed title if it makes a special law which distinctly allows such a revival.)

('83) 7 Bom 459 (462, 463) (D B), *Gurupadappa v. Virbhadrappa*. (A new Limitation Act may itself state when it is to take effect)]

See also Section 6 Note 4.

18. ('16) 3 AIR 1916 Pat 300 (303) (DB), *Krishna Dayal v. Sakina Bibi*. (Limitation Act governs all proceedings from date of its enactment.)

('11) 11 Ind Cas 295 (298) (DB) (Cal), *Kishori v. Mukund Lal*.

19. ('34) 21 AIR 1934 P C 77 (78) (P C), *Allah Rakhi v. Abdur Rahim*. (Amendment of 1929 to S.10, Limitation Act, does not govern previously instituted suit.)

('14) 1 AIR 1914 Cal 167 (167) (DB), *Maula Baksh v. Bhabasundari*.

('10) 6 Ind Cas 488 (489) (Lah), *Gujjar Mal v. Sita Ram*. (New Act cannot be construed as depriving a person of rights which he had under the old law and which rights he was actually seeking to enforce at the time when new Act came into force.)

('01) 1901 Pun L R No. 153, p. 392 (D B), *Ram Ditta v. Tehlu*. (The Punjab Limitation Act does not apply to a suit instituted before the date of its enactment.)

('83) 9 Cal 446 (449) (DB), *Behari v. Goveydhun*. (('78) 2 Bom 148, *In re Ratansi Kalianji* followed.)

[See however ('66) 5 Suth W R 95 (96) (PC), *Lall Dokul Sing v. Lall Rooder Purnap Singh*.]

A law creating a *new right* cannot, as such, be presumed to have no retrospective effect. The rule against retrospective operation is intended to apply not so much to a law creating a new *right* as to a law creating a new *obligation* or interfering with vested rights. Where the new right is created expressly under conditions which prevent its imposing any new obligation on, or its interfering with, any vested rights in others, the reason against its retrospective operation ceases to exist.²⁰

In the undermentioned case²¹ of the Calcutta High Court the question was raised without being decided whether, when a latter Limitation Act repeals a prior Act which itself had kept alive certain provisions of a still earlier Act, the earliest Act was kept in force in so far as those provisions were concerned. But subsequently the same High Court has decided²² the question and laid down that the earliest Act was not kept in force.

16. Limitation bars remedy but does not destroy right.—

As has been seen in Note 3, *limitation*, as distinguished from prescription, merely bars the remedy but does not destroy the right,¹ which

20. ('95) 22 Cal 767 (777, 778) (FB), *Jagadanund v. Amirta Lall*. (Overruling ('87) 14 Cal 636, *Lal Mohun v. Jogendra Chandra*.)

21. ('83) 9 Cal 644 (646, 647) (DB), *Radha Prosod v. Sundar Lall*.

22. ('85) 11 Cal 55 (58) (DB), *Bacharam v. Abul Wahed*.

Preamble — Note 16

1. ('50) 3 Sau L R 120 (122) (DB), *Jagmohanlal v. Jyotilal*.

('49) 36 AIR 1949 East Punj (C N 9) 29 (32) (DB), *Ram Sarup v. Ram Chandar*. (Limitation does not bar plea in defence.)

('46) 33 AIR 1946 Oudh 129 (141) (DB), *Sant Bux v. Ali Raza*. (Limitation Act is not applicable to the case of a defendant and the party in possession is not affected by it.)

('43) 30 AIR 1943 Mad 370 (372) (DB), *Ananthanarayana v. Sivaramakrishna*. (Limitation does not extinguish liability but only bars remedy—Mortgage barred by limitation—It can still be used by mortgagee as defence to his right of possession.)

('39) 26 AIR 1939 Bom 494 (496), *Surat Borough Municipality v. Sarifa Karunnissa*. (The rule of limitation is a rule of procedure, a branch of the adjective law, and does not either create or extinguish rights, except in the case of acquisition of title to immovable property by prescription under S. 28, Limitation Act.)

('87) 14 Cal 50 (55) (DB), *Anando Kishore Dass v. Anando Kishore Bose*.

('10) 7 Ind Cas 898 (899) (DB) (Mad), *Subramania v. Gopala*.

('31) 18 A I R 1931 All 635 (649) (FB), *Ram Karan v. Ram Das*. (Obiter — Per Bajpai, J.)

('30) 17 A I R 1930 Rang 228 (232) (FB), *Abdul Ganny v. Russell*. (Per Carr, J.)

('21) 8 AIR 1921 Lah 170 (171) (DB), *Nathwa v. Kanhaiya*. (('15) 2 A I R 1915 All 480, *Kesar Kunwar v. Kashi Ram*, disapproved.)

('21) 8 AIR 1921 Lah 351 (352) (DB), *Akbar Hussain v. Ragnandan*.

('35) 22 A I R 1935 Oudh 213 (216) (DB), *Sarda Nand v. Daya Shanker Singh*. (Mortgagee in possession—So long as possession lasts, his right to the mortgage money is not lost though right of suit on the mortgage may have become time-barred.)

[See ('16) 3 AIR 1916 Low Bur 67 (68), *S. King v. D. J. Buchanan*, ('80) 5 Cal 897 (899) (DB), *Nursingh Dayal v. Hurryhur Saha*.]

See also Section 28, Note 1.

Preamble
Notes 16-18

remains and continues available in other ways. Thus, where a suit or a debt is barred by limitation, the debt nevertheless remains; it is open to the debtor to pay the barred debt and the payment cannot be recalled on the ground of failure of consideration.² Similarly a barred debt is a good consideration for a written promise to pay it. See S. 25 of the Contract Act. See Note 14 under section 3.

17. Limitation and defence. — See Note 15 to Section 3.

18. "Consolidate and amend." — "The very object of consolidation," said Lord Watson in *Administrator-General of Bengal v. Premlal Mullick*,¹ "is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act is passed."

In the case, therefore, of a consolidating statute, the construction must be, not with reference to the circumstances existing at the time of the preceding Acts, but in relation to those existing at the time of the consolidating itself,² and the law should thenceforth be ascertained from that enactment itself and not from prior decisions.³

If a consolidation Act re-enacts with a like context a word or phrase in one of the Acts consolidated which has received judicial interpretation, that interpretation will generally be applicable to the same word or phrase in the consolidation Act.⁴

2. ('40) 27 A I R 1940 Lah 166 (169), *Punjab National Bank Ltd. v. Official Receiver, Karnal*. (Sections 60 and 61 of the Contract Act which recognise this principle give the right to a creditor to appropriate payments even towards time-barred debts.)

('40) 27 AIR 1940 Mad 908 (908), *Thimmanna v. Adyanthaya*. (The relationship of debtor and creditor does not cease even though the debt is barred by limitation.)

('39) 26 A I R 1939 Bom 494 (496), *Surat Borough Municipality v. Sarifa Karunnissa*. (A barred debt if paid cannot be recovered back on the ground that it was barred by limitation.)

('77) 1 Mad 267 (276) (DB), *Administrator General v. Howkins*.

[See ('21) 8 AIR 1921 Cal 67 (68), *Narendra Lal v. Tarubala Dassi*. (A creditor can enforce the lien in respect of the debt though the debt itself is barred.)

('10) 7 Ind Cas 399 (400) (DB) (Mad), *Kandaswami v. Avayambal*.]

Preamble — Note 18

1. ('95) 22 Cal 788 (798) (PC). (It is not correct to give the Act a meaning in the light of the circumstances present at the time of the enactment in its original form.)

[See also ('30) 17 AIR 1930 All 225 (230) (FB), *Santha Nand Gir v. Basudevvanand*. (Consolidation means reduction to a system of the whole of the statute law relating to the same subject-matter as illustrated by judicial decisions.)]

2. ('95) 22 Cal 788 (798) (P C), *The Administrator-General of Bengal v. Premlal Mullick*.

3. ('96) 23 Cal 563 (571, 572) (P C), *Norendra Nath v. Kamalbasini Dassi*.

('01) 28 Cal 517 (528) (DB), *Suraj Prosad v. Golab Chand*.

('23) 10 AIR 1923 Mad 523 (525) (FB), *Gopal Naidu v. Emperor*. (Per Schwabe, C. J.)

('09) 4 Ind Cas 442 (445) (DB) (Cal), *Bidhumukhi Dasi v. Jitendra Nath*. (Essence of a Code is to be exhaustive on matters in respect of which it declares the law.)

('09) 1 Ind Cas 829 (832) (DB) (Cal), *Burn & Co. Limited v. Colin Mc Donald*. (Per Maclean, C. J.)

4. ('50) 37 AIR 1950 Orissa (CN 21) 125 (Pr 8) (FB), *Ramchandra v. Bholu*.

19. Act, if exhaustive. — “The essence of a Code,” said Lord Davy in *Gokul Mandar v. Pudmanund Singh*,¹ “is to be exhaustive on the matters *in respect of which it declares the law*, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction.”

The Indian Limitation Act is an exhaustive Code governing the law of limitation in India in respect of all matters specifically dealt with by it, and the Indian Courts are not permitted to travel beyond its provisions to add to or supplement them.² In respect of matters *not* dealt with by it, however, the Act does not apply and there will be no limitation in respect of such matters. It is a rule of construction of every statute that the Court ought not to act on the principle that every procedure is to be taken as *prohibited* unless it is expressly provided for, but should proceed on the converse principle that every procedure is to be understood as *permissible* till it is shown to be prohibited by law.³ Again, while the periods of limitation or the rules

Preamble — Note 19

1. ('02) 29 Cal 707 (715) (PC).
2. ('40) 27 AIR 1940 Rang 276 (278) (FB), *Firm Eng Gim Moh v. Chinese Merited Banking Co. Ltd.* (There is no judicial discretion to relieve the parties from the operation of the Limitation Act in a case of hardship or any authority in the Court to dispense with its provisions.)
- ('39) 26 AIR 1939 All 82 (83, 84) (DB), *Lakhmi Chand v. Bibi Kalzumannissa*. (It is not permissible to the Court to discover in the provisions of the Limitation Act general principles and to apply these principles to cases which are not specifically provided for by the Act itself.)
- ('38) 25 AIR 1938 Nag 534 (535) (DB), *Rajaram v. Paiku*. (Effect must be given to the provisions of the Act unhampered by questions of expediency and the like.)
- ('35) 22 AIR 1935 P C 85 (88) (PC), *Maqbul Ahmad v. Onkar Pratap*. (The Court has no general discretion, outside the limits of the Act, to dispense with its provisions or to relieve a suitor from the operation of the Act in a case of hardship or mistake.)
- ('27) 14 AIR 1927 Lah 200 (208, 209) (DB), *Hari Singh v. Mahomed Said*. (No saving of limitation apart from the provisions of the Act.)
- ('27) 14 AIR 1927 All 446 (449) (DB), *Ram Charan v. Goga*. (No rule of suspension of limitation contrary to S. 9 of the Act.)
- ('33) 20 AIR 1933 Mad 418 (420) (FB), *Sundaramma v. Abdul Kadir*. (Exemption unknown to the Limitation Act cannot be granted.)
- ('35) 22 AIR 1935 All 323 (325, 326) (DB), *Mahomed Yunis v. Tilog Chand*. (Principle of equity cannot be invoked to enlarge period of limitation.)
- ('26) 13 AIR 1926 Cal 65 (73) (DB), *Sarat Kamini v. Nagendra Nath*.
- ('28) 15 AIR 1928 Mad 509 (512, 513) (DB), *Ammalu Amma v. Narayanan*.
- ('25) 12 AIR 1925 Oudh 369 (369), *Ram Pher v. Ajudhia Singh*. (('14) 1 AIR 1914 Bom 201, *Satyabhamabai v. Govind*, dissented from.)
- ('25) 12 AIR 1925 Mad 334 (337) (DB), *Ammathayi Ammal v. Sivarama Pillai*. (No new ground of extension or suspension of time to be allowed.)
- ('27) 14 AIR 1927 Mad 597 (597) (DB), *Atyanarayana v. M. Seethayya*. (No equitable ground of suspension of cause of action.)
- ('26) 13 AIR 1926 Mad 857 (859) (DB), *Sornam Pillai v. Thiruvazhiperumal*. [See ('36) 23 AIR 1936 All 383 (384) (DB), *Ram Gopal v. Ganga Devi*.]
- ('32) 142 Ind Cas 23 (24) (DB) (Tra-Co.), *Sankunny Menon v. Parameswara*. (Cochin Limitation Regulation.)]
3. ('83) 5 All 163 (172) (FB), *Narsingh v. Mangal*. (Per Mahmood J.)
- ('89) 11 All 267 (287) (FB), *Muhammad Sulaiman v. Muhammad Yar*.

Preamble Notes 19-20

of computation must be strictly confined to the limits of the Act, there will be nothing repugnant in so *construing the words* of column 3 of the schedule as to date a cause of action only when the remedy based on it is available.⁴

The entire law of limitation and all the provisions for computation of period of limitation and for suspension of cause of action and for exclusion of time have not been codified for all time and for all purposes in the Limitation Act, and it is open to the Legislature, Central as well as Provincial, from time to time, to make additional and supplemental provisions of the kind enumerated above, and if such provisions are made they will become part and parcel of the law of limitation applicable to an action.⁵

20. "Certain applications to Courts." — The Act lays down the law relating to the limitation of *all* suits and appeals but of *certain* applications only. These applications are specified in the articles of the Act dealing with *applications*. The Act does not govern an application which does not fall under one or the other of these articles.¹

The Limitation Act applies only to such applications as a party is bound to make for securing the relief he requires and does not apply when the application relates to an action which the Court ought to take *of its own motion*, whether the parties apply for it or not,² or

('25) 12 AIR 1925 Mad 42 (44), *Sooryaprakasam v. Muniswami Chetti*. (Section 151, C. P. C.)

('10) 5 Ind Cas 532 (534) (DB) (Cal), *Chhayunnissa v. Basirar Rahman*. (But Court should see that the decision is not in conflict with the intention of Legislature.)

4. ('25) 12 AIR 1925 Cal 456 (459) (DB), *Dina Nath v. Jadu Nath*.

'20) 7 AIR 1920 Mad 1 (13) (FB), *Muthukorakkal v. Madar Ammal*. (Per Seshagiri Aiyar J.)

[See ('35) 22 AIR 1935 Cal 333 (335) (DB), *Jateendra Chandra v. Reba'leemohan*.]

5. ('42) 29 AIR 1942 All 396 (398) (FB), *Radhey Lal v. Roop Ram*.

Preamble — Note 20

1. ('28) 15 AIR 1928 Bom 236 (238) (DB), *Shankar Appaji v. Ganga Ram*. (Application to ascertain mesne profits.)

[See ('02) 25 Mad 724 (725), *Alagappa v. Sarathamal*. (Application for insolvency after one month mentioned in S. 55, C. P. C. — Not barred by limitation.)]

2. ('16) 3 AIR 1916 Cal 231 (232, 233) (DB), *Beni Singh v. Berhamdeo Singh*. (Application under O. 34, R. 5 (2) must be made by party — Hence Article 181 applies.)

('30) 17 AIR 1930 Nag 206 (207), *Lakshmi Bai v. Tukaram*. (An application for appointment of a commissioner to make partition, the preliminary decree itself having made provision for the appointment — No limitation : ('81) 4 Mad 172, *Kylasa Goundan v. Ramasami*, Rel. on.)

('04) 28 Mad 127 (129) (DB), *Latchmanan v. Ramanathan*. (Do.)

('15) 2 AIR 1915 Oudh 140 (141, 142), *Ali Muhammad v. Alia Khanum*. (Court setting aside an erroneous order confirming a sale under S. 151, C. P. C. — No limitation.)

('06) 30 Bom 415 (420, 421) (DB), *Balaji v. Kushaba*. (Bombay Mamlatdar's Courts Act, 1876—Mamlatdar himself bound to order village officers to give effect to his order for possession without party's application.)

('12) 19 Ind Cas 496 (496) (Mad), *Hyder Sahib v. Giria Chettiar*. (Correction of obvious slips or mistakes in an award.)

('29) 16 AIR 1929 Pat 368 (368) (DB), *Kamakhyia Narayan v. Akloo Singh*. (Application for ascertainment of mesne profits.)

which the Court has no discretion to refuse,³ or which is only ministerial,⁴ or is only of a formal character.⁵

Preamble
Notes 20-21

The Act applies to suits or appeals or applications to Courts.⁶
See also Note 27 under section 3.

The Act bars a remedy only against a person *against whom a right exists* and not against whom no relief is claimed.⁷

As to whether the residuary article, Art. 181, applies to applications which are not under the Civil Procedure Code, see Note 2 to Art. 181.

21. Criminal proceedings and limitation. — The Indian Limitation Act has no application to criminal proceedings except to

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- (192) 19 Cal 132 (138, 139) (FB), *Puran Chand v. Roy Radha Kishen*.
[See (1926) 13 AIR 1926 Pat 141 (142, 143) (DB), *Bhatu Ram v. Fogal Ram*.
(Application for mesne profits.)
(1924) 11 AIR 1924 Pat 781 (782), *Harakhpan v. Jagdeo*. (Do.)]
[See also (1924) 11 AIR 1924 Cal 895 (897) (DB), *Chandra Kumar v. Sudhansu Badani Debi*. (Amendment under S. 152, C. P. C., can be made at any time.)
(1913) 21 Ind Cas 540 (541) (DB) (Sind), *Bikhomal Lal Chand v. Rajamal Manomal*.
(Do.)]
[See however (1928) 15 AIR 1928 Mad 522 (522) (DB), *Timma Raju v. Narasimharaju*. (Application under O. 20, R. 12, C. P. C., for ascertainment of mesne profits falls within Article 181.)]
See also Section 3 Note 26.
3. (187) 9 All 364 (365), *Darbo v. Kesho Rai*. (Application to bring decree into conformity with judgment.)
(1897) 1897 Pun Re No. 12, *Devi Das v. Gurdatta*. (Do.)
(1910) 6 Ind Cas 537 (540, 541) (DB) (Cal), *Madhabmoni v. Lambert*. (Application under O. 34, R. 3, C. P. C.)
(1908) 11 Oudh Cas 208 (211, 212), *Sital Prasad v. Abdur Rashed*. (Application to amend description of property in decree.)
[See (1913) 20 Ind Cas 685 (687) (Cal), *Prasanna Kumar v. Asutosh Roy*. (Application by assignee to be substituted in a pending suit—No limitation.)
(1916) 3 AIR 1916 Low Bur 10 (11) (DB), *Moolla Kasim v. Moolla Abdul Rahim*.]
4. (187) 10 Mad 51 (52) (DB), *Jwraji v. Pragji*. (Application to bring decree into conformity with judgment—No limitation.)
(1882) 6 Bom 586 (587) (DB), *Vithal v. Vithojirav*. (Application for sale certificate.)
(1884) 8 Bom 377 (380) (DB), *Devidas v. Pirjada Begum*. (Do.)
(1881) 4 Mad 172 (173) (DB), *Kylasa Gounden v. Ramaswami*. (Do.)
(1883) 1883 All W N 262 (262) (DB), *In re Kishen Singh*. (Do.)
5. (1881) 6 Cal 60 (63, 64), *Govind Chander v. Rungunmony*. (Such as application to transfer a case from one board to another or to transfer a case to the bottom of the board, change of attorney or change of case or to request the Court to deal with a pending suit in a particular way.)
6. (1948) 35 AIR 1948 Bom (C N 103) 387 (391), *Charles E. Ring v. Collector of Bombay*. (Rent Controller exercising powers conferred under Bombay Act 7 of 1944 is not a Court.)
(1902) 24 All 402 (404) (FB), *Udit Upadhia v. Imam Bandi Bibi*. (District Registrar not ordinarily a Court.)
[See (1913) 15 Ind Cas 652 (653) (FB) (Mad), *Krishnammal v. Krishna Ayyangar*. (Registration Officer is not a Court.)
(1912) 18 Ind Cas 896 (896) (All), *Emperor v. Udit Narain*. (Do.)]
7. (1927) 14 AIR 1927 Cal 794 (796) (DB), *Jadu Nath v. Amulya Krishna*. (Application to implead a party against whom no relief is claimed — No question of limitation.)
(1907) 6 Cal L Jour 558 (563) (DB), *Mohammad Ishaq v. Sheikh Akramul*. (Do.)

Preamble
Notes 21-26

the extent provided therein.¹ There is no limitation for preferring a complaint of a criminal offence unless the penal law creating the offence prescribes any period within which a complaint may be made in respect thereof.² See also the Authors' Commentary on Criminal Procedure Code (2nd Edn.), s. 4 (1) (h), Note 14. See also Note 20.

22. Damdupat and the Limitation Act. — The rule of damdupat is not affected by the Limitation Act¹ with the result that though the Limitation Act prescribes a period of twelve years for the recovery of money due on immovable property, the plaintiff will not be entitled to recover interest in contravention of the rule of damdupat.

23. Application of periods of limitation to facts. — It is not on the facts *alleged* in the plaint but on the facts *proved or admitted* that limitation has to be computed and any particular article of the Act applied.¹

24. Applicability of the Act to arbitrations. — See Note 27 to Section 3.

25. Applicability of the Act to special or local laws. — See Note 6 to Section 29.

25. "Rules for acquiring by possession the ownership of easements and other property." — See Notes to Sections 26 and 28.

Preamble — Note 21

1. See ('24) 11 AIR 1924 Lah 569 (569), *Abdul Qadir v. Mahomed Ibrahim*. (Application for sanction to prosecute — No limitation.)
- ('16) 3 AIR 1916 Mad 1110 (1113) (FB), *Bapu v. Bapu*. (There is no rule of law which subjects applications made under the special provisions of S. 195, Cr. P. C., to the periods of limitation contained in the Limitation Act.)
- ('93) 16 Mad 347 (349) (DB), *Queen-Empress v. Konda*. (Act XIII of 1859 — Complaint in respect of breach of contract — Complaint cannot be dismissed on the ground that the claim is barred by time.)
- ('71) 15 Suth W R Cr 25 (27) (DB), *Queen v. Ammeroddeen*.
2. ('25) 12 AIR 1925 Mad 186 (187), *Jagannadham Naidu v. Rama Rao*. (Madras District Municipalities Act, V of 1920, S. 180 — Offence under — Three months limitation is provided.)
- ('11) 10 Ind Cas 787 (789) (Low Bur), *Mahomed Jewa v. Wilson*. (Section 15 of the Merchandise Marks Act, IV of 1889.)
- ('99) 22 Mad 488 (490) (DB), *Ruppell v. Ponnusami Tevan*. (Do.)

Preamble — Note 22

1. ('85) 9 Bom 233 (235) (DB), *Hari v. Balambhat*. (('77) 3 Bom 312, *Ganpat v. Adarji Dadabhai*, followed.)

Preamble — Note 23

1. ('40) 27 AIR 1940 Oudh 134 (135) (DB), *Jai Mangal v. Bindeshuri Singh*.
- ('29) 16 AIR 1929 Nag 124 (125), *Ibrahim Khan v. Nagoji*.
- [See ('38) 25 AIR 1938 Nag 335 (339) (FB), *Asaram v. Ludheshwar*. (Per Stone, C. J. — In considering whether a particular remedy is barred one looks not at the relief given but at the cause of action, that is at the necessary allegations which have to be made and found before the relief sought can be given.)
- ('27) 14 AIR 1927 Nag 10 (12), *Secretary of State v. Bagmal Kishandayal*.]
- [See however ('37) 24 AIR 1937 Bom 244 (254) (DB), *Achut v. Shiraji Rao*. (Question of limitation is to be decided with reference to cause of action and to frame of suit when instituted and not with what is found at the end of trial.)]
- See also Section 3 Note 8.

PART I. PRELIMINARY.

Short title, extent and commencement. **1.* (1) This Act may be called the Indian Limitation Act, 1908.** **Section 1**

(2) It extends to ^a[the whole of India except the State of Jammu and Kashmir]; and

(3) This section and section 31 shall come into force at once. The rest of this Act shall come into force on the first day of January, 1909.

a. Originally sub-section (2) read as follows: "It extends to the whole of British India: and". For the words "the whole of British India" the words "all the Provinces of India" were *substituted* by A. C. A. O., 1948, which words were, later on, replaced by the words "the whole of India except Part B States" by A. O., 1950. Recently, for the words "except Part B States" the words "except the State of Jammu and Kashmir" were *substituted* by the Part B State (Laws) Act, 3 of 1951, S. 3 and Schedule. [1-4-1951].

PAKISTAN ADAPTATION. — In sub-section (1) the word 'Indian' is omitted by P. A. C. A. O.

1. "India". — For definition of "India," see definition in S. 2 (9 a). In the light of that definition the words "except the State of Jammu and Kashmir" are redundant. As to the territories comprised in India, see Art. 1 (3) of the Constitution of India.

2. "The rest of this Act shall come into force on the first day of January, 1909." — The object of postponing the opera-

* Act of 1877 : S. 1.

PART I.

PRELIMINARY.

Short title. 1. This Act may be called "The Indian Limitation Act, 1877":
It extends to the whole of British India; but nothing
Extent of Act. contained in section two and three or in Parts II and III applies:
(a) to suits under the Indian Divorce Act, or
(b) to suits under Madras Regulation VI of 1831;
Commencement. And it shall come into force on the first day of October, 1877.

Act of 1871 : S. 1.

PART I.

PRELIMINARY.

Short title. 1. This Act may be called "The Indian Limitation Act, 1871:"
It extends to the whole of British India; but nothing
Extent of Act. contained in sections two and three or in Parts II and III applies:
(a) to suits instituted before the first day of April, 1873;
(b) to suits under the Indian Divorce Act;
(c) to suits under Madras Regulation, VI of 1831;
Commencement. This Act shall come into force on the 1st day of July, 1871.

Act of 1859.

No provision corresponding to the present section.

Section 1
Note 2

tion of the Act is to enable persons to enforce their rights, if any before the new Act negating such rights comes into force.¹

Section 2

2.* In this Act, unless there is anything repugnant in Definitions. the subject or context, —

(1) "applicant" includes any person from or through whom an applicant derives his right to apply :

(2) "bill of exchange" includes a hundi and a cheque :

(3) "bond" includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be :

(4) "defendant" includes any person from or through whom a defendant derives his liability to be sued :

*Act of 1877 : Ss. 2 and 3.

References to Act IX of 1871. Saving of titles already acquired. Saving of Act IX of 1872, Section 25.

2. All references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue, barred under that Act, or under any enactment thereby repealed; and nothing herein contained shall be deemed to affect the Indian Contract Act, Section 25.

Interpretation clause.

3. In this Act, unless there be something repugnant in the subject or context, —

'plaintiff' includes also any person from or through whom a plaintiff derives his right to sue; 'applicant' includes also any person from or through whom an applicant derives his right to apply; and 'defendant' includes also any person from or through whom a defendant derives his liability to be sued :

'easement' includes also a right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon, the land of another :

'bill of exchange' includes also a hundi and a cheque :

'bond' includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be :

'promissory note' means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight :

'trustee' does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title :

'suit' does not include an appeal or an application :

'registered' means duly registered in British India under the law for the registration of documents in force at the time and place of executing the document, or signing the decree or order, referred to in the context :

'foreign country' means any country other than British India :

and nothing shall be deemed to be done in 'good faith' which is not done with due care and attention.

Section 1 — Note 2

1. ('16) 3 AIR 1916 Lah 146 (148), *Asa Ram v. Budhu Mal*. (Where operation of Act is postponed, that Act is retrospective.)

('22) 9 AIR 1922 Mad 417 (418, 419) (DB), *Ganapathi Mudaliar v. Krishnamachari*. (New law ought not to be applied so as to kill causes of action which were alive on date of its enactment.)

Section 2

(5) "easement" includes a right not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in, or attached to or subsisting upon, the land of another :

(6) "foreign country" means any country other than ^a[India, but includes also the State of Jammu and Kashmir] :

(7) "good faith" : nothing shall be deemed to be done in good faith which is not done with due care and attention :

(8) "plaintiff" includes any person from or through whom a plaintiff derives his right to sue :

(9) "promissory note" means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight :

^b[(9a) "India" means the territory of India excluding the State of Jammu and Kashmir] :

(10) "suit" does not include an appeal or an application : and

(11) "trustee" does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title.

a. For "British India" the words "India, but includes also any Acceding State" were *substituted* by A. C. A. O., 1948. Later on, for "Acceding State" the words "Part B State" were *substituted* by A. O., 1950. Recently, for the words "any Part B State" the words "the State of Jammu and Kashmir" were *substituted* by the Part B States (Laws) Act, 3 of 1951, S. 3 and Schedule. [1-4-1951.]

b. *Substituted* by the Part B States (Laws) Act, 3 of 1951, S. 3 and Schedule. [1-4-1951] for Clause (9A) *inserted* by A. O., 1950 which was as follows :

Act of 1871 : Ss. 2 and 3.

Repeal of enactments. 2. On and from that day the enactments mentioned in the first schedule hereto annexed shall be repealed to the extent specified in the third column of the same schedule.

Interpretation clause. 3. In this Act, unless there be something repugnant in the subject or context, —

'minor' means a person who has not completed his age of eighteen years ;

'plaintiff' includes also any person through whom a plaintiff claims ;

'nuisance' means anything done to the hurt or annoyance of another's immovable property and not amounting to a trespass ;

'bill of exchange' includes also a hundi ;

'trustee' does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title ;

'registered' means duly registered under the law for the registration of documents in force at the time and place of executing the documents referred to in the context ;

'foreign country' means any country other than British India ;

and nothing shall be deemed to be done in 'good faith' which is not done with due care and attention.

Act of 1859.

There was no interpretation clause in this Act.

Section 2

"(9A 'States' means all the territories for the time being comprised within Part A States and Part C States."

PAKISTAN ADAPTATION.—In clause (6) the words 'Pakistan, but includes any Acceding State' are *substituted* for the words 'British India' by (P) A. C. A. O., 1949.

Section 2
(General)

SECTION 2 (GENERAL)

1. **Definitions — General.** — This section is an interpretation clause. As a general rule of construction, words in an Act should receive their *ordinary and plain meaning* unless a contrary intention is apparent from the context. The object of a definition clause is, however, to declare that certain words used in the Act shall have the meaning given to them by the definition thereof.¹ The definition may include in the connotation of the word defined, certain things which the Legislature, under certain circumstances, intends to include, but which may not fall within the ordinary acceptation of the term.²

The meaning assigned to a word by the definition clause is the meaning of the word wherever it occurs in the Act,³ *unless there is anything repugnant in the subject or context.*⁴ Thus, the definition of the word "suit" does not include an *appeal*. But the word read with the context in S. 31, now repealed, clearly showed that it included for the purposes of that section an appeal. There was thus a repugnancy in the context and the definition did not apply in interpreting that section.⁵

The word "includes" used in the definition clause is not intended to be exhaustive of the things denoted by the word defined. It is a word of extension and generally used to *enlarge* the meaning of the word.⁶ By "including" certain things in the definition, others are thereby not excluded.⁷ Where a word is defined as "including" certain things, the Legislature cannot be intended to prevent the operation of the word in its ordinary or obvious sense under all circumstances.⁸

Section 2 (General) — Note 1

1. ('86) 12 Cal 430 (433) (DB), *Umacharan Bag v. Ajadannissa Bibee*.
(26) 13 AIR 1926 Sind 58 (61) (FB), *Walter John Brooks v. Nee Barwick*.
2. ('26) 13 AIR 1926 Sind 58 (61) (FB), *Walter John Brooks v. Nee Barwick*.
(11) 11 Ind Cas 610 (612) (DB) (Bom), *Emperor v. Braj H. DeSouza*.
3. ('86) 12 Cal 430 (433) (DB), *Umacharan v. Ajadannissa Bibee*.
[See however ('16) 3 AIR 1916 Pat 133 (134) (FB), *Manik Ram v. Emperor*.
(In this case, Atkinson, J., observed that as a general rule, the interpretation clause should be used for interpreting words which are ambiguous or equivocal and not so as to disturb the meaning of such as are plain.)]
4. ('16) 3 AIR 1916 Pat 133 (134) (FB), *Manik Ram v. Emperor*.
(09) 2 Ind Cas 632 (632) (DB) (All), *Brij Mohan v. Ram Sarup*.
5. ('09) 2 Ind Cas 632 (632) (DB) (All), *Brij Mohan v. Ram Sarup*.
6. ('06) 4 Cri L Jour 23 (31) (DB), *The Municipal Commissioner v. Mathorabai*.
[See also ('82) 8 Cal 534 (536) (DB), *Nasibuan v. Preoshanker*.]
7. ('98) 22 Bom 235 (237, 238) (DB), *Queen-Empress v. Magla Kala*. (Words "police-officer" and "Magistrate" in S. 26, Evidence Act, include police-officers and Magistrates of Native States as well as those of British India.)
(79) 4 Cal 483 (490, 493) (FB), *Empress v. Ashutosh Chukerbutty*. (Word "Court" in S. 30, Evidence Act, includes both Judge and Jury in a jury trial.)
8. See ('78) 2 All 74 (86) (DB), *Uda Begum v. Imam-ud-din*.

Where a definition exhaustive of the signification of the word is intended, the expression "means" or "means and includes" is used.⁹

Section 2
(General)

Where a word is not defined in this Act but is defined in the General Clauses Act, 1897, that definition should be applied unless there is anything repugnant in the subject or context, inasmuch as S. 3 of that Act provides that the definitions given therein shall apply "in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context."

But a definition given in another *statute* not *in pari materia*,¹⁰ or the incidents attached to the word by another statute,¹¹ cannot be made applicable except so far as provided by the statute itself.¹²

(1) "Applicant" includes any person from or through whom an applicant derives his right to apply.

Section 2 (1)
Applicant

"Applicant." — The word "applicant" includes not only the actual applicant but also the persons from whom he derives his right to apply. As to the meaning of the word "includes," see Note 1 to the section under the heading "Definitions—General." As to when one person is said to derive his right or liability from another, see Notes under the definitions of "defendant" and "plaintiff."

(2) "Bill of exchange" includes a hundi and a cheque.

Section 2 (2)
Bill of exchange

Scope of the definition. — A "bill of exchange" as defined by S. 5 of the Negotiable Instruments Act, 1881, is —

"an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument."

A "cheque" is defined by S. 6 of the said Act as —

"a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."

A "*hundi*" is an instrument which is generally written in an oriental language, and, by the local usage of the Indian commercial community, is negotiable. There are diverse forms of such instruments; sometimes they are so drawn that they come within the definition of "bill of exchange" given in the Negotiable Instruments Act; and at other times they are in the form of promissory notes as defined by the said Act. Where the *hundi* in any particular case falls within the definition of bill of exchange or promissory note as so defined, the Negotiable Instruments Act will of course apply. Where it does not so fall, it is not a "bill of exchange" within the meaning of the said Act

9. ('78) 2 Mad 5 (7) (DB), *Empress v. Ramanujiyya*.

('79) 4 Cal 483 (493) (FB), *Empress v. Ashutosh Chukerbutty*. (Where a definition is intended to be exclusive, the form of words is "means and includes"—Per Jackson J.)

10. ('08) 31 Mad 408 (412) (DB), *Mylapore Hindu Permanent Fund Limited v. Corporation of Madras*.

('32) 19 AIR 1932 Pat 281 (283), *Abdul Rauf v. Banarsi Lal*.

11. ('86) 12 Cal 430 (433) (DB), *Umacharan v. Ajadannissa*.

12. ('93) 15 All 141 (143), *Queen-Empress v. Ram Lal*.

Section 2 (2)
Bill of exchange

and the matter is governed by the general law of contract and local usage relating thereto which is saved expressly by S. 1 of the said Act.¹

This Act defines a "bill of exchange" as including a cheque and a *hundi* and is, consequently, wider in its scope than the definition of the expression as given in the Negotiable Instruments Act.

Section 2 (3)
Bond

(3) "Bond" includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be.

Synopsis

1. Bond.
2. Bonds and agreements to do specified acts.
3. Bond and promissory note.
4. Bond and acknowledgment of liability.

1. **Bond.** — The instrument mentioned in the definition is what is known in English law as a *conditional bond* and has been referred to in Art. 68 as a bond *subject to a condition*. The use of the word "includes" shows that the definition is not exhaustive and that the word *bond* is not limited in its meaning to a *conditional bond*.^{1a}

But the word has been used in this Act as meaning an instrument by which a person obliges himself to *pay money* to another.^{1b} Articles 66, 67, 68,¹ 74, 75 and 80, which are the only provisions in the Act relating to bonds, use the words "day specified for *payment*," "*payable* by instalments" and "when the note or bond becomes *payable*."

Under the Stamp Act, 1899, a bond includes an instrument whereby a person obliges himself to *deliver grain or other agricultural produce* to another. That definition must, however, be taken to be limited in its applicability to the interpretation of the Stamp Act and not of other Acts.² But in the undermentioned case,³ it was held by

Section 2 (2) — Note 1

1. ('19) 6 AIR 1919 Nag 39 (39, 40), *Radha Kisan v. Hiralal*.
(36) 23 AIR 1936 All 396 (399, 401), *Mangal Sen v. Ganeshi Lal*. ("Shahjog hundi" though not "a bill of exchange" is a negotiable instrument.)

Section 2 (3) — Note 1

- 1a. ('47) 1947 Mar L R 94 (Civ) (98) (DB), *Lachhmansingh v. Karansee*.
[See ('48) 35 AIR 1948 Oudh 258 (259), *Ram Dat Ram v. Lalta Prasad*. (Definition of bond in S. 2 (3), Lim. Act, is not exhaustive and is only meant for the purpose of that Act, and cannot be taken to apply generally to the term "bond".)]
- 1b ('47) 1947 Mar L R 94 (Civ) 98 (DB), *Lachhmansingh v. Karansee*.
1. The bond dealt with in this Article is the same as that mentioned in the definition which says that it is an obligation for *payment* of money.
(41) 28 AIR 1941 P C 6 (9) (PC), *General A. F. & L. Assurance Corpn. Ltd. v. Jan Mahomed*. (Administration bond is a bond within the definition and Art. 68.)
[See also ('82) 8 Cal 534 (536) (DB), *Nasibuan v. Preosunker Ghose*.]
2. See AIR Commentaries on the Civil Procedure Code (5th 1950 Edn.), Notes to the Preamble — "Interpretation of Statutes."
(48) 25 AIR 1948 Oudh 258 (259), *Ram Dat Ram v. Lalta Prasad*.
3. ('25) 12 AIR 1925 Lah 415 (416) (DB), *Wadhava Mal v. Karim Bux*.

Section 2 (3)
Bond

the High Court of Lahore that such an instrument is a bond even for purposes of the Limitation Act. Their Lordships observed as follows :

"The language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not expressly modify or repeal. Here we find that the Legislature in one of its enactments, that is, the Stamp Act, without giving any exhaustive definition of the term "bond" has directed that a certain type of instrument shall for the purpose of the levy of stamp duty be classed as a bond and, in the absence of any indication to the contrary, we must hold that the Legislature regards such an instrument as a bond within the meaning of another of its enactments, namely, that of limitation."

Their Lordships have not adverted in the above decision, to the fact that an intention to the contrary is clearly apparent from the use of the words "payment" and "payable" wherever the word "bond" has been used in the Act. It is submitted, therefore, that the decision cannot be accepted as correct.

2. Bonds and agreements to do specified acts. — A covenant to do a particular act, the breach of which must be compensated in damages, is not a *bond* at all.¹ The covenant to do the specified *act* is not an obligation to pay the *money*. Further, the remedy on a bond is different from the remedy in the case of the aforesaid covenant. In the former case the plaintiff can recover, where the bond is a simple one, the *sum named in the bond*, or where the bond is a conditional one, the *actual damage* which he can prove he has sustained. In the case of covenants the breach of which must be compensated in damages, the plaintiff can only recover *compensation*, whatever be the sum named as penalty for the breach, and he can recover such compensation *whether he proves actual damage or not*.

In *Gisborne and Co. v. Subal Bowri*,² Garth, C. J., observed as follows :

"The definition of a bond in S. 5 of the Act" (i. e. the Stamp Act, 1879, where the definition was exactly the same as is given in this Act) "is precisely what we understand by a bond in England, and it is an obligation of a different character from a covenant to do a particular act, the breach of which must be compensated in damages.

Whether a penal clause is attached to such a covenant or not, the remedy for the breach of it is in form and substance a suit for damages ; and by S. 74 of the Indian Contract Act, the English rule with regard to liquidated damages is abolished, and the plaintiff in such a suit has no right under any circumstances to claim the penalty itself as such. He can only recover such compensation, not exceeding the amount of the penalty, as the Judge at the trial considers reason-

Section 2 (3) — Note 2

1. ('81) 8 Cal 284 (284, 285, 286) (DB), *Gisborne & Co. v. Subal Bowri*. (Approving the view taken by Stuart, C. J., in 2 All 654 (662) (FB)—Case under Stamp Act.) ('71) 7 Beng L R 510 (511, 512), *Robert & Charriol v. Shiroore*. ('15) 2 AIR 1915 Lah 209 (210), *Sher Khan v. Gokal Chand*. ('27) 14 AIR 1927 Nag 72 (73, 74), *Collector of Nimar v. Lakhmichandsa*. (Case under Stamp Act.) ('80) 2 All 654 (660, 661, 662) (FB), *Reference by Board of Revenue, N. W. P.* (Per Stuart, C. J.—The contrary opinion of the majority of the Full Bench was dissented from by Straight, J., in ('84) 9 All 585 (589) (FB), *In re Gajraj Singh* and by Garth, C. J., in 8 Cal 284.)
2. ('81) 8 Cal 284 (286) (DB).

Section 2 (3) Bond

able ; but he is entitled to that compensation, whether he proves any actual damages or not.

The remedy upon a bond is very different. The plaintiff in the case of a simple money bond recovers the sum named in the bond, or in the case of a bond conditioned for the performance of covenants, he recovers the *actual damage* which he can prove that he has sustained."

3. Bond and promissory note.—The expression "promissory note" has been defined in clause 9. The essential element of a promissory note is that the maker *engages to pay* a sum of money to another. The undertaking to pay must appear on the face of the instrument. Otherwise, it is not a promissory note. Where a person simply obliges himself to pay a certain sum of money to another, the *legal effect* is no doubt as if he had undertaken to pay the sum. But it cannot be said on the words used that the obligor has *engaged* to pay the sum. Thus, while a promissory note may be a bond, a bond will not necessarily be a promissory note. In *Mahomed Akbar Khan v. Attar Singh*,¹ their Lordships of the Privy Council observed as follows :

"It is indeed doubtful whether a document can properly be styled a promissory note which does not contain an undertaking to pay, not merely an undertaking which has to be *inferred* from the words used. It is plain that the implied promise to pay arising from an acknowledgment of a debt will not suffice; for, the third illustration indicates that an I O U is not a promissory note, though of the implied promise to pay there can be no doubt. The second illustration, however, seems to show that the express words 'I promise' or 'I undertake' are unnecessary. The form of words is taken from an early English case, reported in Selwyn's N. P., 11th Edn., page 401, from Scacc. M. I. Geo. II MSS, where according to the learned author the Court stated that the words 'to be paid' in the document there sued on amounted to a promise to pay, observing that the same words in a lease would amount to a covenant to pay rent. It does not appear to form a useful general illustration except in the case of a document in that particular form of words."

4. Bond and acknowledgment of liability.—In a bond there is a *creation* of an obligation to pay. In the case of an acknowledgment of liability, on the other hand, there is no creation of any liability but merely a recognition of a *pre-existing* liability.

Section 2 (4) Defendant

(4) "Defendant" includes any person from or through whom a defendant derives his liability to be sued.

1. Scope of the definition.—Where A has a *right to sue* B, it follows that B has a liability to be sued by A. If B dies, his liability may survive against X. If B's interest in the subject matter in respect of which the right to sue exists, is assigned to, or devolves on Y, the liability to be sued comes to, or devolves on Y. X in the former case, and Y in the latter, derive their liability to be sued from or through B, and, for purposes of limitation, stand in the same position as B.

The question as to whether a liability to be sued survives to, or devolves on, another is a matter of substantive law. The same principles,

Section 2 (3) — Note 3

1. ('36) 23 AIR 1936 P C 171 (174) (PC).

however, as are applicable to the survival or devolution of a *right to sue*,¹ will also apply to the liability to be sued.

Illustrations.

1. X purchased the property in dispute at an auction sale in execution of a decree against B and took formal possession on the 14th August 1877, but B remained in actual adverse possession. In 1888 B sold the property to C. X instituted a suit against C on the 18th September 1889 for possession. The question was whether the suit was barred by limitation. Article 144 of the Limitation Act provides that the period of limitation for such a suit is twelve years from the date "when the possession of the defendant becomes adverse to the plaintiff." If the word "defendant" referred in the above case only to C, then the suit was in time; but if it included B, from or through whom C derived his liability to be sued, then the suit was clearly barred. It was held that in view of the definition, the word "defendant" included B also, that, therefore, time ran from the 14th August 1877 and that the suit was barred by limitation.²

2. The cause of action for suit on a mortgage arose on the 14th March 1903. The mortgagee X instituted a suit against the mortgagors A and B, members of a joint Hindu family, on the 5th February 1915. A previous suit had been filed by him in respect of the same cause of action in a wrong Court in the year 1904 and had been dismissed in the year 1914 on the ground of want of jurisdiction. In the year 1910, B's son C was born, but was added as a party to the subsequent suit only on the 30th May 1916. The question was whether the suit was barred as against C. Section 14 of the Limitation Act provides that in computing the period of limitation the time during which the plaintiff has been prosecuting another civil proceeding against the "defendant" shall, under certain circumstances, be excluded. It was held that by virtue of the definition, the word "defendant" included not only C but also A and B from or through whom C derived his liability to be sued, that, therefore, the period between 1904 and 1910 could be excluded in computing the period of limitation, and that the suit against C was not barred. Dawson-Miller, C. J., observed as follows: "That section (i. e. Section 2) seems to assume that every person who acquired an interest by devolution or otherwise in the subject matter of litigation previously vested in others, which renders him liable to be impleaded as a defendant, derives his liability to be sued from or through somebody. In the case of a new born son in a Mitakshara family, the person or persons through whom he derives this liability must be the other members of the family in whom the property which the son acquires by birth was previously vested."³

3. The junior widow of a deceased Hindu adopted, without the consent of the senior widow, one X on the 1st July 1866. The senior widow, however, remained in adverse possession of the properties, and on the 12th August 1869, adopted Y who assumed and got into possession of the properties. X instituted a suit against Y for possession on the 10th August 1881. It was held that by virtue of this definition, the word "defendant" included not only Y but also the senior widow from or through whom Y derived his liability to be sued, that, therefore, limitation began to run from the 1st July 1866 and that the suit was barred by limitation.⁴

4. The trustees of a temple assumed a right to appoint *archakas* for the temple and were so appointing them for a period of about sixty years, in derogation of the right of the hereditary *archakas*. Within twelve years from the date of appointment of the last *archaka*, the hereditary *archaka* instituted a suit against the appointed *archaka* for possession of the office. The limitation appli-

Section 2 (4) — Note 1

1. See Notes under "Plaintiff."

2. ('94) 18 Bom 37 (38, 40) (DB), *Namdeo v. Ramchandra*.

3. ('22) 9 AIR 1922 Pat 450 (456, 457, 458) (DB), *Hari Frasad v. Sourendra Mohun*.

4. ('89) 13 Bom 160 (164, 165) (DB), *Bada-jirav v. Ram Rav*.

Section 2 (4) Defendant

cable to the case was, under Art. 124, twelve years from the date "when the defendant took possession of the office adversely to the plaintiff." It was held that the word "defendant" in that Article included not only the actual defendant, but included the previous *archakas* appointed by the same trustees and that the suit was, therefore, barred by limitation.⁵

5. On the 7th December 1871, *R* sold certain immovable properties to the plaintiff but retained possession of the properties sold by him. On the 18th June 1872, these properties were sold in execution of a decree against *R* and were purchased by *A*. The plaintiff instituted a suit against *R* on the 7th December 1883 for recovery of the properties sold to him. On the 17th December 1884, *A* was joined as a co-defendant. It was held that *A* derived his liability to be sued from *R*, the judgment-debtor, that the word "defendant" in Art. 144 included not only *A* but also *R*, and that, therefore, limitation began to run from the date when *R*'s possession became adverse against the plaintiff and that the suit was barred by limitation.⁶

6. Certain land belonging to *A* became submerged and after reformation, was taken charge of by the Government adversely to *A*. Subsequently, *B* applied to the Government claiming the land as his own and the Government, finding that they could not resist his claim to the land, recognized and admitted to the adverse claim of *B* and withdrew from the occupation of the land and *B* began to be in possession. Within twelve years from this latter date but beyond twelve years from the date when the Government assumed possession, *A* instituted a suit against *B* for possession on the ground that the land was his. It was held by the Privy Council that *B* did not derive his liability to be sued from the Government, inasmuch as he had advanced a claim of his own adversely to the Government, which was rested on prior title and possession, and the Government had merely recognized that right, and that the suit was not barred by limitation.⁷

See also the undermentioned cases.⁸

Section 2 (5) Easement

(5) "Easement" includes a right not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in, or attached to or subsisting upon, the land of another.

Synopsis

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| 1. Easement. | 8. Right of easement can be vested only in determinate individual. |
| 2. Easements and natural rights. | 9. Only certain rights are recognised as easements. |
| 3. Easements and licenses. | 9a. Extent of easement. |
| 4. There must be a dominant and servient tenement. | 10. Easement, if an interest in immovable property. |
| 5. Easement must be for the beneficial enjoyment of the dominant tenement. | 11. Classification of easements. |
| 6. Easement is only a fractional right of user. | 12. "Growing in, or attached to or subsisting upon, the land of another." |
| 7. Easement is a specific right. | |

5. ('19) 6 AIR 1919 Mad 292 (292, 293) (DB), *Krishnaswami v. Veeraswami*.
See also Article 124 Note 7.

6. ('92) 16 Bom 197 (199) (DB), *Ali Saheb v. Kaji Ahmad*.

7. ('17) 4 AIR 1917 P O 18 (19, 20, 22) (PC), *Basanta Kumar v. Secretary of State*.

See also Arts. 142 and 144 Note 92.

8. ('45) 32 AIR 1945 Mad 315 (316), *Akkamdi v. Rethinagiri*. (Mortgage by *A* in favour of *B*—*A* selling mortgaged property to *C* and leaving British India—Alienee continuing in British India—Suit by mortgagee against alienee and

TOPIC INDICATOR.

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|---|---|
| 'Easement' used in wider sense than in Easements Act. See Note 1. | Rights which can be acquired as easements. See Note 9. |
| Fishery right. See Notes 6, 9 and 12. | Rights which cannot be acquired as easements. See Note 9. |
| Pasturage right. See Notes 9 and 12. | Right to bury dead. See Note 9. |
| Projection of building over neighbour's land. See Note 9. | Right to hunt. See Note 12. |
| Right of privacy. See Note 9. | Right to take minerals. See Note 6. |
| Right of way. See Note 9a. | |

Section 2 (5)
Easement

1. **Easement.** — A right of ownership of property (*jus in re propria*) is a right to the entirety of the lawful uses of such property.¹ The extent of such uses is only limited by the maxim *sic utere tuo ut alienum non lædas* — use your own property in such a manner as not to injure that of another.² If now, from the general and indefinite rights of user which a owner has in the property, a specific right is separated and subtracted and is vested in another person, such person has a *jus in re aliena* or a right in or over the property of another.

A *servitude* under the Roman law was a particular form of *jus in re aliena* and consisted "in a right to the limited use of a piece of land without the possession of it; for example, a right of way over it, a right to the passage of light across it to the window of a house on the adjoining land, a right to depasture cattle upon it or a right to derive support from it for the foundations of an adjoining building."³ Such servitudes were classed into private and public servitudes, a private servitude being one vested in a *determinate individual*, a public servitude being one vested in the public in general or in some class of *indeterminate* individuals. They were also divided into *prædial* and *personal* servitudes, a *prædial* servitude being a right subtracted from the rights of ownership of one property called the *prædium serviens* or servient tenement, and annexed to the ownership of another property called the *prædium dominans* or dominant tenement for the enjoyment of that property, and a *personal* servitude being such subtracted right vested in an individual other than the owner *irrespective* of the ownership of any property.⁴

An *easement*, as used in the English law, may be said to be a private *prædial servitude*⁵ and was defined in an ancient work as "a privilege that one neighbour hath of another by writing or prescription, without profit, as a way or sink through his land or such like."⁶ In

mortgagor on latter's return to British India — Mortgagee held entitled under S. 13 read with S. 2 (4), to deduction of time during which mortgagor (through whom alienee derived his liability to be sued) was absent from British India, both against mortgagor and alienee.)

(22) 9 AIR 1922 Cal 499 (499, 500), *Ramhari v. Rohini*. (Suit to recover money received by defendant's father as pleader for plaintiffs—*Held*, suit was governed by Art. 62 by virtue of definition of "defendant" in S. 2 (4).)

Section 2 (5) — Note 1

1. Salmond on Jurisprudence, 8th Edition, page 280.
2. Peacock on Easements, 3rd Edition, page 257.
3. Salmond on Jurisprudence, 8th Edition, page 458.
4. Salmond on Jurisprudence, 8th Edition, page 459.
5. Salmond on Jurisprudence, 8th Edition, page 460 foot-note.
6. *Termes de la Ley*, page 284.

Section 2 (5)
Easement

more recent times, it has been defined as a right which the *owner or occupier of certain land* possesses as such for the beneficial enjoyment of that land, to utilise certain land belonging to another in a particular manner *not involving the taking of the natural produce of that land or of any part of its soil*, or a right to prevent the owner of land from utilising his land in a particular manner.⁷

It will be seen from the above definition that an easement as defined in English law will not include the following rights :

1. Servitudes *in gross*, i. e., rights exercisable by an individual on another's land, but irrespective of the ownership or occupation by that individual of any land.
2. Praedial servitudes where the right consists of *taking something* from the servient tenement. Such a right is known as a profit *a prendre*.

The Indian Easements Act, 1882, has practically adopted the English definition of easements but with the addition that a profit *a prendre* will also be an easement provided it is appurtenant or annexed to a dominant tenement, or in the words of the Indian Easements Act, it is a right exercised *for the beneficial enjoyment of the dominant heritage*.

The word "easement" in this Act is used in a wider sense than that which it has under the English law or under the Easements Act. For, under this clause, it includes not only a profit *a prendre appurtenant*, but also a profit *a prendre in gross*, i. e., a profit *a prendre* unconnected with the ownership or occupation of any property by the person claiming the right.⁸ The Act does not, however, *define* what an easement is except by merely including a profit *a prendre*. In the absence of such definition, Courts have adopted the meaning given to it under the English law as extended by the definition in this clause.⁹ Thus, an easement for the purposes of this Act will include—

- (1) all the easements recognised by English law, and also
- (2) profits *a prendre* whether appurtenant or *in gross*.

2. Easements and natural rights. — An easement must be distinguished from natural rights. The latter, as their name imports, are those incidents and advantages which are provided by nature for the use and enjoyment of a person's property. They are *part* of the

7. Halsbury's Laws of England, 1910 Edition, Vol. 11, pages 235, 236.

8. ('50) 37 AIR 1950 Pat 202 (Pr 2), *Darbarikumar v. Khatir Mian*. (Right to take earth from land belonging to another — Right is *profit a prendre in gross* — It falls within the extended definition of "easement" in the Lim. Act.)

('80) 5 Cal 945 (947) (DB), *Chundy Churn v. Shub Chunder*

[See also ('96) 23 Cal 55 (59) (DB), *Dukhi Mulla v. Halway*. (Term 'easement' includes profits *a prendre*.)]

[See however ('28) 25 AIR 1938 Nag 497 (499) (DB), *Narmadaprashad v. Narayansingh*. ("Easement" does not include profits *a prendre in gross* — Obiter.)]

9. ('17) 4 AIR 1917 Cal 681 (686) (DB), *Sital Chandra v. Allen*.

('27) 14 AIR 1927 Lah 492 (493), *Karam Ilahi v. Ghulam Mustafa*.

rights of ownership. The illustrations to S. 7 of the Easements Act, 1882, furnish instances of such natural rights, and may be usefully referred to here—

- (a) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.
- (b) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.
- (c) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.
- (d) The right of every owner of land to so much light and air as pass vertically thereto.
- (e) The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.
- (f) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.
- (g) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.¹
- (h) The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond, into or out of which, a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.
- (i) The right of every owner of upper land that water naturally rising in, or falling, on such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.²

Section 2 (5) — Note 2

1. ('11) 12 Ind Cas 27 (27) (Low Bur), *Mi Hla Thanda v. Maung Shwe*. (Where A has the right to discharge surplus rainfall from his land on to B's land, no length of time will give B the right to compel A to send water on to him, provided A does not interfere with the water flowing in a natural and defined channel.)
2. ('82) 8 Cal 468 (469) (DB), *Imam Ali v. Poresh Mandal*. (Lower land-owner must allow water falling naturally on upper land and running naturally on to lower land.)
- ('86) 12 Cal 323 (326) (DB), *Abdul Hakim v. Gonesh Dutt*. (The right of the owner of a high land to drain of its surplus surface water through the adjacent lower grounds is incident to the ownership of land in this country.)

Section 2 (5) Easement

- (j) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land and for the purposes of any manufactory situate thereon: provided that he does not thereby cause material injury to other like owners.³

As has been seen in Note 1, an easement is a specific right *subtracted* from the general rights constituting ownership of one property and attached to the ownership of another property. In the language of the Easements Act, 1882, an easement is a *restriction* of a natural right.⁴ The right of easement and a natural right are, thus, mutually exclusive.⁵

3. Easements and licenses. — An easement differs from a license in that the former is a right *attached to land* while the latter is a *personal* right. An easement, again, may be acquired independently of any grant by the owner as, for example, by prescription, but a license must be *granted* by the owner. Section 52 of the Easements Act defining a license may usefully be referred to in this connexion. It runs as follows :

“Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.”

4. There must be a dominant and servient tenement. — It follows from the discussion in Note 1 that it is the essence of an easement (other than profits *a prendre in gross*) that it should *firstly* be *appurtenant* to immovable property and *secondly* be associated with *two tenements*, one to which the right is appurtenant called the *dominant tenement*, and the other upon which the burden is imposed, called the *servient tenement*.¹ Further, the notion of a right to be enjoyed on the one side and an obligation to be borne on the other involves the consequence that the dominant and the servient tenements

3. ('88) 1888 Pun Re No. 49, *Ahmad Ali v. Malak Hashu*.

4. See the following cases :

('95) 1895 Pun Re No. 35, *Kirpal Singh v. Lal Khan*. (One riparian owner exclusively using all the water of a river has a right of easement and can prevent other riparian owners higher up, from using the water.)

('18) 5 AIR 1918 Lah 178 (179), *Abdul Rahman v. Muhammad Alam*.

('23) 10 AIR 1923 Lah 594 (594) (DB), *Bali Ram v. Bela Singh*.

('77) 1 Mad 335 (340) (DB), *Subramaniya v. Ramchandra*.

[See also ('92-96) 2 U B R 642 (644), *Ma Hnin Nyo v. Maung Kyin Thu*.]

5. ('20) 7 AIR 1920 Pat 195 (196), *Mohendra v. Nabin Chandra*. (They are two distinct rights.)

Section 2 (5) — Note 4

1. (1865) 34 L J Ex 52 (56), *Mounsey v. Ismay*.

('26) 13 AIR 1926 Mad 625 (626) (DB), *Pakkir Mahamud v. Fichai Thevan*.

('34) 21 AIR 1934 Pesh 96 (98) (DB), *Galun Shah v. Nawab Ali*. (Concession granted to residents of one village personally to enjoy shamilat of another village is not a right of easement but a license.)

Section 2 (5)
Easement

should belong to *different* persons; for, the same person cannot have both the right and the corresponding obligation separately existing in himself. The maxim is that "none can have land and also easement over it."²

A right *in gross*, *i. e.* unconnected with any dominant tenement, is, therefore, not an easement. Thus, a right of way³ or a right of ferry,⁴ independent of its being necessary for the beneficial enjoyment of any dominant tenement is not an easement. Similarly, the right of the public to use a way,⁵ or of the inhabitants of a village to do something on the land of a person, or of the Muhammadans of a village to bury their dead in a particular place,⁶ cannot be acquired as an easement, though the first of the rights may be acquired by dedication⁷ to the public and the other rights by custom.⁸

As has been seen in Note 1, this Act recognizes one right *in gross* as an easement and that is what in English law is known as a *profit a prendre*. See Note 12.

5. Easement must be for the beneficial enjoyment of the dominant tenement. — An easement, other than a *profit a prendre*, can only be for the beneficial enjoyment of the *dominant* tenement. The consequence of this is that the servient owner cannot acquire any right to compel the dominant owner to continue to enjoy the easement.¹ Thus, a servient owner cannot compel the dominant owner to continue to exercise his easement to let the water falling on his land

2. ('30) 17 AIR 1930 Sind 34 (35) (DB), *Girdharidas v. Thirtha Das*. (Easement implies tenements belonging to different persons — No different owners, no easement.)

3. ('89) 2 C P L R 34 (34, 35), *Hira v. Khushalgir*.

4. ('11) 9 Ind Cas 846 (847) (Cal), *Abdul Khoyrat v. Hem Chandra*.

5. ('30) 17 AIR 1930 Cal 286 (287), *Pran Nath v. Emperor*. (Following ('88) 15 Cal 460 (FB), *Chuni Lall v. Ram Kishen*.)

6. ('21) 8 AIR 1921 Cal 569 (570) (DB), *Gopal Krishna v. Abdul Samad*. (NOTE. — Such a right is not an easement also because it cannot be for the *beneficial enjoyment* of any land (See Note 4) and further because it is a right unknown to law. See Note 9.)

('99) 23 Bom 666 (668) (DB), *Mohidin v. Shivlingappa*.

('24) 11 AIR 1924 Rang 61 (62) (DB), *Maung Shwe Kye v. Maung Po Tha*. (23 Bom 666 followed.)

7. ('30) 17 AIR 1930 Cal 286 (287), *Pran Nath v. Emperor*.

8. ('21) 8 AIR 1921 Cal 569 (570, 571) (DB), *Gopal Krishna v. Abdul Samad*.

[See also ('39) 26 AIR 1939 Nag 193 (195) (DB), *Ganpatrao v. Badar Farid* (Immemorial user is not necessary to prove custom — Long user may give rise to presumption of grant.)]

Section 2 (5) — Note 5

1. ('14) 1 AIR 1914 Cal 502 (503) (DB), *Bimal Chandra v. Chandra Kanta*. (Following *Mason v. Shrewsbury and Hereford Railway Co.*, (1871) L R 6 Q B 578.)

('22) 65 Ind Cas 84 (89, 90) (Pat), *Fudu Sahu v. Sarban*. (A I R 1919 Cal 1062, followed.)

('13) 20 Ind Cas 315 (315, 316) (DB) (Cal), *Altafuddin v. Aso Khadem*. ((1871) L R 6 Q B 578 relied on.)

('19) 6 AIR 1919 Cal 1062 (1062) (DB), *Ballave Mandal v. Bepin Behari*.

Section 2 (5) Easement

flow on the servient tenement.² In *Mason v. The Shrewsbury and Hereford Railway Company*,³ Cockburn, C. J., observed as follows :

"Now it is of the essence of such an easement that it exists for the benefit of the dominant tenement alone. Being in its very nature a right created for the benefit of the dominant owner, its exercise by him cannot operate to create a new right for the benefit of the servient owner. Like any other right, its exercise may be discontinued, if it becomes onerous, or ceases to be beneficial, to the party entitled. In like manner, where the easement consists in the right to discharge water over the land of another, though the water may be advantageous to the servient tenement, the owner of the latter cannot acquire a right to have it discharged on to his land, if the dominant owner chooses to send the water elsewhere, or to apply it to another purpose."

The words "beneficial enjoyment" denote that an easement is a right which is enjoyed for the *advantage* of the dominant tenement. A projection of the building of A, such as a cornice, over the land of B, merely for the purpose of *ornamentation* was, on this ground, held not to be for the advantage of the dominant tenement and not to be an easement.⁴

A right to bury the dead in the land of another has been held not to be for the *beneficial enjoyment* of any land, and not to be, therefore, an easement.⁵

6. Easement is only a fractional right of user. — Since an easement is a right subtracted from the general rights of user vested in the owner, it is a fraction of the rights of user constituting ownership, and does not exclude the owner himself from using his property. A right which would prevent the servient owner from making ordinary use of his property and which would oust him from the property cannot, therefore, be acquired as an easement.¹ A right which would *destroy* the ordinary user² of property by the owner cannot be acquired by easement. Thus, a right to the promiscuous use of the whole

2. (1870) 13 Suth W R 414 (414) (DB), *Bunsse Sahoo v. Kalee Pershad*. (Water falling on A's land and collected in reservoir used to flow on B's land — B cannot get a right to compel A to send the water.)

('78) 2 Cal L R 141 (142) (DB), *Khoorshed v. Teknarain*. (Provided that dominant owner does not interfere with any portion of the water which flows from his land to that of the servient owner in a natural and defined channel.)

('23) 10 AIR 1923 Pat 65 (68) (DB), *Sarban v. Phudo Sahu*.

('01) 14 C P L R 145 (148, 150), *Chakradhar v. Tika, am.* (Following *Mason v. Shrewsbury and Hereford Railway Co.*, (1871) L R 6 Q B 578 — Unless the existence of some grant or arrangement is either proved or from the circumstances of the case may reasonably be presumed.)

3. (1871) L R 6 Q B 578 (587).

4. ('03) 30 Cal 503 (504, 505) (DB), *Nritta Kumari v. Puddomoni*. (NOTE. — Assuming that such projection is for the advantage of the dominant tenement, there is a conflict of opinion as to whether the right is an *occupation of space* or an easement: See Note 9.)

5. ('21) 8 AIR 1921 Cal 560 (570) (DB), *Gopal Krishna v. Abdul Samad*. (Such a right is not an easement on other grounds also: See Note 9.)

Section 2 (5) — Note 6

1. ('35) 22 AIR 1935 Rang 56 (57), *Daw Tint v. Maung Kywe*.

2. (1852) 1 Macq 305, *Dyce v. Lady James Hay*.

Section 2 (5)
Easement

property, as for example, by driving cattle over it in all directions,³ or a claim to throw burnt earth in a tank belonging to the servient owner, the result of which is to increase the burden each time until the tank as a tank would be destroyed by the bed being raised,⁴ cannot be acquired as an easement. Similarly, a right to a profit *a prendre* over the soil of another, such as a right to fish without stint and for commercial purposes, which might lead to the destruction of the subject-matter, cannot be acquired as an easement.⁵ A right to take *all* the minerals under a man's land is similarly not an easement but a right in the soil itself.⁶ A right to take *all* the water flowing in a natural stream to the exclusion of the lower riparian owners would seem not to be an easement.⁷

7. Easement is a specific right. — Since an easement is a right subtracted from the general rights of user constituting ownership, it must be a *definite* and limited right.¹ Thus, there cannot be an easement to walk on the servient tenement in whatever manner the dominant owner pleases. He can only have a way from a particular point to another particular point in the servient tenement.² Similarly, there can be no easement in surface water not flowing in any defined channel.³

8. Right of easement can be vested only in determinate individual. — As seen in Note 1, an easement is a private servitude

3. ('71) 15 Suth W R 295 (296) (DB), *Joy Doorgo Dossia v. Juggernath Roy*. ('21) 8 AIR 1921 All 206 (207) (DB), *Lal Bahadur v. Rameshwar Dayal*. (15 W R 295 followed.)

4. (1873) 20 Suth W R 237 (237), *Sreedhur Dey v. Adoyto Kurmoker*. (There can be no prescriptive right to injure another, even though such injury has the warrant of very ancient user.)

5. ('33) 20 AIR 1933 Cal 539 (541) (DB), *Brajendra Kishore v. Iswar Kaibarta*.

6. (1843) 12 L J Ex 227 (229), *Wilkinson v. Proud*.

7. (1906) 1906 App Cas 72 (83), *John White & Sons v. J. & M. White*.

[But see ('26) 13 AIR 1926 Pat 187 (188) (DB), *Jugal Sarkar v. Raj Mangal*.]

Section 2 (5) — Note 7

1. Austin Lectures on Jurisprudence, abridged by Robert Campbell, 1899 Edition, pages 390 and 391.

2. ('25) 12 AIR 1925 Nag 168 (171), *Wasudeo v. Shankar*.

(1865) 4 Suth W R 49 (50) (DB), *Goluck Chunder v. Tarinee Churn*. (A right of way is a right of passing in a particular line, and not the right to vary it at pleasure.)

3. ('29) 16 AIR 1929 Rang 300 (302) (DB), *Maung Pwe v. Maung Chan Nyein*.

('23) 10 AIR 1923 Pat 65 (68) (DB), *Sarban v. Phudo Sahu*.

('27) 14 AIR 1927 Mad 144 (147), *Raghavalu Naidu v. Secretary of State*. (No prescriptive right to throw back surface water not flowing in any defined course, on the land of another and to keep it standing there.)

('14) 1 AIR 1914 Mad 507 (508) (DB), *Adinarayana v. Ramudu*.

('88) 11 Mad 16 (22) (DB), *Perumal v. Ramasami Chetti*.

[See ('13) 18 Ind Cas 824 (825) (FB), *Munshi Misser v. Bhimrajmam*. (But the fact that the water flows over the surface of the servient tenement without a defined channel for its carriage cannot prevent the acquisition of an easement by the dominant owner to send the water from his land on to the servient tenement. ('04) 8 Cal W N 244, *Bidhoo Bhusan v. Beny Madhub* overruled.)]

Section 2 (5) Easement

vested in a *determinate* individual. It follows, therefore, that there can be no *easement* in favour of a fluctuating and indeterminate body of individuals,¹ though a right in the nature of an easement may be acquired by a fluctuating body by *custom*,² or by long user from which a legal origin for such right may be presumed.³

9. Only certain rights are recognized as easements. — Theoretically there can be no limit to the varieties of rights of user that may be separated from the rights constituting ownership and be created as easements. But the law does not recognize every such right as an easement. The number of easements that can be acquired is limited to certain well-known and well-defined rights, and the law does not permit obligations of a novel and fanciful character to be created as easements. This limitation seems to be based on grounds of expediency. The leading case on the subject is *Keppell v. Bailey*,¹ where Brougham, L. C., observed as follows:

"But it must not therefore be supposed that incidents of a novel kind can be devised and attached to the property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief and is a reasonable liberty to bestow; but great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands however remote."

On this principle it has been held that no easement can be acquired in the following cases :

Section 2 (5)—Note 8

1. ('49) 53 C W N 346 (347), *Kunja Behari v. Nitya Nanda*. (Prescriptive right of fluctuating body of persons is not allowable in law.)
('39) 26 AIR 1939 Lah 191 (192), *Walaiti Ram v. Nathi Ram*. (On appeal from ('39) AIR 1939 Lah 12, *Walaiti Ram v. Nathu Ram*. The right of the residents of a mohalla to take water from a certain well cannot be acquired as an easement under S. 26.)
('83) 9 Cal 698 (703) (DB), *Luchmeput Singh v. Sadaullah Nushyo*.
('26) 13 AIR 1926 Mad 625 (627) (DB), *Pakkir Muhammad v. Pichai Thevan*. (Following 9 Cal 698 and distinguishing *Secy. of State v. Mathurabhai*, 14 Bom 213.)
('17) 4 AIR 1917 Pat 640 (643) (DB), *Maharajah Bahadur Singh v. Gandaursi Singh*. (Indeterminate and fluctuating body is not "a person" and cannot prescribe.)
[See ('22) 9 AIR 1922 Upp Bur 23 (24), *Maung Po Hla v. Maung Po Sein*. (Person does not include indeterminate body.)]
2. ('49) 53 Cal W N 346 (347), *Kunja Behari v. Nitya Nanda*. (An indeterminate body of persons like the villagers of a village can claim a right to catch fish in a tank belonging to another person only on the basis of a custom : 15 Cal 460 (FB), *Chunni Lall v. Ramkisan*, followed.)
('26) 13 AIR 1926 Mad 625 (627) (DB), *Pakkir Muhammad v. Pichai Thevan*.
('17) 4 AIR 1917 Pat 640 (646) (DB), *Maharajah Bahadur Singh v. Gandaursi Singh*.
3. ('04) 31 Cal 503 (509) (PC), *Bhola Nath Nandi v. Midnapore Zamindari Co*.

Section 2 (1)—Note 9

1. (1834) 39 R R 264 (277).

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1. Right to build latrines on another man's land and to use it as such.²
2. Right to rear fish in another man's tank.³
3. Right to go on another man's land for gathering fruits that fall there.⁴
4. Right to hold a musical festival on a particular plot of land.⁵
5. Right to throw back water and keep it standing on another's land, where the water is surface water not flowing in a defined channel.⁶

The following are all recognized as rights which can be acquired as easements :

1. Right to light and air, right to user of a way or watercourse, right to use water and right of support.⁷
2. Right to exercise a noxious or injurious or offensive occupation.⁸
3. Right of pasturage.⁹
4. Right to carry on private ferry.¹⁰
5. Right to keep a bund at a particular height.¹¹
6. Right to stack manure on a certain plot of waste land.¹²

2. ('16) 3 AIR 1916 Cal 787 (787) (DB), *Hara Lal v. Lokenatha*.

3. ('24) 11 AIR 1924 Cal 667 (668) (DB), *Chand Mia v. Tukamia*. (Novel right and a vague one.)

4. ('22) 9 AIR 1922 Mad 398 (398) (DB), *Sarangapani v. Sadagopa*.

('93) 17 Bom 745 (747) (DB), *Naik Parsotam v. Gandrap Fatelal Gokuldas*. (The right to go on the land of the plaintiff to pick the fruit off the branches is perfectly distinct from the prescriptive right to have those branches overhanging the land, and cannot be said to be accessory to the latter right.)

5. ('09) 1 Ind Cas 108 (109) (DB), *Gopinath Jew v. Radhakanta*. (It may be considered a customary right, but not a right of easement.)

6. ('27) 14 AIR 1927 Mad 144 (147), *Raghavalu v. Secretary of State*.

7. ('29) 16 AIR 1929 All 885 (886) (DB), *Bhagwan Das v. Iqbal Sultan Banu*. (Case of right of easement of support.)

8. ('15) 2 AIR 1915 Bom 284 (285), *Bai Bhicaji v. Perojshaw Jiwanji*.

('98) 22 Bom 831 (832) (DB), *Kashinath Dada v. Narayan Bapu*. (Right to discharge smoke over defendant's land.)

9. ('90) 14 Bom 213 (221) (DB), *Secretary of State v. Mathurabhai*.

[See ('04) 31 Cal 503 (509, 510) (PC), *Bhola Nath v. Midnapore Zamindari Co.*]

10. ('92) 19 Cal 253 (262) (PC), *Luchmeswar Singh v. Manowar Hossein*.

('81) 6 Cal 608 (610, 612, 613, 618) (DB), *Permeshari Proshad v. Mahomed Syud* (Such a right is more akin to an easement than to immovable property.) [But see ('91) 18 Cal 652 (663) (DB), *Nithyhari Roy v. Dunne*. (6 Cal 608 not approved, but the opinion was held not necessary for the decision.)

('22) 9 AIR 1922 Bom 245 (245) (DB), *Shama Durgaji v. Gangadhar Narayan*. (Right of ferry can only be acquired by grant express or, implied and not by prescription.)]

11. ('71) 15 Suth W R 216 (216) (DB), *Shunker v. Gurbhao*. (Claim to repair a bund for purpose of securing water for irrigating land.)

('71) 15 Suth W R 516 (516) (DB), *Heeranund v. Khubeeroonissa*. (Right to erect a bund in a natural stream so as to cut off the water from another party.)

12. ('27) 14 AIR 1927 All 115 (115), *Dhaneshwar v. Antu*.

Section 2 (5) Easement

7. Right to use land for sorting, for thrashing floor and for using it as courtyard.¹³

8. Right of fishery as a profit *a prendre*.^{13a}

See also the undermentioned cases.¹⁴

Right of privacy :

A right of privacy is not one which can under law be acquired as an easement. Such a right can however be acquired by *custom*, and such custom is recognized in some parts of India,¹⁵ but not in

13. ('30) 17 AIR 1930 All 410 (412), *Ram Phal Singh v. Bachchu Ram*. (('90) 14 Bom 213, *Secy. of State v. Mathurabhai* and ('80) 5 Cal 945, *Chundee Churn v. Shib Chunder*, referred.)

13a. ('80) 5 Cal 945 (947) (DB), *Chundee Churn v. Shib Chunder*.

('11) 12 Ind Cas 305 (306) (Cal) (D B), *Lokenath v. Jahania Bibi*. (5 Cal 945 followed.)

('32) 19 AIR 1932 Cal 300 (302), *Krishna Nandi v. Lokenath*.

('23) 10 AIR 1923 Pat 58 (61, 62) (DB), *Henry Hill & Co. v. Sheoraj Rai*.

14. ('03) 30 Cal 1077 (1082) (D B), *Budh Mandal v. Malial Mandal*. (An easement may exist and may be established in the nature of a right to have water passed from a river through a servient tenement for irrigation purposes of the dominant tenement by means of bund created in the dominant tenement.)

('22) 9 A I R 1922 Bom 79 (79) (D B), *Yusuf David v. Moses Solomon*. (Right of passage by sweeper for plaintiff's privy can be acquired by twenty years' user.)

('26) 13 A I R 1926 Bom 282 (283) (D B), *Ramchandra v. Anant*. (Passage for sweeper can be acquired by prescription though sweeper is municipal servant — But see contra ('39) 26 AIR 1939 Rang 34, *Murugappa v. Chettiar Firm*.)

('22) 9 A I R 1922 Bom 378 (379) (D B), *Baswantappa v. Bhimappa*. (Right to receive water falling on higher land can be acquired by prescription.)

('97) 1897 Pun Re No. 14, *Ilahi Bakhsh v. Din Muhammad*. (Right to dry tobacco on certain adjacent land.)

('99) 23 Bom 397 (402) (DB), *Sundarabai v. Jayawanti*. (Right of growing rice-plants in another's land to be afterwards transplanted to his own is an easement of the nature of profits *a prendre*.)

15. ('35) 22 AIR 1935 All 754 (755), *Tika Ram v. Ram Lal*. (Almora.)

('21) 8 AIR 1921 Sind 155 (158) (DB), *Shah Muhammad v. Ramzan*.

('29) 16 AIR 1929 All 809 (810), *Karimun-nissa v. Mira Bakhsh*.

('01) 5 Cal W N 147 (149) (DB), *Sri Narain v. Jadoo Nath*. (Right of privacy can arise only by express local usage, by grant or by special permission.)

('93) 16 All 69 (71, 72) (DB), *Abdul Rahman v. D. Emile*. (The customary right of privacy is a right which attaches to property and is not dependent on the religion of the owner thereof : 10 All 358 relied on.)

('06) 29 All 64 (65), *Kundun v. Bidhi*. (Not only the owner, but the lessee or other person in lawful possession of a house may maintain an action if his right of privacy is interfered with : 10 All 358 referred to.)

('68) 3 Agra 253 (253) (DB), *Ram Buksh v. Ram Sookh*. (The fact that the plaintiff does not observe a strict purdah, is not sufficient to deprive him of the right to object to an innovation by which his comfort is affected.)

('67) 2 Agra 269 (270) (DB), *Goor Dass v. Manohur Dass*.

('88) 10 All 358 (385, 386, 387) (DB), *Gokul Prasad v. Radho*.

('69) 6 Bom H C R A G J 143 (145), *Kuwarji Premchand v. Bai Javer*.

('68) 5 Bom H C R A C J 42 (45), *Mani Shankar v. Trikam*. (Guzerat.)

('69) 1869 Pun Re No. 21, page 109 (110), *Nanuck Chand v. Lalla*.

[See also ('72) 9 Bom H C R 266 (269) (DB), *Srinivas v. Reid*.

('26) 13 AIR 1923 Oudh 541 (542, 543), *Subhaga v. Janki*. (Customary right of privacy is not only personal but also attaches to property.)

('69) 1869 Pun Re No. 91, page 135 (135), *Gohree v. Jante*.]

other parts.¹⁶

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Right to bury the dead in another man's land :

In the undermentioned cases¹⁷ it was held that a right to bury the dead in a particular spot cannot be acquired as an easement as such a right is unknown to law. As has been seen in Notes 4 and 5, such a right is even otherwise not an easement.

Right to project building over neighbour's land :

There is a difference of opinion as to whether the projection of a building over the land of the neighbour is an occupation of space constituting an occupation of property or is the enjoyment of an easement. In the undermentioned case,¹⁸ the projection of a cornice merely for the purpose of ornamentation was held not to be an easement as it was considered not to be for the *beneficial enjoyment* of the dominant tenement. According to the High Court of Madras, such projection is an occupation of space rather than an enjoyment of an easement and the right to maintain the projection can be acquired by adverse possession of the space for twelve years.¹⁹ In *Mohanlal Jechand v. Amratlal Bechardas*,²⁰ the projection of the eaves of a house on the neighbour's land was held to be an occupation of space and not an easement. In *Chootalal Hirachand v. Manilal Gagalbhai*²¹ it was held by the High Court of Bombay that the possession of eaves overhanging the neighbour's land *for the discharge of water* was an easement and not an occupation of his property.

Other miscellaneous rights :

A builds a room adjoining B's wall so that B's wall is one of the walls of the room. But no beams are placed on the wall and no support of any kind is received therefrom. A acquires no right of easement so as to compel B to allow the wall to exist.²²

A right of *prospect*, e. g., an unobstructed view of shop from the road is not an easement.²³

16. ('95) 18 Mad 163 (164) (DB), *Sayyad Asuf v. Ameeru Bibi*. (('66) 3 M H C R 141, *Komathi v. Gurunanda*, followed, which case followed the English law on the subject.)

17. ('21) 8 AIR 1921 Cal 569 (570) (DB), *Gopal Krishna v. Abdul Samad*. (Such right may be acquired through purchase or dedication.)

('27) 14 AIR 1927 Lah 664 (664), *Jiwan Singh v. Karam Din*. (A I R 1921 Cal 569 and AIR 1924 Lah 492 followed.)

('28) 107 Ind Cas 769 (769) (Lah), *Nathu Lal v. Nur Muhamad*. (A I R 1921 Cal 569 and AIR 1924 Lah 492 relied on.)

('24) 11 A I R 1924 Lah 492 (493), *Mangat Ram v. Siraj-ul-Hasan*. (A I R 1921 Cal 569 followed.)

18. ('03) 30 Cal 503 (504, 505) (DB), *Nritta Kumari v. Puddo Moni*.

19. ('06) 29 Mad 511 (512, 513, 514) (DB), *Rathnavelu v. Kolandavelu*. (('78) 3 Bom 174, *Mohanlal v. Amratlal*, followed.)

20. ('78) 3 Bom 174 (175, 176) (DB).

21. ('13) 20 Ind Cas 246 (246, 247) (DB).

22. ('89) 13 Bom 79 (82) (DB), *Gordhan v. Chotalal*.

23. ('06) 29 All 22 (23), *Gopinath v. Munno*. (*Smith v. Owen*, (1886) 35 L J Ch 317 and *Butt v. Imperial Gaslight Co.*, (1886) L R 2 Ch 158, relied on.)

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A right to a *current of wind* as distinguished from air cannot be acquired as an easement.²⁴

9a. Extent of easement.— The general rule is that the extent of the easement acquired is determined by the *accustomed user*. In the case of certain easements, however, the extent of the easement that may be acquired has also been limited by law. Thus, the extent of the easement of *light*, under the English law, (and the same applies to cases arising under this Act) is that amount of light which is sufficient according to the ordinary notions of mankind for the comfortable use and enjoyment of the house as a dwelling house, if it is a dwelling house, or for the beneficial use and occupation of the premises for the business for which it is used.¹ In other words, no obstruction is actionable unless there is such a diminution as to amount to a nuisance.² In this view, it differs somewhat from the provisions of the Easements Act under which the extent of such easement is the *accustomed user*. At the same time, it is also provided that no suit is maintainable in respect of any disturbance of such easement unless such disturbance has caused *substantial damage* to the plaintiff.³

24. ('87) 14 Cal 839 (854), *Delhi & London Bank Ltd. v. Hem Lall*. (Following 3 Beng L R O C 18 (45), *Bagram v. Khettranath*.)

Section 2 (5) — Note 9a

1. ('35) 22 AIR 1935 Lah 865 (866), *Umar Hayat v. Mohammad Zaman*.
 ('04) 1904 App Cas 179 (208), *Colls v. Home and Colonial Stores, Ltd.*
 ('27) 14 AIR 1927 Cal 345 (348) (DB), *Debendra Nath v. Surendranath*.
 ('33) 20 A I R 1933 Rang 351 (352, 353), *Ellerman Arracan Rice & Trading Co. Ltd. v. Pazundaung Bazar Co., Ltd.*
 ('14) 1 AIR 1914 P C 45 (47) (PC), *P. C. E. Paul v. W. Robson*.
 ('14) 1 AIR 1914 Cal 374 (375) (DB), *Banomali Rooj v. Mokunda Lal*.
 ('05) 9 Cal W N 543 (546) (DB), *John Alexander v. Har Dut Chamaria*.
 ('08) 35 Cal 661 (669), *Anath Nath v. Gaulstan*.
 ('20) 7 AIR 1920 Cal 375 (376) (DB), *Hira Lall v. Mohendra Nath*.
 ('75) 15 Beng L R 361 (369), *Modhoosoodan v. Bissonath*.
 ('69) 3 Beng L R O C 18 (46) (DB), *J. G. Bagram v. Khettra nath*.
 ('87) 14 Cal 839 (854), *Delhi & London Bank Ltd. v. Hem Lall*. (3 Beng L R O C 18 followed.)
 ('83) 1883 All W N 256 (256) (DB), *Nur Muhammad v. Alimullah*.
 ('96) 20 Bom 788 (790) (DB), *Bala v. Maharau*.
 [See ('39) 26 AIR 1939 Sind 39 (43), *Abdulla v. Municipal Corporation, Karachi*. (Case under Easements Act)]
 [See also ('89) 13 Bom 674 (676) (DB), *Kadarbhai v. Rahimbhai*.]
2. ('14) 1 AIR 1914 P C 45 (46, 47) (PC), *P. C. E. Paul v. W. Robson*.
 ('26) 13 AIR 1926 Nag 474 (475), *Badri v. Jafarbai*.
 ('11) 12 Ind Cas 60 (62, 64) (DB), *P. C. Paul v. William Robson*. (*Colls v. Home and Colonial Stores, Ltd.*, ('04) 1904 A C 179 relied on)
 ('19) 6 AIR 1919 Low Bur 75 (77), *Balthazar & Sons v. M. A. Patail*. (AIR 1914 P C 45 followed.)
 ('09) 4 Ind Cas 425 (426, 427) (DB), *Esa Abbas v. Jacob Haroon*. (The English law laid down in 1904 A C 179 does not apply to India.)
 ('08) 35 Cal 661 (670), *Anath Nath Deb v. Galstaun*.
 ('05) 29 Bom 157 (162) (DB), *Chotalal Mohanlal v. Lallubhai*.
 ('75) 15 Beng L R 361 (368, 371), *Modhoo Soodan v. Bissonath*.
3. ('05) 7 Bom L R 73 (76, 82), *Framji v. Framji*. (*Colls v. Home and Colonial Stores, Ltd.*, ('04) 1904 A C 179 followed.)
 ('05) 29 Bom 157 (161) (DB), *Chotalal v. Lallubhai*. (Do.)

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The extent of an easement to *air* is that amount of air which is necessary to prevent injury to health or something very nearly approaching it.⁴ Ordinarily, where there is sufficient adit for light, it is sufficient adit for air also.⁵

The extent of the *support* is that it shall not cause damage to the servient owner.⁶

A right of way over the servient tenement is generally the right of passage between two fixed termini in a particular line,⁷ though the servient owner can, it has been held generally, point out the route.⁸ As to the extent of a right of way, see Peacock on Easements, 3rd Edition, pages 504 to 516 and also the undermentioned cases.⁹

(127) 14 A I R 1927 All 191 (192), *Dwarka v. Bishambhar*. (P. C. E. Paul v. W. Robson, (14) 1 AIR 1914 P C 45 (PC) followed.)

(126) 13 AIR 1926 All 764 (766), *Lachmi Narayan v. Ram Bhorosey*.

(115) 2 AIR 1915 All 151 (153), *Gajadhar v. Kishorilal*.

(124) 11 AIR 1924 All 394 (395), *Durga v. Lachmi*. (AIR 1915 All 151 followed.)

(129) 16 AIR 1929 Bom 388 (389, 390) (DB), *Bhimaji v. Yeshwant*. (1904 A C 179 followed.)

(194) 18 Bom 474 (486), *Ghansham v. Moroba*.

(116) 3 A I R 1916 Sind 29 (33) (D B), *Premji v. Visram*. (The requirement of substantial damage tends to approximate the law under the Easements Act to the English rule.)

(199) 23 Bom 786 (788), *Kaliandas v. Tulshidas*.

(109) 1 Ind Cas 961 (962, 963), *David Sassoon & Co. v. Edulji Dinshaw*.

(109) 4 Ind Cas 425 (426), *Esa v. Jacob*.

4. See Peacock on Easements, 3rd Edition, pages 97, 98.

5. (109) 1 Ind Cas 961 (963), *David Sassoon & Co. v. Edulji Dinshaw*.

6. Peacock on Easements, 3rd Edition, page 136.

7. (115) 2 AIR 1915 Cal 199 (200, 201) (DB), *Jibananda Chakrabarti v. Kandas Mullik*. (Where the right of way is acquired by a particular track by the dominant owner, the servient owner cannot force upon him, in lieu thereof a different track.)

(167) 1867 Pun Re No. 80, *Khewan v. Dewan Jowahir Mull*.

(1865) 4 Suth W R 49 (50) (DB), *Goluk Chunder v. Tarinee Churn*.

8. (125) 12 AIR 1925 Nag 168 (171), *Wasudeo v. Shankar*.

(119) 6 AIR 1919 Cal 976 (977) (DB), *Lakhi Kanta v. Rajchandra*.

(188) 1888 Pun Re No. 22, *Buta Singh v. Hamir Singh*. (Servient owner can close up old way and substitute new way provided the right is not rendered less easy of exercise.)

(129) 16 AIR 1929 Pat 124 (125) (DB), *Nasiruddin v. Deokali*.

9. (183) 9 Cal 778 (786) (DB), *Gopal Chunder v. Jaddoo Lall*. (Right of way for cleaning privy and drain is as often as is necessary for such cleaning. Affirmed by (186) 13 Cal 136 (PC), *Jadulal Mullick v. Gopalchandra*.)

(174) 1874 Bom P J 3 (DB), *Raghupathi v. Bapuji*. (Right of way for one purpose cannot extend to any other purpose whatever.)

(175) 1875 Bom P J 172, *Saloji v. Pandoji*. (Right of way may be limited to a particular season.)

(126) 13 AIR 1926 Bom 537 (538) (DB), *Manchershah v. Virji*. (A right of way enjoyed for agricultural purposes may be used for other purposes provided no additional burden is thereby imposed on the servient heritage.)

(1864) 1 Suth W R 217 (218) (DB), *Ramsoondar v. Woomakant Chuckerbutty*. (Right of passage during a particular season.)

(168) 10 Suth W R 363 (364) (DB), *Oomur Shah v. Rumzan Ali*. (Do.)

(177) 1 Cal L R 425 (428) (DB), *Toolseemony v. Jogesh*. (Right of way — The dominant owner is not necessarily entitled to the use of the whole width of the

Section 2 (5) Easement

10. Easement, if an interest in immovable property. — An easement is only a privilege and is only a right to the *limited use* of a piece of land without the *possession* of it.¹ It does not exclude the owner of the servient tenement from using his property.² It is not an interest in immovable property.³ Where, however, the right claimed is an *exclusive* user of the property (*i. e.* excluding even the owner from using it), it is not an easement but is an interest in immovable property. Thus, it has been held that an *exclusive* right of jalkar,⁴ or an *exclusive* right to maintain a ferry⁵ on the property of another is a right in immovable property and may be acquired by twelve years' user.

11. Classification of easements. — Easement can be classified into —

1. Affirmative and negative easements :

Affirmative easements are those which entitle the dominant owner to make *active* use of the servient tenement or to do some act which in the absence of an easement would be a nuisance or a trespass. A negative easement is one which restrains the

road, but is merely entitled to pass with the conveniences to which he has been accustomed.)

('71) 15 Suth W R 46 (47) (DB), *Rajmanik v. Ruttun*. (A general right of way includes a right to carry marriage and funeral processions.)

('73) 20 Suth W R 293 (293) (DB), *Lokenath v. Monmohan*. (A general right of way, *i. e.*, a way usable for all purposes includes a way for marriage and funeral processions as well.)

('15) 2 AIR 1915 PC 131 (137) (PC), *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.* (Case from Southern Nigeria — Easement to take river water includes right to storage.)

('04) 28 Bom 428 (431) (DB), *Ranchod v. Abdulabhai*.

('20) 7 AIR 1920 Bom 233 (233, 234) (DB), *Chintamani v. Ratanji*. (Right of way of any one kind does not include a right of way of another kind.)

Section 2 (5)—Note 10

1. See Note 1.

2. ('23) 10 AIR 1923 Pat 58 (60, 61, 62) (DB), *Henry Hill & Co. v. Sheoraj*.

('34) 21 AIR 1934 Pat 420 (421), *Ramhary v. Nidhi Mahanty*. (A mere right to fish not excluding the rightful owner is a profit *a prendre* and falls within the definition of easement given in S. 2 (5) of the Limitation Act and may be acquired by twenty years' uninterrupted enjoyment under S. 26.)

See ('32) 19 AIR 1932 Cal 300 (302), *Krishna v. Lokenath*. (A I R 1923 Pat 58, relied on.)]

3. See the cases cited in foot-note 2.

4. ('23) 10 AIR 1923 Pat 58 (60, 61, 62) (DB), *Henry Hill & Co. v. Sheoraj Rai*.

('17) 4 AIR 1917 Pat 528 (529), *Baker v. Ranjit*.

('32) 19 AIR 1932 Cal 300 (302), *Krishna v. Lokenath*. (3 Cal L R 509 and 3 Cal 276 referred to.)

('79) 3 Cal L R 509 (510), *Lukhimoni v. Koruna Kant*.

('30) 17 AIR 1930 Mad 679 (680, 683), *Secretary of State v. District Board of Tanjore*.

('11) 12 Ind Cas 305 (307, 308) (DB) (Cal), *Lokenath v. Jahania Bibi*. (Exclusive right of fishery is an interest in immovable property.)

('77) 3 Cal 276 (279) (DB), *Parbutty Nath v. Mudho Parol*.

See also S. 28 Note 5: Art. 39 Note 10 and Arts. 141 and 144 Note 7.

5. ('20) 7 AIR 1920 Pat 38 (40) (DB), *Pardip Singh v. Secretary of State*.

('11) 9 Ind Cas 846 (847) (Cal), *Abdul v. Hem Chandra*.

servient owner from exercising an ordinary right of ownership over his land.¹

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2. *Continuous and discontinuous easements :*

A continuous easement is one whose enjoyment is, or may be, continual without the act of man. Thus, a right annexed to B's house to receive light by the windows without obstruction by his neighbour A is a continuous easement. A discontinuous easement is one that needs the act of man for its enjoyment, *e. g.*, a right of way.²

3. *Apparent and non-apparent easements :*

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him, *e. g.*, right of A to overhang the eaves of his house over B's land and the right of A to lead water to his land across B's land by an aqueduct. A non-apparent easement is one that has no such sign, *e. g.*, a right annexed to A's house to prevent B from building on his own land.³

4. *Permanent and limited easements :*

A permanent easement is one which is acquired for all time; while a limited easement is one that will last for a term of years or other limited period. The latter cannot be acquired by prescription but may be acquired by contract or grant.⁴

12. "Growing in, or attached to, or subsisting upon, the land of another." — The legal meaning of the word 'land' is not only dry land but also land covered by water. Taking land to have this meaning, fish may properly be said to 'grow or subsist' upon it.¹ A right of fishery on the land of another (not being an *exclusive* right) is therefore an easement within the meaning of this clause.² A right to take water from a well situated in another man's land,³ the right to catch fish in a tidal river by placing stake nets in certain places, the right of pasturage over the land of another, are other examples in the nature of profits *a prendre in gross*. The right to hunt and to appropriate the game is in the nature of the right of fishery and of grazing.⁴

Section 2 (5) — Note 11

1. Sweet's Law Dictionary, page 303.
2. Compare S. 5 of the Easements Act, 1882.
3. Compare S. 5 of the Easements Act, 1882.
4. Compare S. 6 of the Easements Act, 1882.

Section 2 (5) — Note 12

1. ('80) 5 Cal 945 (947) (DB), *Chundee Churn v. Shib Chunder*.
2. ('80) 5 Cal 945 (947) (DB), *Chundee Churn v. Shib Chunder*.
See also Note 10.
3. See however ('39) 26 AIR 1939 Lah 191 (192), *Walaiti Ram v. Nathi Ram*. (Letters Patent appeal from ('39) AIR 1939 Lah 12, *Walaiti Ram v. Nathu Ram*. In this case it was held that the right of the residents of a mohalla to take water from a certain well cannot be acquired as an easement under S. 26. The decision proceeds on the ground that there cannot be an easement in gross. It is submitted that in view of the definition in this clause the decision is open to doubt.)
4. ('17) 4 AIR 1917 Pat 640 (651) (DB), *Maharaj Bahadur Singh v. Gandauri Singh*.

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Section 2 (6)
Foreign country

(6) "Foreign country" means any country other than [India, but includes also the State of Jammu and Kashmir].

- a. For "British India" the words "India, but includes also any Acceding State" were *substituted* by A. C. A. O., 1948. Later on for "Acceding State" the words "Part B State" were *substituted* by A. O., 1950. Recently, for the words "any Part B State" the words "the State of Jammu and Kashmir" were *substituted* by the Part B States (Laws) Act, 3 of 1951, S. 3 and Sch. [1-4-1951].

PAKISTAN ADAPTATION. — In clause (6) the words "Pakistan, but includes any Acceding State" were *substituted* for the words "British India" by, (P.) A. C. A. O., 1949.

Section 2 (7)
Good faith

(7) "Good faith": nothing shall be deemed to be done in good faith which is not done with due care and attention.

1. "Good faith." — The following illustrations will bring out the meaning of the term "good faith" as defined in this Act :

- (1) A, who had a right to prefer a second appeal against a certain decree, applied in revision instead. The revision petition was later on converted into a second appeal, but on the date on which this was done the time for second appeal had expired. No affidavit was filed to show the circumstances which misled the counsel to give wrong advice to file a revision instead of a second appeal. It was held that the application in revision could not be said to have been made in good faith.¹
- (2) Where the case was such that it must have been obvious to anyone with ordinary legal knowledge that court-fee should be paid *ad valorem* on the property, but the legal practitioner paid a fixed fee of Rs. 10 on the memorandum of appeal, and after its being pointed out by the office, paid the court-fee after the period of limitation had expired, it was held that the filing of the appeal with a court-fee of Rs. 10 was not done in good faith, and that the delay could not be excused under S. 5 of the Act.²
- (3) A decree on the face of it showed that it was passed by a Subordinate Judge's Court. There had been two petitions in the said Court for execution of the decree. Nevertheless the decree-holder filed the next execution petition in the Munsif's Court, and when it was returned, re-filed the same in the Court of the Subordinate Judge. By that time, however, the time for making such application had expired. It was held that the application was not prosecuted in good faith in the Munsif's Court and that therefore the period during which it was so prosecuted could not be excluded under S. 14 of the Act, in computing the period of limitation for the application.³
- (4) A filed a suit for damages against B, a public officer, and the same was dismissed for want of notice to the officer under S. 80 of the

Section 2 (7) — Note 1

1. ('18) 5 AIR 1918 Lah 67 (67) (DB), *Resal Singh v. Shadi*.
2. ('18) 5 AIR 1918 Pat 336 (337) (DB), *Jodhan Pershad v. Nanhku Pershad*.
3. ('27) 14 AIR 1927 Pat 256 (256) (DB), *Fa-lul Jamil v. Helal-ud-din*.

Civil Procedure Code. A thereupon filed another suit against the same officer after giving the required notice and claimed to exclude from the period of limitation the time taken by the first suit. It was held that the first suit was not prosecuted in good faith and the time could not be excluded under S. 14 of the Act.⁴

Section 2 (7)
Good faith

See also the undermentioned cases.⁵ See also S. 14 Note 20.

(8) "Plaintiff" includes any person from or through whom a plaintiff derives his right to sue.

Section 2 (8)
Plaintiff

Synopsis

- | | |
|---|--|
| 1. Scope of definition. | 6. Shebait, trustees, hereditary officers, etc. |
| 2. "Derives his right to sue." | 7. Vendor and purchaser. |
| 3. Hindu widow and reversioner. | 8. Suit by aurasa son to set aside adoption by father. |
| 4. Hindu widow and son adopted by her. See Note 3. | 9. Persons suing on same cause of action. See Notes 1 and 5. |
| 5. Whether one reversioner derives his right to sue from another. | |

1. Scope of definition. — This clause defines "plaintiff" as including any person from or through whom the plaintiff derives his right to sue. Thus, under Art. 144 (suit for possession of immovable property) limitation begins to run from the time when the possession of the defendant becomes adverse to the "plaintiff." By virtue of the definition in this clause, the word "plaintiff" in article 144 will include any person from whom the plaintiff derives his right to sue, so that, if the defendant's possession becomes adverse to A, and B thereafter derives from A the right to sue for possession, limitation for the suit by B runs from the date on which the defendant's possession becomes adverse to A.

Thus, the effect of the definition is that time which runs against one person also affects another person who derives his right to sue from the former. It will be seen that in such cases *the cause of action* of both the persons is the *same*. In this view it is clear that the definition merely illustrates the general principle that when the *cause of action for a suit is the same*, limitation begins to run at the same time against all persons who are or who may become entitled to sue on such cause of action.¹ It is not necessary for the application of this

4. ('11) 13 Ind Cas 260 (261), *Manghan Mal v. Fernandez*.

5. ('48) 35 AIR 1948 Nag 189 (194), *Prayagdas v. Indirabai*. (Execution application — Omission to set out mode of execution and property to be attached and sold — Application not made with due care and attention.)

('46) 33 AIR 1946 Pat 301 (303) (DB), *Inderdeo v. Deonarayan*. (Where decree-holder has no less than 3 times allowed his execution application in a wrong Court to be dismissed for default, it cannot be said that he has been showing due diligence.)

('40) 27 AIR 1940 Bom 5 (9), *Brijmohandas v. Sadashiv*. (Proceedings contrary to a clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in good faith.)

(1900) 22 All 248 (258) (FB), *Mathura Singh v. Bhawani Singh*.

Section 2 (8)—Note 1

1. ('19) 6 AIR 1919 Mad 911 (922) (FB), *Varamma v. Gopaladasayya*.

Section 2 (8)
Plaintiff

principle that the person suing must have derived his right to sue from another. The principle will equally apply where the cause of action arises simultaneously in favour of several persons, so that one of them can be said to derive his right to sue from another.² It is for this reason that the word "includes" has been used indicating that the definition of "plaintiff" in this clause is not exhaustive.³ The expression "plaintiff" as used in the Act includes, therefore, any person who is entitled to sue on the same cause of action, although he may not derive his right to sue from him. To take an example: A Hindu widow takes a son in adoption in 1910. At that time two persons, A and B, who are reversioners of the same degree, are the next reversioners to the estate, and a cause of action accrues simultaneously in favour of both of them for a suit for a declaration that the adoption is invalid. The period of limitation for such a suit is six years under Art. 118 and time begins to run from the date on which the alleged adoption becomes known to the plaintiff. The adoption in this case becomes known to A in 1911 and to B in 1920. A does not bring any suit to have the adoption declared invalid. B sues in 1924 (within six years of the adoption becoming known to him) for a declaration that the adoption is invalid. His suit is barred. The reason is that the cause of action of both A and B being the same, when time begins to run against A in 1911 on the adoption becoming known to him in that year, it begins to run against B also. In other words, the knowledge of A is sufficient to make limitation run against B also, though the article says that limitation will run from the time when the adoption becomes known to the "plaintiff." This shows that a person in the position of A is included within the expression "plaintiff" in the article. It will be seen that A is not a person from whom B *derives* his right to sue. The reason for B being affected by A's knowledge is only that both have the same cause of action.

See also Note 5 below.

2. "Derives his right to sue." — The words "right to sue" must be interpreted to mean right to seek relief. The question whether and when one person derives such a right from another is a matter of substantive law. There are three general rules governing the question.

- (1) All rights of action and all demands whatsoever existing in favour of or against a person *at the time of his death*, survive to and against persons who in law represent his estate.
- (2) All rights of action existing in favour of or against a person *in respect of any particular interest* vested in him are enforceable by or against persons who become entitled in any manner to such interest. (See Notes 3 and 7.)
- (3) Where a right of action arises in favour of or against any person in a representative capacity, such right may be enforced by or against

2. (27) 14 AIR 1927 Mad 216 (216, 217), *Neelakantamier v. Chinnu Annal*.

3. (18) 5 AIR 1918 Mad 675 (678, 679) (DB), *Raja of Paljhat v. Raman Unni* (Per Seshagiri Iyer, J)

any person on whom such representative capacity devolves or by or against the person represented.¹ (See Notes 5 and 6.)

Section 2 (8)
Plaintiff

There are, however, some exceptions to the first general rule mentioned above. Rights intimately connected with the individuality of the deceased will not survive to his legal representatives. One aspect of this exception is expressed by the maxim *actio personalis moritur cum persona*—a personal right of action dies with the person.

The said general rule coupled with the exception has been recognised by the Legislature in the following enactments dealing with particular classes of cases; they may be usefully referred to as illustrating the principles applicable to the generality of cases :

- (1) Section 37 of the Indian Contract Act lays down that promises bind the legal representatives of the promisor in the case of the death of such promisor, unless a contrary intention appears from the contract. Such a contrary intention will be presumed when the contract is of a nature involving special skill or personal confidence, etc.
- (2) Section 306 of the Indian Succession Act provides that "all demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

3. Hindu widow and reversioner. — A reversioner succeeding to an estate on the death of a Hindu widow does so not by virtue of his heirship to the widow but by virtue of his heirship to the last full owner. Hence, if any right to sue has accrued to the widow in her lifetime, the reversioner cannot derive such right from *her as her heir*. But the question arises whether on any *other* ground it can be held that the reversioner derives such right to sue from the widow or is otherwise affected by the limitation that has run against the widow. On this question the important point seems to be whether the widow can be held to represent the estate fully for purposes of limitation. If the widow can be held to represent the estate fully for purposes of limitation, any right to sue accruing in her favour would accrue not for her benefit alone but also for that of others who would eventually become entitled to the estate (though not deriving their right to the estate from her), and the reversioner succeeding to the estate after her would derive the right to sue from her and would be bound by any limitation that has run against her. If, on the other

Section 2 (8) – Note 2

1. ('40) 27 AIR 1940 Cal 228 (232), *Srikissen v. Tarachand*. (Successor trustee derives his right to sue from his predecessor.)

('18) 5 AIR 1918 Mad 464 (468) (DB), *Chidambaranatha v. Nallasiva*. (Beneficiary derives his right to sue from trustee.)

Section 2 (8)
Plaintiff

hand, it be held that the widow does not fully represent the estate for purposes of limitation, any right to sue accruing to her would only be for her benefit and not for that of others who may succeed to the estate after her, and the latter would not derive such right from her. The law on the question whether the widow represents the estate fully for purposes of limitation has undergone a change from what it was under the Limitation Act of 1859 and prior to that Act.

The Act of 1859 did not contain any provision corresponding to the present article 141. Under that Act, limitation for a suit for possession of immovable property by a reversioner succeeding to an estate on the death of a Hindu widow was governed by the residuary provision contained in section 1, clause 12, which corresponds to article 144 of the present Act. The starting point of limitation under this clause was the date of the cause of action. Where the adverse possession of the defendant had commenced during the lifetime of the widow, the question would have been whether the cause of action for a suit by the reversioner was the *same* as that of the widow or whether he had a *fresh* cause of action on his succeeding to the estate. On this question it was held that the widow fully represented the estate and that the reversioner who succeeded to the estate on her death only derived his right to sue from her and did not get a fresh right to sue on the widow's death. So, it was held that the reversioner was bound to sue within the period of limitation calculated from the date of the accrual of the cause of action in favour of the widow and was not entitled to a fresh starting point of limitation on her death.¹ But where the possession of the defendant originated in an invalid alienation by the widow, it was held that his possession became unlawful only on the death of the widow and therefore the cause of action for a suit for possession against him arose only on the death of the widow.²

On another aspect of the same theory of the representation of the estate by the widow, it was held that a decree passed against a widow in her capacity as representing the estate would, in the absence of fraud or collusion, bind the reversioner in the same manner and to the same extent as if he was a party to the decree.³

Under these circumstances, article 142 of Act IX of 1871 was enacted and it was enlarged and repeated in the Acts of 1877 and 1908 as article 141. This article gives the reversioner entitled to possession of immovable property on the death of a Hindu or Muhammadan female, twelve years from the death of the female within which to bring his suit for possession. Under this article, therefore, where a stranger is

Section 2 (8) — Note 3

1. ('75) 23 Suth W R 214 (215) (P C), *Amritolal v. Rajoneekant*.
(68) 9 Suth W R 505 (509) (FB), *Nobin Chunder v. Issur Chunder*.
(90) 13 Mad 512 (515), *Sambasiva v. Raghava*.
2. ('90) 13 Mad 512 (515), *Sambasiva v. Raghava*.
'69) 5 Mad H C R 428 (431), *Atchamma v. Subbarayadu*.
3. (1865) 2 Suth W R 31 (37) (PC), *Katama Natchiar v. Srimut Rajah Mooltoo-vijaya Ranganatha Bodha*.

Section 2 (8)
Plaintiff

in adverse possession of immovable property to which a reversioner succeeds on the death of a Hindu female heir, the reversioner is entitled to sue for possession within a period of twelve years from the death of the female heir, in all cases irrespective of the question whether the possession of the defendant originated in an alienation by the female heir or not.⁴ Even in cases where the adverse possession has continued for the full period of twelve years during the lifetime of the widow and her right to the property has been extinguished thereby, the reversioner will have a period of twelve years from the date of the widow's death within which to bring his suit, the bar of the widow's right not affecting the right of the reversioner.^{4a}

The question arises whether in cases not falling within the purview of article 141 the old theory of the representation of the estate by the widow still holds good. In other words, the question is whether in cases not governed by article 141 the reversioner or other person becoming entitled to the estate which was previously vested in the widow is affected by limitation that has run against the widow or whether such reversioner or other person obtains a fresh right to sue on his succession to the estate. It has been held that even in cases not falling within the purview of article 141, limitation against a widow would not affect the person who subsequently becomes entitled to the estate.⁵ Thus, it has been held that the cause of action for a suit by the reversioner for the recovery of *moveables* (to which article 141 will not apply) arises on the death of the widow and not before, and that limitation for such suit runs only from the date of the widow's death.⁶ Similarly, where a widow adopts a son and the latter thereupon becomes entitled to the estate, it has been held that he will not be affected by adverse possession against the widow prior to the adoption and that limitation for a suit for possession by him would commence to run only from the time of his adoption, notwithstanding that article 141 does not apply to such cases.⁷

4. See cases cited in Article 141 Note 13.

4a. ('29) 16 AIR 1229 P C 166 (170) (P C), *Jaggo Bai v. Utsava Lal*.

('99) 23 Bom 725 (736) (PC), *Runchordas v. Parvati*.

('83) 9 Cal 934 (937) (FB), *Srinath Kur v. Prosunno Kumar*.

[But see ('28) 15 AIR 1928 Cal 670 (672), *Aurabindo Nath v. Monorama* (Not good law.)]

5. See cases cited in foot-notes (6) and (7) below.

6. ('99) 23 Bom 725 (736) (PC), *Runchordas v. Parvati*.

('22) 9 AIR 1922 Cal 321 (328) (DB), *Pramatha Nath v. Bhuban Mohan*, (23 Bom 725 (PC) followed.)

[But see ('28) 15 AIR 1928 Cal 670 (674) *Aurabindo Nath v. Monorama* (Not good law.)]

See also Article 120 Note 12.

7. ('05) 2 Cal L Jour 87 (94) (DB), *Harek Chand v. Bejoy Chand*. (Per Mukherjee, J.) ('15) 2 AIR 1915 Mad 539 (540), *Venkataramiah v. Venkataramiah*. (Applying the general principle that until plaintiff's right to immediate possession accrues his right to possession is not barred.)

('03) 26 Mad 143 (147) (DB), *Sreeramulu v. Kristamma*.

('21) 8 AIR 1921 Nag 111 (111) (DB), *Sitaram v. Rajaram*. (('88) 13 Bom 160 *Padajira v. Ramrao* distinguished.)

Section 2 (8)
Plaintiff

The view upon which the above decisions proceed is that the widow does *not* represent the estate *for purposes of limitation* and that the reversioner or other person who becomes entitled to the estate subsequently is not a person who derives any right to sue from her.⁸ The alterations made in the Act of 1871 and the later Acts have been taken to indicate a general scheme on the part of the Legislature to assimilate, *for purposes of limitation*, the position of a Hindu female heir to that of a life tenant and that of a reversioner to that of a remainderman succeeding to the estate on the termination of the life-tenure. Just as adverse possession against a life-tenant will not affect the remainderman subsequently obtaining the estate, so it has been held that adverse possession against a Hindu female heir will not affect the reversioner or other person succeeding to the estate subsequently.⁹ Article 141, in this view, merely gives legislative embodiment to a general principle, so that even in cases not coming within its express provisions, the same principle is applicable and limitation against the reversioner or other person succeeding to the estate cannot run before the estate vests in him.

But as regards *decrees* passed against a widow, the old view that such decrees bind the reversioner in the absence of fraud or collusion is still good law.¹⁰ Even if the decree against the widow was based on limitation it will bind the reversioner,¹¹ although as already seen, in the absence of such a decree the reversioner will not be affected by the limitation that has run against the widow. See also Art. 141 Note 13.

4. Hindu widow and son adopted by her. — See Note 3 above.

5. **Whether one reversioner derives his right to sue from another.** — A Hindu reversioner who succeeds to an estate on the death of a widow derives his right from the last full owner and not from any other *reversioner*. But any cause of action that may accrue in favour of a reversioner during the lifetime of the widow, such as the cause of action for a suit to set aside an alienation or an adoption

(1900) 2 Bom L R 411 (414) (DB), *Hari v. Waman*. (19 Bom 809, followed.)

('95) 19 Bom 809 (816) (DB), *Moro v. Balaji*.

See also S. 9 Note 10, Art 141 Note 7 and Arts. 142 and 144 Note 83.

8. See cases cited in foot-notes (6) and (7) above.

[But see ('35) 22 AIR 1935 Bom 420 (421), *Mariyappa v. Chanvirangouda*. (Widow adopting son — Son suing for arrears of rent accumulated under lease executed by widow prior to adoption — Assumed that the son sues on the same cause of action and held that the suit was time-barred — Submitted that the assumption underlying the decision is not correct, though the decision itself is correct — The proper ground for rejecting the suit in such cases is that the adopted son has no right to sue for the arrears, such right being the widow's personal right and not forming part of the estate — In this view the decision does not militate against the general principle stated above, viz., that the adopted son or reversioner gets an independent cause of action to sue for the estate, on the estate falling in possession.)]

9. See cases cited in foot-notes (6) and (7) above.

10. ('25) 12 AIR 1925 P C 249 (251) (PC), *Vaithalinga v. Srirangath Anni*.

('29) 16 AIR 1929 P C 166 (170) (PC), *Jaggo v. Utsava Lal*.

11. See cases cited in foot-note (10) above.

by the widow, accrues to such reversioner in a *representative* capacity. The basis of such a suit is the common apprehended danger to the inheritance, and hence there is only one cause of action accruing in a representative capacity for the benefit of the entire reversionary body. Each of the reversioners entitled to sue has not an independant cause of action. Hence, where a cause of action arises in favour of a reversioner in his representative capacity, the same cause of action applies to any other reversioner who may become entitled to sue in respect of the same matter.¹

Illustration.

S died leaving a widow and two daughters. The widow took one *D* in adoption. The daughters though aware of the adoption from the time when it was made did not sue to set aside the adoption within the period of six years allowed under Art. 118. Subsequently, *P*, a son of one of the daughters sued to set aside the adoption. It was held that the suit was barred, the reason being that the daughters as the immediate reversioners represented the inheritance and that *P* sued on the same cause of action as had accrued in favour of the daughters.²

See also Note 1 above.

6. Shebait, trustees, hereditary officers, etc. — Where a right to sue accrues in favour of a person in a representative capacity, the right would be derived by any person on whom the representative capacity devolves afterwards. On this principle, where adverse possession begins against the shebait of the idol or the trustee of a temple or other religious endowment, the successor of such shebait will be affected by such adverse possession and will not have a fresh right to sue or a fresh starting point of limitation from the date of his accession to office.¹ The same principle applies to holders of hereditary offices like

Section 2 (8)
Plaintiff

Section 2 (8) — Note 5

1. ('38) 25 AIR 1938 Pat 510 (510, 511), *Deebal v. Moti*.
 - ('19) 6 AIR 1919 Mad 911 (920) (FB), *Varama v. Gopala*.
 - ('22) 9 AIR 1922 All 301 (309) (FB), *Kesho Prasad v. Shiva Prasad*.
 - ('90) 14 Bom 512 (515, 516) (DB), *Chhaganram v. Motigavari*.
 - ('02) 4 Bom L R 893 (908), *Jamnabai v. Dharsey*. (14 Bom 512 followed.)
 - ('25) 12 AIR 1925 Lah 654 (656) (DB), *Chirag Din v. Abdullah*.
 - ('01) 24 Mad 405 (407) (DB), *Ayyadorai v. Solai Ammal*.
 - ('26) 13 AIR 1926 Mad 1123 (1123), *Siddareddy v. Deva Jarama Reddy*. (But the case of aurasa son challenging adoption is different from that of reversioners.)
 - ('36) 23 AIR 1936 Lah 652 (654) (DB), *Rameshwar v. Ganpati*. (On the death of a reversioner-plaintiff pending suit, the right to sue survives to the next presumptive reversioner.)
 - ('15) 2 AIR 1915 P C 124 (125, 126) (PC), *Venkatanarayana v. Subbammal*. (Do.) [See also ('25) 12 AIR 1925 PC 249 (256) (PC), *Vaithialinga v. Srirangath Anni*.]
 2. (01) 24 Mad 405 (407) (DB), *Ayyadorai v. Solai Ammal*. (It is said in this case that *P* "claims through or from" the daughters. It is submitted that though *P*'s suit is barred as being based on the same cause of action as accrued in favour of the daughters, he cannot be held to claim through or from them as one reversioner does not derive his right from the other.)
 - ('81) 1881 All W N 83 (83), *Gopi Nath v. Sri Narain*.
- See also Art. 118 Note 8.

Section 2 (8) — Note 6

1. (1900) 23 Mad 271 (280, 281) (PC), *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*.
- ('10) 37 Cal 885 (894) (PC), *Damodar v. Lakhan*.

Section 2 (8)
Plaintiff

vatandars in the Bombay Presidency, etc.² See also S. 18 Note 27 and Arts. 142 and 144 Note 49.

7. Vendor and purchaser.—Where A sells to B property which belongs to him but of which C is in adverse possession, B derives his right to sue from A and will be affected by the limitation that has run against A.¹

Illustration.

The Government sells to A certain lands to which they are entitled. At the time of the sale B's in possession of the lands adversely to the Government. In calculating the period of limitation for a suit by A, the purchaser, for possession of the land, the period for which B has been in adverse possession against the Government must be taken into account.²

8. Suit by aurasa son to set aside adoption by father.—An *aurasa* son as a person whose chances of inheritance are affected has an independent right to challenge an adoption made by his father and such right is quite different from any right which the father himself may have to set aside the adoption. Hence, the son suing on his independent cause of action is not affected by the fact that his father has not sued within the period of limitation prescribed.¹

9. Persons suing on the same cause of action.—See Notes 1 and 5 above.

Section 2 (9)
Promissory Note

(9) "Promissory note" means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight.

('05) 28 Mad 197 (201) (DB), *Jagannath v. Rama Dass*.

('96) 23 Cal 536 (545) (DB), *Nilmony Singh v. Jagabandhu*.

('18) 5 AIR 1918 Mad 675 (676, 677, 679) (DB), *Rajah of Palghat v. Raman Unni*. (Sthani of Malabar Devaswom.)

('12) 16 Ind Cas 927 (928) (DB) (Cal), *Madhu Sudan v. Radhika Prosad*.

('12) 14 Ind Cas 142 (144) (DB) (Cal), *Jharula Das v. Jalandhar Thakur*.

2. ('04) 7 Bom L R 135 (137) (DB), *Rama v. Shamrao*. (Vatandar.)

('31) 18 AIR 1931 Bom 24 (27) (DB), *Tuka v. Ganu*. (Do.)

('85) 9 Bom 198 (212) (FB), *Radhabai v. Anantrav*. (Do.)

(1900) 10 Mad L Jour 114 (115) (DB), *Veerabudhra v. Vellanki Venkatadri*. (Karnam—9 Bom 198 followed.)

[But see ('95) 10 C P L R 78 (79), *Seetharam v. Rambhaoo*. (Predecessor in office is not a "person from or through whom a plaintiff derives his title to sue.")]

See also S. 9 Note 10; Art. 124 Note 15.

Section 2 (8) — Note 7

1. ('24) 11 AIR 1924 Cal 394 (394) (DB), *Annada Mohan v. Kina*.

('26) 13 AIR 1926 Mad 1155 (1157) (DB), *Venkata v. Makka Venku*.

[See also ('38) 25 AIR 1938 Lah 437 (439) (DB), *Ishar Das v. Rallia Ram*. (Execution purchaser of plaintiff's interest is bound by same period of limitation.)]

2. ('24) 11 AIR 1924 Cal 394 (394) (DB), *Annada Mohan v. Kina*. (But the purchaser will not be entitled to the 60 years' period of limitation under Art. 149 as the suit is not by or on behalf of the Government.)

('26) 13 AIR 1926 Mad 1155 (1157) (DB), *Venkata v. Makka Venku* (Do.)

See also Article 149 Note 7.

Section 2 (8) — Note 8

1. ('26) 13 AIR 1926 Mad 1123 (1123), *Siddareddy v. Deva Jayarami*.

1. **"Promissory note."**—A "promissory note" is defined in the Negotiable Instruments Act, XXVI of 1881, S. 4, as —

Section 2 (9)
Promissory note

"an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

Under the Indian Stamp Act, II of 1899, a promissory note is defined as meaning a promissory note as defined by the Negotiable Instruments Act, and as including also "a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any *condition or contingency which may or may not be performed or happen.*"

The said definitions are, however, applicable in construing those Acts only and are not applicable to a construction of the Limitation Act, which must be guided by the definition given in this clause.^{1a}

Where A executed a note to B in these terms, namely. "The amount due to you is Rs. 1000. You being now a minor. I shall pay you in cash the whole sum of Rs. 1000 whenever you demand it, after attaining your majority," it was held that it was a promissory note within the meaning of this definition, and that it was payable after actual demand by the creditor after attaining majority.¹

A Government war-bond payable at a particular place is also a promissory note within the meaning of this definition.²

2. **Specified sum of money.**—Where an amount due under an instrument including interest can be found out from the instrument itself without any extraneous aid, it is a specified sum of money within the meaning of this clause, even though a little calculation may be necessary.¹

(9A) **"India"** means the territory of India excluding the State of Jammu and Kashmir :

Section 2 (9A)
India

- a. Substituted by the Part B States (Laws) Act, 3 of 1951, S. 3 and Sch. [1-4-1951] for clause (9A) inserted by A. O., 1950 which was as follows: (9A) 'States' means all the territories for the time being comprised within Part A States and Part C States".

(10) **"Suit"** does not include an appeal or an application.

Section 2 (10)
Suit

1. **"Suit."** — The word "suit" has not been defined in the Act. This clause merely says that a "suit" does not include an appeal or an application. It has been held, however, that the term ought to be confined to such proceedings as, under that description, are directly

Section 2 (9) — Note 1

- 1a. ('47) 1947 Mar L R (Civ.) 94 (97) (DB), *Lachhman v. Karansee*.
1. ('93) 3 Mad L Jour 199 (200) (DB), *Kuttiassan v. Suppi*.
2. ('33) 20 AIR 1933 Mad 376 (377, 378) (DB), *Secretary of State v. Kunhi Krishna*. (Under Negotiable Instruments Act also.)

Section 2 (9) — Note 2

1. ('47) 1947 Mar L R (Civ.) 94 (97) (DB), *Lachhman v. Karansee*. (An instrument does not cease to be a promissory note merely because it contains a stipulation for payment of interest.)]

Section 2 (10) Suit dealt with by the Code of Civil Procedure, or such as, by the operation of the particular Acts which regulate them, are treated as suits.¹

Under the Code of Civil Procedure, a suit is any proceeding which is instituted by the presentation of a *plaint*.² For an illustration of a proceeding which, by the operation of a particular Act, is treated as a suit, reference may be made to the Indian Succession Act, XXXIX of 1925, section 295.

A proceeding, therefore, which does not commence with the presentation of a plaint and which is not treated as a suit under any other Act is not a "suit" for the purposes of the Limitation Act.

Since by the definition a "suit" does not include an application,³ it follows that the proceedings specified below are not "suits":

- (1) An application for execution of a decree,⁴
- (2) An application under S. 214 of the Indian Companies Act, VI of 1882;⁵ but an application under sub-s. (3) of S. 235 of the Act of 1913 (which corresponds to S. 214 above) was treated as a suit.⁶ Sub-section (3) to S. 235 has however been repealed by Amending Act, XXII of 1936. (See also Article 36 Note 1.)
- (3) A claim against a company in voluntary liquidation made by a proceeding not instituted by the presentation of a plaint.⁷
- (4) An application under O. 9, R. 13, Civil Procedure Code.⁸
- (5) An application under Para. 20, Sch. II, Civil Procedure Code.⁹

The word "suit" does not include an *appeal*.¹⁰ But, the definition will only apply "unless there is anything repugnant in the subject or

Section 2 (10) — Note 1

1. ('95) 22 Cal 943 (948), *M. M. Watkins v. N. Fox*.
2. ('33) 20 AIR 1933 P C 63 (64) (PC), *Hans Raj v. Dehra Dun Mussoorie Electric Tramway Co. Ltd.*
[See ('27) 14 AIR 1927 Cal 281 (282, 283) (DB), *Pran Kumar v. Darpahari Pal*. (Proceedings for grant of probate which are contested come within meaning of word "suit" in Letters Patent (Calcutta), Clause 13.)]
3. ('77) 2 Cal 336 (339, 340) (FB), *Dhonesur v. Roy Gooder*. (Distinguishing ('68) 9 Suth W R 402, *Hurro Chunder v. Shoorodhonee*, a case under Code of 1859 under which application for ascertainment of mesne profits was held to be a suit within meaning of S. 14.)
('23) 10 AIR 1923 Pat 88 (88) (DB), *Chandrika v. Ramkuer*.
4. ('75) 1 All 97 (101) (FB), *Jiwan Singh v. Sarnam Singh*. (Under Limitation Act, 1859, however, word "suit" may include application.)
('75) 2 Cal 336 (339, 340) (FB), *Dhonesur v. Roy Gooder* (Do.)
5. ('96) 19 Mad 149 (150) (DB), *Ramaswami v. Streeramulu*.
('95) 18 All 12 (15) (DB), *Connel v. Himalaya Bank*.
6. ('23) 10 AIR 1923 Lah 58 (59) (DB), *Bank of Multan Ltd. v. Hukum Chand*.
7. ('33) 20 AIR 1933 P. C. 63 (64) (PC), *Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co. Ltd.* (Application under S. 186, Companies Act, 1913.)
8. ('23) 10 AIR 1923 Pat 88 (88) (DB), *Chandrika v. Ram Kuer*.
9. ('23) 10 AIR 1923 Rang 226 (226, 227) (DB), *Ma Thein Tin v. Maung Ba Than*. (Fact that application is numbered and registered as suit does not convert it into suit for purposes of limitation.)
[But see ('23) 10 AIR 1923 Oudh 91 (92, 93), *Sheo Dutt v. Bishunath Singh*.]
10. ('98) 22 Bom 612 (617) (DB), *A (Husband) v. B (Wife)*. (Case under Indian Divorce Act, 1869.)

context." As has been seen already, (see Note "Definitions—General") the context of S. 31 (now repealed) shows that the word "suit" in that section included an appeal.

Section 2 (10)
Suit

Where a suit consists of several independent claims which can be split up, it must, as regards each of such claims, be regarded as a separate suit for the purpose of applying the articles of the Act.¹¹ Thus, where a suit is for the price of medicines supplied and for fees for medical attendance, the former claim will be governed by Art. 52 and the latter by Art. 115.¹²

See also section 3 Note 4.

(11) "Trustee" does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title.

Section 2 (11)
Trustee

Synopsis

1. Trust, meaning of.
2. Benamidar.
3. Mortgagee in possession after satisfaction of mortgage.
4. "Wrong-doer in possession without title."

1. **Trust, meaning of.** — A "trust" in English law is "simply a confidence,, reposed either expressly or impliedly in a person (hence called the trustee), for the benefit of another (hence called the *cestui que trust*, or beneficiary), not, however, issuing out of real or personal property, but as a collateral incident accompanying it, *annexed in privity to (i. e. commensurate with) the interest in such property*, and also to the person touching such interest, for the accomplishment of which confidence the *cestui que trust* or beneficiary has his remedy in equity only."¹ The same idea may be expressed in a simpler way in the language of the Indian Trusts Act, II of 1882, by defining a "trust" an obligation *annexed to the ownership* of property and *arising out of a confidence* reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.

A trust, under the English law, may be created *expressly* by a declaration by the author of the trust in which case it is called an

11. ('31) 18 AIR 1931 Lah 309 (310) (DB), *Bhimz Mal & Sons v. Rahmat Ullah*. (Agreement between A and B for purchase of three cars — B paying some earnest money and taking delivery of one car — Contract broken, but B neither returning car nor making further payment — Suit by A for balance of price of one car and for compensation for breach is governed by Art. 52 and Art. 115 respectively.)

('22) 9 AIR 1922 Lah 198 (199) (FB), *Mahomed Ghasita v. Sirajuddin*.

('31) 18 AIR 1931 All 752 (753) (DB), *Baroda Kant v. Court of Wards, Baraon Estate*.

See also Art. 52 Note 6 and S. 3 Note 4.

12. ('31) 18 AIR 1931 All 752 (753) (DB), *Baroda Kant v. Court of Wards, Baraon Estate*.

Section 2 (11) — Note 1

1. Wharton's Law Lexicon, 14th Edn., page 1014.

See also Halsbury's Laws of England (1914), Vol. 28, pages 5, 6, 7.

Lewin on Trusts, 12th Edn., pages 11 and 12.

Section 2 (11)
Trustee

express trust,² or it may be created by *the operation of law* in which case it is called variously, constructive, resulting, or implied trust.³

The Indian Trusts Act, 1882, confines the word "trust" to what would be *express trusts* under the English law,⁴ the constructive, resulting and implied trusts, under that law, being merely regarded as *obligations in the nature of trusts* and not as trusts at all.⁵ This does not seem to be so under this Act. The fact that the definition of "trustee" in this clause excludes only *certain specified* persons who would be constructive trustees under the English law, seems to show that the word "trust" has been used in this Act in the wider sense in which it is used in the English law. It will thus cover all the obligations in the nature of trusts, though they are not "trusts" in the strict sense of the term. Thus, a guardian appointed under the Guardians and Wards Act has been held to be a trustee within the meaning of this clause, though he is not a trustee in the sense of the term as defined in S. 3, Trusts Act, 1882.⁶

2. Benamidar. — Where A purchases property with his own money but in the name of B, or where A transfers his property to B without intending to benefit B, the purchase or transfer, as the case may be, is a *benami* transaction and B is a *benamidar*. Under S. 82, Indian Trusts Act, 1882, B must hold the property for the benefit of A, and this obligation is described as being in the nature of a trust. In *Mt. Bilas Kunwar v. Deoraj Ranjit Singh*,¹ their Lordships of the Privy Council observed that a *benami* transaction is a dealing that has a curious resemblance to the doctrine of English law that the trust of the legal estate results to the man who pays the purchase money and this again follows the analogy of the Common law that where a feoffment is made without consideration, the use results to the feoffor. Thus, a benamidar would be a *constructive* trustee under the English law. The definition, however, specifically states that a *benamidar* is not to be regarded as a "trustee" for the purposes of the Limitation Act.

2. Wharton's Law Lexicon, 14th Edn., page 1014.

Snell's Principles of Equity, 12th Edn., page 52.

Halsbury's Laws of England (1914), Vol. 28, page 7.

Lewin on Trusts, 12th Edn., page 1125.

3. Wharton's Law Lexicon 14 Edn., page 1014.

Snell's Principles of Equity, 12th Edn., page 127. (A constructive trust is a trust which is raised by construction of equity, without reference to and irrespective of any intention of the parties, either expressed or presumed.)

Halsbury's Laws of England (1914), Vol. 28, page 7.

Lewin on Trusts, 12th Edn., page 1125.

4. See Sections 3 and 5, Trusts Act, 1882.

5. ('29) 16 AIR 1929 Nag 298 (302), *Gaurishankar v. Ibrahim Ali*. (See Chapter 9, Trusts Act.)

('25) 12 AIR 1925 Rang 289 (290) (DB), *Ma Thein May v. U Po Kin*.

[See ('98) 1898 Bom P J 380 (386) (DB), *Allima v. Murari*.

('21) 8 AIR 1921 Mad 125 (125), *Rajeswara Dorai v. Ponnusami Tevar*.]

See also Pollock and Mulla's Indian Contract Act, 4th Edn., page 848.

6. ('49) 36 AIR 1949 Nag (CN 94) 235 (240) (DB), *Mirabai v. Kaushalyabai*.

Section 2 (11) — Note 2

1. ('15) 2 AIR 1915 P C 96 (97) (PC), *Bilas v. Deoraj*.

3. Mortgagee in possession after satisfaction of mortgage.**Section 2 (11)**
Trustee

— A mortgagee remaining in possession after the mortgage has been satisfied is in the possession of a *constructive* trustee for the mortgagor.¹ He is however, under this clause, not a “trustee” for the purposes of the Limitation Act.²

4. “Wrong-doer in possession without title.” — In *Viziamaramazu v. Secretary of State*,¹ a case before the passing of the Indian Trusts Act, 1882, Turner, C. J., observed as follows :

“It is not every unlawful entry on, or continuance in, possession that creates a constructive trust. It is difficult to bring within the compass of a definition the principle by which the Courts have been guided in forcing *fiduciary* obligations on the consciences of wrongdoers by operation of law; but it may be asserted that the wrongful invasion or continuance in possession of a stranger, whether with or without knowledge of the infirmity of his title, will not make the wrongdoer a constructive trustee unless he has been admitted into possession by a trustee so as to be affected with notice of the trust.”

Under S. 94, Indian Trusts Act, 1882, the position of a wrongdoer in possession without title would appear to be that of a person whose obligation is in the “nature of a trust.” See illustration (b) to that section. The Limitation Act, however, expressly lays down that such a person is not a “trustee” for its purposes.²

Section 2 (11) — Note 3

1. See Halsbury's Laws of England (1912), Vol. 21, page 310.
2. See ('68) 9 Suth W R civ 187 (189) (FB), *Babulall v. Jamal Ally*. (Code of 1859.) See also S 10 Note 14.

Section 2 (11) — Note 4

1. ('82) 5 Mad 91 (105) (FB). (Decision confirmed by the Privy Council in ('85) 8 Mad 525 (PC), *Viziamaramazu v. Secy. of State*, but without reference to observations cited.)
2. ('45) 32 AIR 1945 Sind 57 (69) (DB), *Shamdas v. Gurmukh Singh*. [A trespasser ab initio cannot be said to be a trustee within the meaning of S. 10 ; ('82) 5 Mad 91 (FB), *Narendra v. Secy. of State*, ('35) 22 AIR 1935 Mad 483, *Manikammal v. Murugappa, Rel. on.*]

PART II.

LIMITATION OF SUITS APPEALS AND APPLICATIONS.

Section 3

3.* Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence.

Explanation.—A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer ; in the case of a pauper, when his application for leave to sue as a pauper is made ; and, in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

* Act of 1877 : S. 4.

4. Subject to the provisions contained in sections five to twenty-five (inclusive), every suit instituted, appeal presented and application made after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence.

Explanation.—A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer ; in the case of a pauper, when his application for leave to sue as a pauper is filed ; and in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

Illustrations.

(a) A suit is instituted after the prescribed period of limitation. Limitation is not set up as a defence, and judgment is given for the plaintiff. The defendant appeals. The Appellate Court must dismiss the suit.

(b) An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed.

Act of 1871 : S. 4.

Same as S. 4 of Act of 1877.

Act of 1859 : S. 1.

1. No suit shall be maintained in any Court of Judicature within any part of the British territories in India in which this Act shall be in force unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any law or regulation to the contrary notwithstanding.

Synopsis

Section 3

1. Legislative changes.
- ② Scope of the section.
3. "Subject to the provisions of Sections 4 to 25."
- 3a. Extension of limitation in case of suits by displaced persons.
4. "Suit," meaning of.
5. Institution of suit, what constitutes.
6. Appeal, when preferred.
7. Application, when made.
8. "Period of limitation prescribed therefor by the first schedule."
- 8a. Special or local law — Applicability of S. 3 — See notes on S. 29.
9. "Shall be dismissed."
10. "Although limitation has not been set up as a defence."
- ⑪ Explanation to the section. See Notes 4 and 5.
12. Pauper proceedings and limitation.
13. Company in liquidation — Proceedings by or against.
14. Limitation bars remedy but does not destroy right.
15. Limitation does not bar defence.
- ⑫ Duty of Court to raise and decide question of limitation.
17. New plea as to limitation.
18. Duty of appellate Court under this section.
19. Res judicata and plea of limitation.
20. Consent decree for time-barred claim.
21. Admission on point of limitation — Effect.
22. Abandonment of plea of limitation. See Note 17.
23. Waiver of plea of limitation.
24. Contract or custom cannot override the statute.
- ⑮ Estoppel against pleading limitation.
26. Proceedings to which section applies.
- ⑯ Applicability of Act to arbitration proceedings.
28. Inherent power and limitation.
29. Set-off and counter-claim — Limitation.
30. Insolvency proceedings and limitation.
- ⑰ Plea of exemption from limitation.
32. Limitation only applies to institution of proceedings, not their continuation.
33. Amendment of plaint, etc.
- 33a. Conversion of proceedings.
- ⑱ Withdrawal of suit and institution of fresh suit.
35. Rejection of plaint.
36. Summary rejection of appeal.
37. Effect of non-compliance with section.
38. Onus of proof.
39. Plea of limitation, if technical.
- ⑳ Delay in filing suit.
41. Concurrent remedies, limitation for.
42. High Court, if can make rules inconsistent with provisions of the Act. See AIR Commentaries on the Code of Civil Procedure 5th (1950) Edn., S. 122, N. 3.
43. Revision, if lies on question of limitation.
44. Review, if lies on question of limitation.

Topic Indicator.

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| Acts of Court <i>suo motu</i> — No limitation. See Note 26. | Ignorance of law or fact — No ground for extension. See Note 3. |
| Companies Act. S. 186 — Application under — Not a suit. See Notes 4 and 26. | Limitation not pleaded — Court's duty, See Notes 1, 2, 10, 16, 18 and 23. |
| Consent of parties. See Note 24. | No exemption on equitable considerations. See Note 3. |
| Crown — Not exempt. See Note 3. | Plea — Whether one affecting jurisdiction. See Notes 1, 37 and 43. |
| Decree passed in Native State — Execution in British India — This Act applies. See Note 8. | Presentation to Court having no jurisdiction. See Note 5. |
| Defendant in jail — Plaintiff not entitled to extension. See Note 3. | Presidency Towns Insolvency Act, S. 7 — Application under — Whether suit. See Note 26. |
| Executing Court — Power to extend. See Note 3. | |

Section 3 Notes 1-2

Provincial Small Cause Courts Act, S. 25—Revision under—Power of High Court. See Note 43.

Registration not necessary for institution. See Note 5.

'Reject' and 'dismiss.' See Notes 9 and 35.

Several reliefs—Limitation to be applied to each relief separately. See Note 4.

Signature and verification—Defects in. See Note 5.

Substance of claim and not mere form to be looked into. See Note 8.

1. Legislative changes.

- (1) The section was first enacted in its *present* form in the Act of 1871. The material portion of the corresponding section (*viz.* S. 1) in the Act of 1859 ran as follows :

"No suit shall be maintained . . . unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature"

It will be observed that the section differed from the corresponding section in the later Acts in two important respects :

(a) While the later Acts provided that a time-barred suit or other proceeding should be *dismissed*, the Act of 1859 provided that no such proceeding "shall be maintained."

(b) The section in the Act of 1859 did not contain the provision as to the bar of limitation being given effect to, although it was not set up in defence.

In these circumstances, there was a conflict of decisions as to whether the Court was entitled to go into the question of limitation if it was not raised by the defendant. One view was that the section made limitation a question of *jurisdiction* and hence the Court was entitled to go into such question of its own accord, although it had not been raised by the defendant.¹ The other view was that the provision as to limitation was intended for the *benefit of the defendant* and if he did not raise the point it was not for the Court to raise such point of its own accord.² The amendment of the section into its present form in the later enactments makes it clear that limitation is a material question although not relied on by the defendant and that the Court must dismiss a suit which has been instituted after the period of limitation, although the defendant has not pleaded limitation.

(2) The Act of 1859 did not contain any provision corresponding to the explanation to the section in the later Acts.

(3) The illustrations to the section which occurred in the Acts of 1871 and 1877 have been omitted in the present Act.

2. **Scope of the section.**—This section provides that a suit, appeal or application instituted after the prescribed period of limita-

Section 3 — Note 1

1. ('66) 6 Suth W R 132 (132) (DB), *Purushnath v. Bundah Ali*.

('65) 3 Suth W R 184 (184) (DB), *Khettur Mohun v. Ramessur*.

('67) 7 Suth W R 46 (46, 47) (DB), *Giradharee v. Kalika*.

2. (1863) 1 Bom H C R 15 (15, 16), *Dattaji v. Vamanrav*.

(1864) 1864 Suth W R Gap 207 (208), *Beedhoo Dossee v. Maddun Gopal*.

(1865) 2 Mad H C R 238 (239), *Ramanatha v. Vaithilinga*.

[See also ('69) 12 Suth W R 215 (217) (DB), *Sheo Golam v. Roy Dinkur*.]

tion must be dismissed, although limitation has not been set up as a defence. This only means that where the Court *finds* that a suit or other proceeding has been instituted after the period of limitation, it must be dismissed, although limitation has not been set up as a defence. In other words, the section merely makes such question a *material* one for determination in every case, whether or not the point has been raised by the parties.¹ It does not oblige the Court in any case to *raise and decide*, suo motu, the question whether the suit or other proceeding has been instituted after the period of limitation. The reason is that a Court is not bound suo motu, to raise and decide a question merely because it is material for the decision of the proceeding before it in the sense that the determination of the question one way or other would affect the decision of the proceeding. Whether the Court is so bound to raise and decide a question depends on the law of *procedure*. For instance, it is a general rule of procedure that the Court is not bound to raise and decide a question of *fact* of its own motion, but must raise and decide a material question of *law* although not raised by the parties. Hence, where the question of limitation depends on a question of *fact*, the Court is not bound to go into it unless raised by the parties. But, where the question is one of *law*, the Court is, as a general rule, bound to raise and decide such question although not raised by the parties. (See Note 16.) For other instances of rules of procedure bearing on the question when a point as to limitation may be raised, see Notes 16 to 20.

From the above it is clear that the view expressed in some decisions² that the Court is bound in *every* case to raise and decide the question of limitation is not correct. But where the bar of limitation appears on the face of the proceedings the Court is bound under this section to go into the question of its own accord although not raised by the parties.³

This section limits the time *after* which a suit or other proceeding would be barred. In some cases, there may be a limit of time *before* which a suit or other proceeding cannot be instituted. Thus, where a bond fixes a time for the payment of the money due thereunder, a suit

Section 3 — Note 2

1. This view which was expressed in the First Edn. of this work has been adopted by the Rangoon High Court in ('40) 27 AIR 1940 Rang 207 (210) (DB), *Official Trustee v. Raeburn*.

2 See ('17) 4 AIR 1917 Pat 273 (274) (DB), *Angrahit v. Sitaram*.

('09) 2 Ind Cas 229 (229) (Nag), *Chandrabhan v. Maruti*.

('90) 12 All 461 (483) (FB), *Bechi v. Ahsan-ullah Khan*. (The section irrespective of the pleadings of parties, casts upon Judge the duty of determining whether the appeal is within limitation.)

[See also ('29) 16 AIR 1929 All 485 (488) (DB), *Baldeo v. Sukhdeo*. (Remark that the section imposes on the Court the duty of ascertaining if the proceeding before it has been filed in time is not correct.)]

3. ('48) 35 AIR 1948 Nag 41 (44) (DB), *Alafkhan v. Kurban Khan*.

('40) 27 AIR 1940 Rang 207 (211) (DB), *Official Trustee v. Raeburn*.

[See ('94) 16 All 390 (393) (DB), *Ramu Rai v. Dayal Singh*.]

('12) 17 Ind Cas 638 (639), *Ganeshdas v. Nimbi*.]

Section 3
Notes 2-3

for the recovery of the money cannot be instituted before the date fixed for payment.⁴

The Act *assumes* the existence of a cause of action and does not create or define one. The object of the Act is only to interpose a bar after a certain period to a suit to enforce an existing right. (See Note 15 to the Preamble.) The descriptions of various classes of suits and the specification of the points of time from which limitation would begin to run for such suits do not imply that a suit answering to any of these descriptions is necessarily based on a cause of action which is recognised as such by the law.⁵

Before the consequence of dismissal as provided by this section can have operation it is necessary for the Court to be affirmatively convinced that the proceeding has not been made within the prescribed period. Hence where there is no possibility of ascertaining the starting point of limitation there is no scope for the operation of this section. Thus an application for substitution in place of a deceased party on the basis of presumption of death under S. 108, Evidence Act, cannot be dismissed under this section.⁶

S. 98 (2) of the Assam Co-operative Societies Act, (1 of 1950) specifically provides that the provisions of the Limitation Act shall not apply to any debts or liability due by any member, past member or deceased member to any society in respect of which an order of dissolution has been passed under that Act.

3. "Subject to the provisions of Sections 4 to 25." — Under this section, the Court is bound to dismiss a proceeding if it is instituted after the period prescribed in the first schedule and this duty of the Court is only subject to the provisions of sections 4 to 25. The Court has no power, apart from the above provisions, to relieve a litigant from the bar of limitation.¹ Hence, the Court cannot grant an

4. ('24) 11 AIR 1924 Pat 135 (136), *Bibi Nasiban v. Eknam Narain*.

5. ('94) 21 Cal 8 (18) (PC), *Hari Nath v. Mothur Mohun*.

('11) 10 Ind Cas 477 (480) (PC), *Kunni Lal v. Gobind Krishna*.

('82) 5 Mad 253 (255) (DB), *Karupam v. Merangi*. (Provisions of section apply only to periods named in second schedule.)

('79) 3 Bom 207 (209) (DB), *Jivi v. Ramji*.

('11) 11 Ind Cas 540 (542) (DB) (Cal), *Jalim Singh v. Choonee Lal*.

('25) 12 AIR 1925 Oudh 400 (401), *Ram Narain v. Barkandi*.

('24) 11 AIR 1924 Pat 721 (728) (DB), *Kesho v. Madho*.

('09) 1 Ind Cas 647 (650) (DB) (Bom), *Ram Krishna v. Tripurabai*. (Limitation Act being law of procedure should not be presumed to have effected any change in rights given by Hindu law.)

('01) 28 Cal 37 (46) (DB), *Surjyamonī v. Kalikanta*.

('27) 14 AIR 1927 Nag 10 (12), *Secy. of State v. Bagmal*.

('78) 1878 Pun Re No. 3 (FB), *Ratta Ram v. Mt. Nano*.

6. ('49) 53 C W N 713 (715) (DB), *Jyotirmoy v. Biswanath*.

Section 3 — Note 3

1. ('44) 31 AIR 1944 Nag 145 (146). *Gulab v. Nathu*. (Courts have no power to devise their own technique for saving claims from the bar which the statutes of limitation create.)

('39) 26 AIR 1939 Bom 1 (16) (DB), *Narayan v. Gurunathgouda*.

('71) 3 N W P H C R 318 (319) (DB), *Sadho Singh v. Kishnee*.

exemption from limitation on equitable considerations or on grounds of hardship.² Similarly, the mere fact that a case falls within the *reason*

Section 3 Note 3

- ('35) 22 AIR 1935 Cal 333 (335) (DB), *Jateendra v. Rabatee*.
 (1900) 5 Cal W N 259 (262), *Mahumdar Rahman v. Sarat Chandra Dutt*. (Suit under Chap. XXXIX (now Order 37), C. P. C. — Court has no power, after time fixed by summons for obtaining leave to appear and defend has expired, to extend time.)
 ('26) 13 AIR 1926 Lah 379 (381), *Piroj v. Qarib*. (It is illegal assumption of jurisdiction to grant a prayer in time-barred application for which law does not permit extension of time.)
 ('20) 7 AIR 1920 Mad 1 (12, 13) (FB), *Muthu v. Madar*. (Per Seshagiri Ayyar, J.)
 ('27) 14 AIR 1927 Lah 342 (343), *Pal Singh v. Harnam Singh*.
 ('24) 11 AIR 1924 Lah 40 (41) (DB), *Hukam Chand v. Shahab Din*.
 ('28) 15 AIR 1928 Mad 509 (512, 513) (DB), *Ammalu v. Narayanan*. (Limitation Act is a complete Code.)
 ('14) 1 AIR 1914 Mad 526 (529) (DB), *Ramana v. Babu*. (Limitation being the result of statute law no exemption from it can be recognized except what the statute itself provides.)
 ('23) 10 AIR 1923 Sind 14 (15) (DB), *Saker Chand v. Yasoob*.
 [See also ('74) 1874 Pun Re No. 58, *Bhai Swaya v. Hira Nand*.
 ('25) 12 AIR 1925 Oudh 105 (106), *Shamshai v. Mahbub Khan*. (Court of its own accord restoring suit beyond period of limitation.)]
 [See however ('42) 29 AIR 1942 All 396 (398) (FB), *Radheylal v. Roop Ram*.]
 See also Note 6 to Section 9.
 2. ('44) 31 AIR 1944 Oudh 135 (139) (DB), *Municipal Board, Lucknow v. Kalikrishna*. (Counsel's negligence in filing application for leave to appeal to Privy Council in time—No sufficient cause within S. 5 for condoning delay—Hardship caused by counsel's negligence, cannot be relieved against.)
 ('43) 30 AIR 1943 Sind 132 (133) (DB), *Md. Shah v. Abdul*. (There is no general discretion given to the Court to waive the period of limitation, or to extend it in hard cases.)
 ('42) 29 AIR 1942 Mad 487 (491), *Krishnayya v. Venkatakumara*.
 ('42) 29 AIR 1942 Pat 335 (337) (DB), *Banwari Narain v. Ramhari*.
 ('24) 11 AIR 1924 Lah 666 (666), *Surjit v. C. J. Torrie*. (Court has no discretion to enlarge the period of thirty days provided by Art. 164.)
 ('40) 27 AIR 1940 Rang 276 (278) (FB), *Eng Gim Moh Firm v. Chinese Merited Banking Co. Ltd.*
 ('39) 26 AIR 1939 Bom 1 (16, 17) (DB), *Narayan v. Gurunathgouda*. (No principle can be invoked to add to or supplement provisions of the Act.)
 ('33) 20 AIR 1933 Lah 615 (618), *Bashesar v. Diwan Chand*.
 ('35) 22 AIR 1935 PC 85 (88) (PC), *Maqbul Ahmad v. Onkar*. (Section 3 is peremptory and it is Court's duty to notice the Act and give effect to it even though not referred to in pleadings.)
 ('29) 16 AIR 1929 All 677 (679) (DB), *Maqbul Ahmad v. Pateshri*. (('21) 8 AIR 1921 Bom 379, *Basavanappa v. Krishnadas*, not approved.)
 ('24) 11 AIR 1924 All 828 (830), *Man Singh v. Ram Nath*.
 ('24) 11 AIR 1924 Bom 39 (40) (DB), *Somshikharswami v. v. Shivappa*.
 ('27) 14 AIR 1927 Cal 117 (122) (DB), *Panna Lal v. Adjai Coal Co.*
 ('28) 15 AIR 1928 Cal 646 (647) (SB), *Hari v. Parmeshwar*.
 ('20) 7 AIR 1920 Lah 346 (347), *Bano Mal v. Bano Mal*.
 ('94) 1894 Pun Re No. 128, *Jhandu v. Mohan Lal*.
 ('25) 12 AIR 1925 Mad 334 (337) (DB), *Ammathayi v. Sivarama*. (Limitation Act is complete in itself and any ground of extension or suspension of time must be sought for within the four corners of it.)
 ('25) 12 AIR 1925 Oudh 369 (369), *Ram v. Ajodhia*. (('14) 1 AIR 1914 Bom 201, *Satyabhamabai v. Govind*, dissented from.)
 ('36) 23 AIR 1936 Sind 169 (170) (DB), *Tejumul Bhawandas v. Murad*.
 ('16) 3 AIR 1916 All 222 (223) (DB), *Mukund Ram v. Ramraj*.

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Note 3

of any of the exceptions expressly recognized by the statute is not sufficient to extend such exception to the case.³ So also, the inherent power of the Court under S. 151 of the Civil Procedure Code cannot be invoked to obtain an extension of limitation.⁴ See also Note 28.

The following are instances of the application of the above principles :

- (1) The mere fact that the plaintiff was by some arrangement or negotiation prevented from suing within the prescribed period is no ground for extending such period.⁵
- (2) A mere mistake on the part of the plaintiff as to the date of the cause of action is not a ground for extending limitation in his favour.⁶
- (3) Ignorance of the residence of the defendant is not a ground for extending limitation.⁷

(23) 10 AIR 1923 Mad 114 (116) (DB), *Govindasami v. R. Sami*. (A liberal view cannot be taken if it involves disregard of words of statute.)

(1864) 2 Mad H C R 268 (269) (DB), *Nayanivaru v. Venkataraya*. (No equitable construction can be put on statute of limitation.)

(26) 13 AIR 1926 Cal 65 (73) (DB), *Sarat Kamini v. Nagendra Nath*. (Apart from provisions of the Act itself there is no principle which can legitimately be invoked to add to or supplement its provisions.)

(16) 3 AIR 1916 Mad 350 (363) (DB), *Rajah of Ramnad v. Arunachallam Chettiar*. [See also (19) 6 AIR 1919 Cal 706 (707) (DB), *Deutsche Asiatische Bank v. Hiralall*. (Express statutory provision overrides common law rule.)

(41) 28 AIR 1941 Mad 449 (460) (FB), *Venkateswara v. Venkatesa*. (Equitable considerations are out of place when construing Limitation Act.)]

See also Note 6 to Section 9.

3. (26) 13 AIR 1926 Cal 65 (67) (DB), *Sarat Kamini v. Nagendra Nath*. (Per Mukerji J.)

(16) 3 AIR 1916 Mad 350 (363), *Raja of Ramnad v. Arunachallam*.

(28) 15 AIR 1928 Cal 646 (647) (SB), *Hari v. Parameshwar*.

See also Note 6 to Section 9.

4. (43) 30 AIR 1943 Sind 132 (134) (DB), *Md. Shah v. Abdul*. (S. 151, C. P. C. cannot be invoked to set at naught the provisions of Civil P. C. or Limitation Act.)

(24) 11 AIR 1924 All 668 (669), *Totaram v. Pannalal*.

(35) 22 AIR 1935 Lah 60 (61) (DB), *Jai Kishan v. Chiragh Din*.

(26) 13 AIR 1926 Lah 135 (135), *Kundan Lal v. Kanshi Ram*.

(22) 9 AIR 1922 Lah 266 (266), *Khairati v. Umar Din*. (Section 151, C. P. C., must not be used to defeat the imperative provisions of S. 3, Limitation Act.)

(20) 7 AIR 1920 Lah 261 (262), *Lal Devi v. Amarnath*.

(20) 7 AIR 1920 Lah 309 (310) (DB), *Bissa Mal v. Kesar Singh*.

(22) 9 AIR 1922 Mad 417 (421) (DB), *Ganpathi v. Krishnamachari*.

(35) 22 AIR 1935 Rang 466 (471) (DB), *K. P. L. S. S. Chettiar v. Official Receiver, Ramnad*. (The words "nothing in this Code" in S. 151, C. P. C., do not mean "nothing in this Code or any other law for the time being in force.")

(33) 20 AIR 1933 Rang 96 (98) (DB), *Ma Sein v. S. T. R. M. Firm*.

(35) 22 AIR 1935 Pesh 146 (147) (DB), *Ajab Khan v. Alaf Gul*.

(22) 9 AIR 1922 Pat 479 (480) (DB), *Ajodhya v. Phul Kuer*.

(24) 11 AIR 1924 All 446 (447), *Shib Prakash v. Jhinguria*.

(24) 11 AIR 1924 Mad 114 (115, 116) (DB), *Krishnaswami v. Chengalroya*.

See also Note 9 to Art. 164.

5. (67) 1 Agra 248 (249, 250) (DB), *Jehandar Khan v. Munnoo*.

6. (16) 3 AIR 1916 Cal 709 (709) (DB), *Mohendra v. Narendra*.

7. (70) 2 N W P H C R 173 (175) (DB), *Mahomed Museeh-ood-deen Khan v. Clara Jane Museeh-ood-deen*.

See also Section 13 Note 6.

- (4) The fact that the defendant was in jail does not entitle the plaintiff to an extended period of limitation.⁸
- (5) Time taken in obtaining the permission of the Government for suing a Native Prince under S. 86, Civil Procedure Code, cannot be deducted in computing the period of limitation for the suit.⁹
- (6) The Crown as such is not entitled to any exemption from limitation.¹⁰
- (7) An executing Court while rejecting an application for execution cannot extend the period of limitation by ordering that the decree-holder may file a fresh application within a certain period.¹¹
- (8) Juristic persons like other plaintiffs are subject to the law of limitation and enjoy no special privilege in this respect.¹²

See also S. 6 Note 23 and S. 9 Note 6.

3a. Extension of limitation in case of suits by displaced persons.—Section 8 of the Displaced Persons (Institution of Suits) Act (47 of 1948), as amended by the Displaced Persons (Institution of Suits and Legal Proceedings) Amendment Act (68 of 1950) provides as follows :

“Notwithstanding anything contained in S. 3 of the Indian Limitation Act, 1908, or in any special or local law, any suit or other legal proceeding by a displaced person —

- (a) where such suit or other legal proceeding is instituted in pursuance of S. 4 and the period of limitation expires or has expired on or after the 14th day of August, 1947, or
- (b) where such suit or other legal proceeding is instituted otherwise than in pursuance of S. 4 in respect of a cause of action which arises or has arisen in a place now situate within the territories of Pakistan and the period of limitation expires after the commencement of the Displaced Persons (Institution of Suits and Legal Proceedings) Amendment Act, 1950,

may be instituted at any time before the date of expiry of this Act.”

The Act extends to the whole of India except the State of Jammu and Kashmir and remains in force only upto 31-3-1952. For the definition of ‘displaced person,’ see S. 2 of that Act.

4. “Suit,” meaning of. — As seen in the Notes under S. 2, sub-s. (10), the word “suit” ordinarily means and, apart from some context, must be taken to mean a civil proceeding instituted by the

8. (‘69) 1869 Pun Re No. 39, *Janee v. Warris*.

See also Section 13 Note 4.

9. (‘29) 16 AIR 1929 Bom 14 (19), *Sayaji Rao v. Madhava Rao*.

See also Section 9 Note 6.

10. (‘81) 4 Mad 155 (156) (DB), *Appaya v. Collector of Vizagapatam*.

11. (‘09) 4 Ind Cas 958 (959) (Lah), *Rai Chand v. Jhande Khan*.

12. (‘38) 25 AIR 1938 Lah 369 (385) (FB), *Masjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar*.

Section 3
Note 4

presentation of a plaint.¹ The words "and liquidator" in the explanation to this section do not make a claim against a company in liquidation which is not instituted by the presentation of a plaint, a suit against the company so as to attract the provisions as to limitation applicable to such a suit. The explanation is not concerned with what is a suit but merely provides as to when a suit must be deemed to be instituted for purposes of limitation. The effect of the explanation is only that in the case of a suit against a company which is being wound up by the Court, the suit must be deemed to be instituted not on the date on which the plaint is actually presented to the proper officer of the Court but on the date on which the claim is first sent in to the official liquidator.²

Similarly, a claim by a company in liquidation which is not instituted by the presentation of a plaint, as for instance, an application under S. 186 of the Companies Act of 1913, by the official liquidator for recovery of money due from a contributory, is not a suit for the purposes of this section.³

Where a claim on which a suit is based is capable of being divided into parts, the suit is to be regarded as a separate suit in respect of each such part and the rule of limitation is to be applied to each such part separately. Thus, suppose rent is payable annually by A to B. B sues A for the arrears of rent due for five years. His suit is to be treated, for purposes of limitation, as a separate suit in respect of the rent for each year, so that, under article 110 the suit will be in time so far as regards the rent for the three years immediately preceding the institution of the suit and will be barred as regards the rent for the previous period.⁴ In such cases, the entire suit must not be dismissed on the ground of limitation.⁵

Similarly, a suit which comprises several reliefs or claims should be treated as a separate suit in regard to each such relief or claim, and the rule of limitation must be applied to each such claim or relief separately. Thus, each distinct claim or relief in a suit will be governed by its own period of limitation, and although the suit may be dismissed with reference to such of the reliefs or claims as are time-barred, it

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1. ('33) 20 AIR 1933 PC 63 (64) (PC), *Hansraj v. Dehra Dun Mussoorie Electric Tramway Co., Ltd.*
2. ('33) 20 AIR 1933 PC 63 (64) (PC), *Hansraj v. Dehra Dun Mussoorie Electric Tramway Co., Ltd.*
3. ('33) 20 AIR 1933 PC 63 (64) (PC), *Hansraj v. Dehra Dun Mussoorie Electric Tramway Co., Ltd.*
4. For cases, see Notes under Article 110.
[See also ('40) 27 AIR 1940 Cal 401 (401, 402), *Ranjit Kumar v. Kisori Mohan*. (Where a surety for a promisor denies liability on the ground of limitation, the plea of limitation can apply only to the debt and interest thereon, which it is alleged, had become barred by limitation at the time of the institution of the suit, and cannot apply to interest and charges which had not become barred or which have accrued subsequently.)]
5. ('65) 3 Suth W R Act X Rul 131 (131) (DB), *Nobokishen v. Gopal Shamunt*.

may be decreed with reference to the other reliefs or claims.⁶ For instance, a suit by a mortgagee which combines in itself both a claim against the mortgaged property as well as a claim for a personal decree against the mortgagor will be governed, as regards the claim against the mortgaged property, by article 132, and as regards the claim for a personal decree, by article 116, and although the suit may be out of time as regards the claim for a personal decree, it may be within time as regards the claim against the mortgaged property.⁷

See also Note 26.

5. Institution of suit, what constitutes. — The explanation to the section provides as to when a suit is to be deemed as instituted for purposes of limitation.

A comparison of the explanation with the provisions of the Civil Procedure Code¹ relating to the manner in which a suit can be instituted will show —

- (1) that the Code does not contain any express provision embodying the two exceptions contained in the explanation, and,
- (2) that while it may be possible under the Code to institute a suit even otherwise than by the *presentation of a plaint*, under the explanation to this section, a suit is instituted *only* on the presentation of a plaint to the proper officer except in the two cases specifically provided for.

6. ('41) 28 AIR 1941 Mad 786 (788), *Maha Latchayya v. Adi Seshayya*. (In considering limitation more than one period of limitation can be applied to different claims in one suit : A I R 1922 Lah 198 : 2 Lah 376 (FB), Rel. on.)

('36) 23 AIR 1936 Mad 804 (807) (DB), *Swami Kone v. Sankaravalia*. (Suit comprising prayer for declaration and for possession—Whole suit cannot be governed by Article 144.)

('27) 14 AIR 1927 Mad 350 (351), *Venkatasivaramdass v. Secretary of State*. (('06) 30 Mad 101 (FB), *Ramchandra v. Noorulla* distinguished.)

('22) 9 AIR 1922 Lah 198 (199) (FB), *Mahomed Ghasita v. Sirajuddin*. (It is nowhere laid down that only one article should govern whole suit though it may consist of several independent claims.)

('31) 18 AIR 1931 Lah 309 (309, 310) (DB), *Bhima Mal v. Rahmatullah*.

('81) 1881 Pun Re No. 116, *Dowlat v. Jivan*. (Suit by pawnee for money against defendant personally and against pawned property.)

('68) 10 Suth W R 71 (72), *Mazuffur Ally v. Girish Chandra*. (Plaintiff asking cancelment of survey award and also claiming to be restored to possession of land from which he was subsequently dispossessed — *Held* latter claim was entirely different cause of action.)

(1900) 24 Bom 260 (274) (FB), *Shrinivas v. Hanmant Chavdu*. (Combination of several claims would not in general deprive each claim of its own specific character and description.)

[See also ('49) 36 AIR 1949 Cal 174 (178) (DB), *Atikulla v. Md. Mobarak*. (Suit against a ward of Court comprising also a claim against him personally and not as a ward of Court—Extension of limitation under S. 10 (cc), Bengal Court of Wards Act 1879 does not apply to such claim.)]

See also Section 2 (10) Note 1.

7. ('30) 17 AIR 1930 Lah 993 (994) (DB), *Sahib Singh v. Gurdial Singh*.

('85) 7 All 502 (505) (PC), *Ram Din v. Kalka Prasad*.

Section 3 — Note 5

1. See Section 26 and Order 4 Rule 1 of the Civil Procedure Code.

Section 3
Note 5

Thus, the explanation is not a mere reproduction of the provisions of the Civil Procedure Code as to the manner of instituting a suit.

According to the explanation, a suit is instituted, in ordinary cases, when the plaint is presented to the proper officer. The word "plaint" has no statutory definition. It has been described as nothing more than a private memorial tendered to a Court in which a person sets forth his cause of action: the exhibition of an action in writing.² But the explanation contemplates the presentation of a *valid* plaint. The question as to what constitutes a valid plaint depends on other branches of law. Thus, a plaint on which the requisite court-fee has not been paid is not valid according to the Court-fees Act,³ and its presentation, therefore, will not save limitation under this section. But, under S. 149 and O. 7, R. 11, Civil Procedure Code, the Court has power to allow the court-fee to be paid at any time after the presentation of the plaint and on such payment it will be validated retrospectively from its original presentation.^{3a} But, a payment not made within the time allowed by the Court, but made afterwards, cannot validate the plaint retrospectively.⁴ For a discussion of the power of the Court under the above provisions, see the A.I.R. Commentaries on the Civil Procedure Code, 5th 1950 Edn., Notes under S. 149 and O. 7, R. 11.

The Civil Procedure Code prescribes various rules as to the form of the plaint and other particulars. But a non-compliance with these rules will not necessarily make the plaint invalid.⁵ Thus, a mere defect as to the signature and verification of the plaint does not invalidate the plaint so as to make its presentation useless for the purpose of saving limitation.⁶

2. ('99) 22 Mad 494 (502) (DB), *Assan v. Pathumma*.

('21) 8 AIR 1921 Sind 166 (168), *Mitsui Bussan Kaisha Ltd. v. Totaram*.

See Authors' Commentary on the Civil Procedure Code, 5th (1950) Edn., S. 26 Note 3.

3. See Court-fees Act, Sections 4, 6 and 28.

3a. ('38) 25 AIR 1938 Mad 560 (562) (DB), *Durairangam v. Govindarajulu*.

('37) 24 AIR 1937 Pat 550 (551, 553) (SB), *Bajinath v. Umeshwar*.

('10) 7 Ind Cas 578 (579) (DB) (Cal), *Budhan Shah v. Sita Nath*.

('08) 3 M L T 63 (70) (DB), *Saif Ali Khan v. Fazal Mehdi*. (Court cannot be prevented from receiving deficient court-fee and thereby validating plaint from original date of presentation because possible plea of limitation would be defeated thereby.)

4. ('05) 2 Cal L Jour 70 (72, 73) (DB), *Hara Kumar v. Sheikh Safatullah*. (But the date on which the deficiency is made up may be treated as the date on which the suit is instituted and if at that date it is not barred by limitation, it must not be dismissed on the ground of limitation.)

(1900) 27 Cal 376 (378) (DB), *Brahmomoyi Dasi v. Andi Si*.

('10) 7 Ind Cas 578 (579) (DB) (Cal), *Budhan Shah v. Sita Nath*.

('37) 24 AIR 1937 Pat 550 (553) (SB), *Baij Nath v. Umeshwar Singh*.

[See ('39) 26 AIR 1939 Cal 722 (722), *Dharma Nath v. Madhu Chandra*. (Extension to pay deficient court-fee granted under S. 149, Civil P. C., even after rejection of plaint—Order granting extension not set aside by superior Court in review or revision — Order whether right or wrong stands and suit cannot be dismissed as time barred.)]

5. ('21) 8 AIR 1921 Sind 166 (168), *Mitsui Bussan Kaisha Ltd. v. Totaram*.

6. See Authors' Commentary on the Civil Procedure Code, 5th (1950) Edn., Notes under O. 6 Rr. 14, 15.

The mere *presentation* of the plaint is sufficient to constitute the institution of a suit under the section;⁷ the *registration* of the plaint is not necessary for this purpose.⁸ But the presentation must be valid according to law. That is to say, the plaint must be presented by a duly authorized person⁹ and in a manner and under conditions which make the presentation valid under the law. What constitutes a valid presentation depends on the Civil Procedure Code and other enactments. The undermentioned cases¹⁰ illustrate the legal requirements in this respect.

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- (25) 12 AIR 1925 Mad 660 (668), *Govindoss v. Muthiah*.
 (21) 8 AIR 1921 Cal 277 (279) (DB), *Maharajah of Cooch Behar v. Mohendra Ranjan Rai*.
 (25) 12 AIR 1925 All 79 (80, 81) (DB), *Shib Deo v. Ram Prasad*.
 (32) 19 AIR 1932 Bom 367 (368), *Nanjibhai v. Popatlal*.
 [But see (1865) 4 Suth W R 81 (81), *Aboo Beebee v. Collector of Jessore*.
 (05) 2 Cal L Jour 11 (14) (DB), *Baroda Prasad v. Girijanath*.]
 7. (40) 44 Cal W N 604 (606) (DB), *Suproakash v. Amullya*. (Presentation of plaint within period of limitation—Suit will be deemed to be instituted on day when plaint is presented although leave under Cl. 12, Letters Patent, is granted beyond period of limitation.)
 (27) 14 AIR 1927 Bom 480 (482) (DB), *Dharamsi Morarji Chemical Co. Ltd. v. Ochhavlal*.
 [See also (29) 16 AIR 1929 Mad 480 (480), *Ponnusamy v. Kaliaperumal*. (Suit commences with presentation of plaint. See S. 26, O. 4, R. 1, C. P. C.)]
 8. (1865) 3 Suth W R 1 (1), *Juggobundhoo v. Gourmonee*.
 (71) 3 N W P H C R 202 (203) (DB), *Hidayut Ali v. Maeraj Begum*.
 (21) 8 AIR 1921 Cal 277 (279) (DB), *Maharajah of Cooch Behar v. Mohendra Ranjan*.
 (73) 19 Suth W R 159 (159) (DB), *Young v. MacCorkindale*.
 (67) 7 Suth W R 241 (241) (DB), *Irtaza Hossein v. Hurry Pershad*.
 (34) 21 AIR 1934 Bom 91 (93) (DB), *Ramgopal v. Ramsarup*. (Admission of plaint does not affect presentation for purposes of limitation.)
 9. For a discussion of what constitutes valid authority for the presentation of plaints and other proceedings see the Authors' Commentary on the Civil Procedure Code, 5th (1950) Edn., Notes under O. 3, Rr. 2 and 4.
 10. (27) 14 AIR 1927 Cal 477 (477, 478) (DB), *Narayan Chandra v. Dulal Chandra Dutta*. (Plaintiff major—Plaint signed by person as next friend — Plaint and presentation if valid.)
 (24) 11 AIR 1924 All 54 (55, 56) (DB), *Ruhul Amin v. Shankar Lal*. (Do.)
 (94) 21 Cal 866 (868) (DB), *Taqi Jan v. Obaidulla*. (Do.)
 (31) 18 AIR 1931 All 507 (511) (SB), *Wali Mohamed v. Ishak Ali*. (Do.)
 (18) 5 AIR 1918 Mad 916 (917) (DB), *Shanmuga v. Narayana*. (Do.)
 (97) 20 All 90 (91) (DB), *Sheorania v. Bharat Singh*. (Do.)
 (26) 13 AIR 1926 Lah 82 (82), *Amritsaria v. Gamun*. (Do.)
 (34) 21 AIR 1934 Bom 91 (93) (DB), *Ramgopal v. Ram Sarup*. (When leave is required, plaint to be submitted to Chamber Judge and leave obtained from him under Cl. 12, Letters Patent.)
 (75) 7 N W P H C R 5 (9) (DB), *Jaikuar v. Heera Lal*. (Place of presentation.)
 (22) 9 AIR 1922 Nag 167 (167), *Madhorao v. Manoharlal*. (Presentation after Court hours at residence of Judge is valid.)
 (10) 5 Ind Cas 689 (690, 691) (PC), *Ganpat Rao v. Anand Rao*. (Delay in filing a certificate under the Pensions Act condoned.)
 (10) 7 Ind Cas 986 (989) (DB) (Bom), *Baudu Subrao v. Jambu Tavnappa*. (Conciliator's certificate under Dekkhan Agriculturists' Relief Act—Production of, is not condition precedent to institution of suit—Court is **only** forbidden to hear the suit in absence of such certificate.)

Section 3
Note 5

A suit against a minor is instituted when the plaint is filed and not when the guardian *ad litem* is appointed. The reason is that the question of guardianship is a separate matter and relates not to the institution of the suit but to the right of the plaintiff to carry it on against the minor.^{10a}

The explanation requires that the presentation of the plaint must be made to the *proper officer*.¹¹ This necessarily implies that the

- (12) 15 Ind Cas 159 (160) (DB) (Cal), *Sajjad Hussain v. Ramlal*. (Failure to carry out statutory directions or judicial orders does not mean that Court should dismiss suit as improperly instituted.)
- (93) 17 Bom 169 (172) (DB), *Jijaji v. Balkrishna*. (Suit under Pensions Act, 1871, not bad *ab initio* because filed without Collector's certificate.)
- (1900) 1900 Pun L R 126 (127) (DB), *Lakha v. Munshi Ram*. (Presentation to be in person or through agent and not by post.)
- (70) 6 Mad H C R 136 (138) (DB), *Moparti Pitchi v. Vuppala Kondamma*. (Mode of presentation - Suit under S. 50, Madras Rent Recovery Act, 1865.)
- (85) 8 Mad 411 (413) (DB), *Sankaranarayana v. Kunjappa*.
- (01) 1901 Pun L R No. 31, p. 65 (66), *Imami v. Saddan*. (Appointment of guardian *ad litem* for minor essential for commencement of suit.)
- (05) 1905 Pun L R No. 179, p. 621 (624), *Sharif Hussain v. Mohammad Yusuf*. (Do.)
- (27) 14 AIR 1927 All 787 (787) (DB), *Har Lal v. Rudra Singh*. (Do.)
- (84) 1884 Bom P J 73 (74) (DB), *Parikh Gokaldas v. Raval Jalam*. (Do.)
- (30) 17 AIR 1930 All 644 (646) (DB), *Talib Ali v. Piarey Lal*. (Do.)
- (82) 4 All 37 (39) (DB), *Khem Karan v. Hardayal*. (Do.)
- (34) 21 AIR 1934 Cal 833 (833), *Prosanna Ram v. Anfar Ali*. (Do - Guardian for lunatic.)
- (95) 19 Bom 135 (137) (DB), *Kirparam v. Modia Dayalji*. (Do - Suit by lunatic.)
- (84) 1884 Pun Re No. 140, *Shivdial v. Aladia*. (Time of presentation.)
- (71) 16 Suth W R 230 (231) (DB), *Ununto Ram v. Protap Chunder*. (Plaint may be received on holiday.)
- (69) 11 Suth W R 537 (538) (DB), *Gobind Coomar v. Har Gopal*. (Revenue Courts cannot fix days when plaints shall not be received.)
- (25) 12 AIR 1925 Mad 201 (201), *Sinnappa v. Sinnappa*. (Plaint presented after office-hours to Munsif at his club—Refusal good.)
- (24) 11 AIR 1924 Mad 448 (448) (FB), *Sattayya v. Soundrathatchi*. (Presentation out of Court and office-hours valid if accepted by Judge.)
- 10a. (41) 28 AIR 1941 Nag 130 (131), *Abdul Aziz v. Sk. Amir*.
11. See the following cases as to when presentation is to the proper officer :
- (87) 1 C P L R 99 (99), *Vinayak v. Madho*. (Clerk of the Court.)
- (72) 18 Suth W R 172 (173) (DB), *Raj Chunder v. Joogal*. (Nazir—No.)
- (12) 14 Ind Cas 221 (224) (DB) (Oudh), *Habib v. Debi Bar*. (Clerk of the Court in absence of Deputy Commissioner.)
- (69) 6 Bom H C R A C 254 (256) (DB), *Nandrallabh v. Allibhai*. (Clerk in charge during vacation—No.)
- (16) 3 AIR 1916 Mad 3 (4) (FB), *The Receiver of the Nidadavole & Medur Estates v. Surappa azu*. (Collector's head-clerk if authorized.)
- (18) 5 AIR 1918 Mad 1152 (1153) (DB), *Radakrishna v. Swaminatha*. (Head clerks in Revenue Courts, under Madras Estates Land Act, 1908, if authorized.)
- (28) 15 AIR 1928 Lah 484 (486) (DB), *Sharam v. Sadhu*. (Judge appointed to receive and distribute plaints.)
- (34) 21 AIR 1934 Lah 622 (622), *Nur Mahammad v. Guhlaman*. (Officer authorized in Judge's absence.)
- (14) 1 AIR 1914 Mad 376 (376) (DB), *Apparu v. Ameer Sahib*. (Head clerk authorized to receive during office-hours only.)
- (21) 8 AIR 1921 Mad 654 (654, 655) (DB), *Umma'hu v. Pa'humma*. (Chief Ministerial officer.)

presentation of a plaint to a Court having no jurisdiction is not sufficient to save limitation.¹² Hence, where a suit is first instituted in a Court and on its being found that the Court has no jurisdiction the suit is filed in another Court which has jurisdiction, the suit must be deemed as instituted only when it is filed in the latter Court. In such a case, the suit in the latter Court cannot be considered as a *continuation* of the suit instituted in the wrong Court.¹³ In such cases, however, the time taken in prosecuting the suit in the wrong Court can (in proper cases) be deducted under S. 14.¹⁴ See also S. 14 Note 12.

But, where a plaint is presented in time to the proper Court but is returned for re-presentation to another Court to which the suit is

(10) 5 Ind Cas 330(331)(All), *Prabhu Narain v. Sarju*. (Munsarim of Court himself.)

12. (06) 9 Oudh Cas 1 (4) (DB), *Basant v. Bijai*.

(13) 18 Ind Cas 121 (122) (DB) (Cal), *Hari Das v. Sarat Chandra*. ((71) 16 Suth W R 47 *Khellat Chunder v. Nusseebunnissa*, distinguished.)

(71) 1871 Pun Re No. 64, *Heera Lall v. Sheo Buksh*.

(11) 12 Ind Cas 58 (60) (DB), *Mira Moiden v. Nalla Perumal*.

(73) 10 Bom H C R 495 (496) (DB), *Ramaya v. Mahomadbhai*. ((1868) 5 Bom H C R A C 117, *In re Ganesh Sadashiv*, overruled.)

(94) 1894 All W N 159 (159) (DB), *Prag Das v. Kallu*.

[See (16) 3 AIR 1916 Nag 31 (33), *Abu Baker Abdul Rahman & Co. v. Rambux*. (Observation.)]

[See also (41) 28 AIR 1941 Mad 711 (712) (DB), *Ramaswami v. Veerarayan*. (Presentation of plaint to Court not having jurisdiction to try suit is no institution of the suit though the plaint has been accepted as being in order and registered — But presentation to a Court which *has jurisdiction* but which is not the Court of the lowest grade competent to try the suit under S. 15, C. P. C., stands on a different footing and, if subsequently, the plaint is returned for presentation to a lower Court and is presented in such Court, it is only a continuation of the suit.)]

13. (29) 16 AIR 1929 P C 103 (107) (P C), *Ramdutt v. E. D. Sassoon & Co*. (Though subject-matter and parties are identical.)

(40) 27 AIR 1940 Mad 689 (690) (DB), *Chandrayya v. Seethanna*. (In this case the plaint was re-presented to same Court after striking out certain items of property so as to make suit within jurisdiction: (39) 26 AIR 1939 Mad 397. *Chandarayya v. Seethanna* reversed.)

(29) 16 AIR 1929 Lah 877 (878), *Surat Singh v. Nihal Kaur*.

(28) 15 AIR 1928 Bom 421 (422) (DB), *Hirachand v. G. I. P. Rly. Co*.

(30) 17 AIR 1930 Lah 394 (395) (DB), *Madho Ram v. Dhanam Singh*.

(12) 14 Ind Cas 157 (157, 158) (Mad), *Seshagiri Rao v. Vagra Velayudam*.

(28) 15 AIR 1928 Lah 484 (486) (DB), *Sharam Singh v. Sadhu Singh*.

(12) 13 Ind Cas 377 (380) (DB) (Cal), *Hedlot Khasia v. Ka Ran Khasiani*.

(26) 13 AIR 1926 Cal 355 (356) (DB), *Bimala Prosad v. Lal Moni Devi*. (If Court-fees Act is amended in the meantime, fees according to new Act to be paid.)

(95) 5 Mad L Jour 58 (59) (DB), *Nayinakamen v. Madureswara*. (Plaint re-presented in the same Court after striking out part of claim so as to bring suit within jurisdiction.)

[But see (15) 2 AIR 1915 All 344 (344) (DB), *Ganga Prosad v. Ramanand*.]

See also Section 14 Note 3.

14. (29) 16 AIR 1929 P C 103 (107, 108) (P C), *Ramdutt v. E. D. Sassoon & Co*,

(11) 12 Ind Cas 58 (60) (Mad), *Mira Mohidin v. Nalla Perumal*.

[See (40) 27 AIR 1940 Mad 689 (691) (DB), *Chandrayya v. Seethanna*. (Held plaintiff could not claim benefit of S. 14 as he deliberately undervalued his relief when he presented the plaint in the first instance.)

(95) 5 Mad L Jour 58 (59) (DB), *Nayinakamen v. Madureswara*. (Held, plaintiff was not entitled to benefit of S. 14.)]

Section 3
Note 5-6

transferred, the re-presentation of the plaint in the latter Court is only a continuation of the suit and the date of such re-presentation is immaterial for purposes of limitation.¹⁵ As to the power of the Court, while returning a plaint, to fix a time within which it may be re-presented, see the A.I.R. Commentaries on the Civil Procedure Code 5th (1950) Edn. O. 7, R. 10, Note 9.

6. Appeal, when preferred.—The question when an appeal is preferred is not dealt with by explanation to this section and depends on other branches of the law. Thus, O. 41, R. 1, Civil Procedure Code, provides for the manner in which an appeal from an original decree is to be preferred. Similarly, S. 419, Criminal Procedure Code, lays down the manner in which an appeal in criminal cases is to be preferred.

The following are illustrative of the requirements as to a valid institution of an appeal:

I. CIVIL APPEAL.

- (1) Every memorandum of appeal must be accompanied by a copy of the decree appealed from and, unless the appellate Court dispenses therewith, of the judgment on which it is founded.¹

15. ('41) 28 AIR 1941 Mad 711 (712) (DB), *Ramaswami v. Veerarayan*. (When a plaint has been presented to a Court having jurisdiction a transfer of the case to another forum as a result of finding as to the value of subject-matter does not mean the cancellation of the institution.)

(1865) 3 Suth W R 20 (21) (DB), *Thakuroodeen Mahomed v. Kurimbux*.

('95) 1895 Pun Re No. 7, *Seth Thandi Ram v. Mahdia*.

('16) 3 AIR 1916 Lah 202 (203), *Azam Ali v. Akhtar Hussain*. (Court in such cases should have itself sent case to transferee Court.)

[See also ('13) 16 Ind Cas 979 (979) (Lah), *Khota Ram v. Mauji Din*. (Appeal.)]

Section 3 — Note 6

1. ('44) 31 AIR 1944 Mad 90 (91), *Meera v. Md. Kyathi*. (Appellate Court granting time to file printed copies of judgment — Trial Court wrongly refusing application for copies — Appeal should not be dismissed for non-production of copies.)

('42) 29 AIR 1942 Oudh 349 (349) (D B), *Durga v. Rampal*. (Same rule applies to appeal from order as distinguished from decree.)

('32) 19 AIR 1932 Cal 589 (595) (DB), *Surendra v. Mohendra*.

('24) 11 AIR 1924 Nag 271 (273), *Pandu v. Rajeshwar*.

('20) 7 AIR 1920 Pat 280 (281), *Chaturbhuj v. Muhammad*.

('96) 9 C P L R 109 (109), *Narbadi v. Gajri*.

('26) 13 A I R 1926 Nag 57 (59, 60) (DB), *G. I. P. Rly Co. v. Radhakisan*. (Copy of judgment.)

('15) 2 AIR 1915 All 459 (460), *Gurprasad v. Ram Samajh*. (Copy of decree in connected case filed.)

('18) 5 AIR 1918 All 394 (396) (DB), *Quasin Ali v. Bhagwanta Kuer*.

('27) 14 AIR 1927 Lah 49 (49, 50) (DB), *Nur Din v. Secretary of State*. (Award under S. 26, Land Acquisition Act, 1921 is decree — Hence copy is necessary.)

('27) 14 AIR 1927 Lah 103 (104) (DB), *Mortan v. Woodfall*. (Copy of judgment.)

('28) 15 AIR 1928 Lah 263 (264) (D B), *Narasing Das v. Secretary of State*. (Award under Land Acquisition Act, 1921, is decree.)

('27) 14 AIR 1927 Lah 449 (451) (D B), *Labha Singh v. Basant Singh*. (Copy of complete judgment.)

('27) 14 AIR 1927 Lah 451 (452) (DB), *Mt. Fazl-ul-nissa v. Didar Hussain*. (Defective memo admitted — Objection at later stage may be barred.)

('22) 9 AIR 1922 Pat 580 (581) (DB), *Rijan Thakur v. Charitar*.

('15) 2 AIR 1915 Mad 493 (493, 494) (DB), *Avudai Ammal v. Ganapathi Iyer*.

- (23) 10 AIR 1923 Mad 482 (483), *Sundaram Iyer v. Muthuramalinga Sethupathi*.
 (14) 1 AIR 1914 Lah 265 (265), *Achhar Singh v. Nikku*.
 (21) 8 AIR 1921 Upp Bur 15 (15, 16), *Maung Po Saung v. Ma Mun*.
 (25) 12 AIR 1925 Nag 52 (53), *Baliram v. Ghasiram*. (Second appeal.)
 (11) 10 Ind Cas 866 (868) (Nag), *Parashram v. Likhan*.
 (19) 6 AIR 1919 Lah 125 (125), *Mangal v. Hirda*. (Decree not framed, not filed—
 Appeal to be adjourned.)
 (17) 4 AIR 1917 Lah 436 (437), *Dhanpat Mal v. Mela Mal*. (Copy of lower appellate Court's judgment.)
 (28) 15 AIR 1928 Nag 131 (132), *Ramchandra v. Mayaram*.
 (30) 17 AIR 1930 Rang 182 (183), *U Po Thet v. Hauk Pat*. (No dispensation with copy of decree.)
 (11) 9 Ind Cas 222 (223) (DB) (Lah), *Masum Begam v. Madan Mohan*. (Copy of appellate decree.)
 (11) 11 Ind Cas 8 (8) (Cal), *Keamat v. Abhooram*. (Do.)
 (12) 15 Ind Cas 140 (141) (DB), *Dhan Singh v. Khan Singh*. (Lower appellate Court's decree in cross-case.)
 (12) 17 Ind Cas 155 (156) (D B) (Cal), *Prosonna Kumari v. Ramchandra*. (Copy of decree.)
 (12) 17 Ind Cas 119 (120) (DB) (Cal), *Binapani Debi v. Shashibhushan*. (Do.)
 (12) 17 Ind Cas 99 (100) (DB) (Cal), *Hemchandra v. Jadubchandra*. (Do.)
 (12) 14 Ind Cas 1006 (1006) (DB) (Cal), *Kamala v. Tarapada*. (Appeal from order having effect of decree.)
 (37) 24 AIR 1937 Oudh 65 (66) (D B), *Lallu Ram v. Deputy Commissioner, Kheri*. (Decree filed late but within limitation.)
 (25) 12 AIR 1925 Lah 438 (438, 439) (D B), *Mubarak Ali v. Secretary of State*. (Award is decree. See S. 26, Land Acquisition Act, 1921.)
 (28) 15 AIR 1928 Lah 216 (218) (DB), *Secretary of State v. Tirath Ram*. (Do.)
 (15) 2 AIR 1915 Cal 666 (667) (D B), *Abdul Hakim v. Hemchandra*. (Appellate decree.)
 (95) 17 All 537 (553) (FB), *Bhavani Prasad v. Kallu*. (Observation.)
 (79) 1879 Pun Re No. 7, *Bhag Singh v. Jhanda Singh*.
 (79) 1879 Pun Re No. 147, *Nihal Singh v. Ishwar Singh*.
 (87) 1887 Pun Re No. 53, *Akbar Ali v. Ram Chand*.
 (99) 1899 Pun Re No. 19, *Mt. Jaindi v. Kanshi Ram*.
 (03) 1903 Pun L R No. 91, p. 237 (240) (DB), *C. v. C. & B.* (Order rejecting petition for dissolution of marriage is decree and appealable; vide Ss. 45 and 55- Divorce Act, IV of 1869 and S. 2, C. P. C.)
 (22) 9 AIR 1922 Lah 170 (171) (D B), *Chiniot Municipal Committee v. Bashi Ram*. (Letters Patent Appeal.)
 (22) 9 AIR 1922 Lah 191 (192), *Bashi Ram v. Chiniot Municipality*.
 (21) 8 AIR 1921 Lah 266 (267) (D B), *Daim v. Hayat*. (Translation, instead of copy of decree.)
 (92) 1892 All W N 47 (48) (DB), *Gulab Debi v. Shankar Lal*.
 (97) 1897 All W N 15 (15), *Wahid Nur Khan v. Haqdad Khan*.
 (15) 2 AIR 1915 Cal 693 (694) (DB), *Sitikantha Roy v. Bipradas*. (Decrees if two, both to be filed.)
 (90) 12 All 129 (138, 139) (FB), *Balkaran v. Gobind Nath*.
 [See (46) 33 AIR 1946 Mad 163 (164), *In re Ramappa*, (Civil P. C., O. 41A. R. 2 (Mad)—Rule requiring appellant to produce requisite number of printed copies of judgment is not mandatory—Production of copies can be dispensed with—(45) 32 AIR 1945 Mad 353, *In re Jami Kurmanna* dissented from.)
 (13) 19 Ind Cas 438 (439) (DB) (Lah), *Harjas Mal v. Kahni*. (Copy of deposition filed by mistake.)]
 [But see (94) 4 Mad L Jour 121 (Jour), See Critical Note on 16 All 77, *Chamela Kuar v. Amir Khan*.
 (29) 16 AIR 1929 All 858 (858) (DB), *Santi Lal v. Raj Narain*. (Appeal from order under Provincial Insolvency Act, 1920.)]
 See also Section 4 Note 14.

Section 3
Note 6

- (2) In case of second appeals, a copy of the judgment of the Court of first instance must also be filed along with the memorandum of the second appeal if the filing of such copy is prescribed by the rules of the particular High Court.²
 - (3) An appeal by or against a minor is preferred when the memorandum of appeal is filed and not when the next friend or guardian *ad litem* is appointed.³
 - (4) The memorandum of appeal must be signed by the appellant or his pleader.⁴
 - (5) The memorandum of appeal must be presented⁵ by a duly authorised person.⁶
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2. ('22) 9 AIR 1922 All 490 (490) (F B), *Shib Dayal v. Jagannath*. (The recent amendment of O. 42, R. 1, C. P. C., by Allahabad High Court, however, dispenses with the filing of such copy.)
- ('21) 8 AIR 1921 All 23 (23) (DB), *Bhairon v. Ram Autar*. (Do.)
- ('21) 8 AIR 1921 All 242 (243) (DB), *Bindeshari Pershad v. Afzal Khan*. (Do.)
- ('27) 14 AIR 1927 Lah 423 (424), *Niadar v. Bhartu*. (Copy with High Court in another appeal not sufficient.)
- ('27) 14 AIR 1927 Lah 721 (722), *Ghulam Muhammad v. Rura*.
- ('23) 10 AIR 1923 Lah 208 (208), *Nazko v. Gopal*.
- ('30) 17 AIR 1930 Lah 935 (936) (DB), *Arif v. Akbarali*.
- ('29) 16 AIR 1929 Lah 771 (772) (DB), *Reasat Ali v. Mahfu:ali*. (Copy to be certified under S. 76, Evidence Act.)
- ('21) 3 Lah L Jour 255 (256), *Dyala v. Hiru*.
- ('37) 24 AIR 1937 Pesh 50 (50) (DB), *Abdul Qayum v. Firm Maulvi Haji Md.*
- ('82) 4 Mad 419 (420) (FB), *Pirathi Singh v. Vencataramanayyan*.
- ('23) 10 AIR 1923 Lah 144 (144), *Lakshmi Das v. Meharchand*.
- ('23) 10 AIR 1923 Lah 95 (95), *Raja v. Kurria*. (AIR 1921 Lah 73 followed.)
- ('26) 13 AIR 1926 Lah 404 (404), *Firm Chhota Lal v. Firm Basdeb Mal*. (Un-attested copy allowed, attested being not available.)
- ('26) 13 AIR 1926 Lah 626 (626, 627) (D B), *Naul v. Mula*. (Appellant cannot avail himself of copy filed by respondent in cross-appeal.)
- ('21) 8 AIR 1921 Lah 73 (73), *Molu Mal v. Sri Ram*.
- ('24) 11 AIR 1924 Lah 41 (42) (DB), *Mahomed Hassan-ud-din v. Saif Ali*.
- ('28) 109 Ind Cas 727 (727) (Lah), *Bahadur Singh v. Sain*.
3. ('26) 13 AIR 1926 Lah 186 (186) (DB), *Ralla Singh v. Bishna*. (4 All 37 and 30 All 55 followed.)
- ('07) 30 All 55 (56) (DB), *Rupchand v. Dasodha*.
- ('81) 4 All 37 (39) (DB), *Khenkaran v. Hardayal*.
- ('36) 23 AIR 1936 Pat 153 (156) (DB), *Satyadava Narayan v. Tirbeni Prasad*. (Appointment, however, necessary for commencement.)
- [See ('30) 17 AIR 1930 All 456 (457) (DB), *Latafat Ali v. Yar Khan*. (Refusal by guardian *ad litem* to appeal—Next friend can appeal with application praying such appointment for himself.)]
4. See Civil Procedure Code, O. 41, R. 1.
5. ('39) 26 AIR 1939 Mad 669 (669, 670), *In re Gonappala Basappa*. (Presentation to second clerk of appellate Court as head clerk was on leave held sufficient.)
- (1900) 1900 Pun L R No. 133 p. 363 (364), *Kaim Din v. Nihal Singh*. (Mode of presentation.)
- ('08) 1908 Pun W R No. 71 p. 251, *Mela Mal v. Natha Singh*. (Do.)
- ('95) 8 C P L R 93 (93), *Kripasindhudas v. Kunjabandas Mafidar*. (Sending by post, not presentation. 8 Mad 411, *Sankaranarayana v. Kunjappa*, distinguished.)
- ('71) 3 N W P H C R 341 (342), *Taj Uldeen v. Ghafoor-ul-nissa*. (Placing on table when Judge is absent is no presentation.)
6. ('26) 13 AIR 1926 Bom 336 (336), *Mahomed Jafer v. Sheikh Ahmed*. (Vakalatnama.)

(6) The presentation must be to the proper Court.⁷

(7) A memorandum of appeal on which the requisite court-fee has not been paid is not valid,⁸ But the Court has power

(20) 7 AIR 1920 Lah 212 (213), *Khaira v. Nathu*. (Do.)

(21) 8 AIR 1921 All 210 (211), *Shambhu Nath v. Badri Das*. (Do.)

(26) 13 AIR 1926 All 252 (253), *Ram Rup v. Naik Ram*. (Do.)

(27) 14 AIR 1927 All 816 (816), *Loknath v. Sheo Saran*. (Do.)

[See (34) 21 AIR 1934 Pat 290 (292) (DB), *Binda Kuer v. Lalita Prasad*. (Application for leave to appeal to Privy Council — Vakalatnama in two sheets on behalf of four parties one signed by one and other by other three—Extension given under S. 5.)]

See the following cases bearing on the authority to present an appeal:

(44) 31 AIR 1944 Lah 131 (134) (DB), *Barkata v. Feroze Khan*. (Memo of appeal signed by a pleader duly authorised but actually presented by another pleader on oral instructions of former — Appeal is properly presented — Defect if any is cured by appearance of pleader duly authorised on several subsequent dates.)

(30) 17 AIR 1930 All 112 (112) (DB), *Mohammad Qamar v. Muhammad Salamat*. (Vakil's name and signature necessary.)

(94) 1894 All W N 131 (131) (DB), *Muhammad Ghulam v. Muhammad Abdul*. (Through mukhtar of appellant, irregular.)

(89) 16 Cal 250 (251) (DB), *Akshoy Koomar v. Chunder Mohan*.

(70) 6 Mad H C R 38 (39), *In re Kristnappah*. (Jail appeal.)

(14) 1 AIR 1914 All 536 (537) (DB), *Md. Ali Khan v. Jasram*. (Do.)

(13) 21 Ind Cas 444(445)(All), *Habeeb v. Naush Ali*. (Party to sign vakalatnama.) (1900) 22 All 331 (331, 332) (DB), *Shiam Karan v. Raghunandan*. (Authority to present, see cl. 8, Letters Patent, Allahabad.)

(11) 11 Ind Cas 387 (388) (Cal) (DB), *Sri Chandan Bhuya v. Haroo Sethi*. (Vakalatnama.)

(26) 13 AIR 1926 Lah 223 (224), *Allah Baksh v. Rohtak Municipality*. (Power may be filed subsequently.)

(25) 12 AIR 1925 Lah 331 (332), *Kura v. Udami*. (Do.)

(30) 17 AIR 1930 Lah 68 (69), *Boora Mal v. Tulsi Ram*. (Power of attorney.)

(32) 19 AIR 1932 Lah 134 (135), *Mangal Singh v. Babu Singh*. (Do.)

(20) 7 AIR 1920 Pat 581(582)(DB), *Sheikh Palat v. Sarwan Sahu*. (Vakalatname.)

(20) 7 AIR 1920 Nag 110 (111), *Masumbi v. Dongar Singh*. (Do.)

(21) 8 AIR 1921 Nag 27 (27, 28), *Chittar v. Lakshminarayan*. (Do.)

(32) 19 AIR 1932 Pat 3 (4) (DB), *Shyam Sunder v. Rahmatunnissa*. (Do.)

(32) 33 Pun L R No. 517 (517), *Mohamed Rafik v. Muhammad Yasin*. (Power may be filed subsequently.)

(09) 6 All L J 110n (110n), *Pokhpal Singh v. Damber Singh*.

(13) 19 Ind Cas 674 (674) (All), *Muhammad Ali v. Saktu*.

7. (28) 110 Ind Cas 533 (535) (DB) (Lah), *Mahomed Amin v. Chanan Mal*. (Appeal re-filed in proper Court after long delay.)

(04) 28 Bom 235 (237), *Daudbhai v. Emnabai*, (Execution proceedings appeal direct to High Court.)

(37) 24 AIR 1937 Nag 80 (82), *Zumberlal v. Sitaram*. (Additional District Judge is part of District Court.)

8. (47) 34 AIR 1947 Lah 210 (212, 213) (DB), *Balwant v. Jagjit*. (Appeal filed with insufficient court-fee — Time for making up deficiency not granted — Deficit court-fee paid beyond limitation — Appeal is barred by limitation—O. 7, R. 11 does not apply.)

(36) 165 I C 57 (57) (DB) (Mad), *Ayyappa v. Mari Muthu*.

(21) 8 AIR 1921 Lah 43 (44) (DB), *Shahu v. Bakri*.

(22) 9 AIR 1922 Lah 233 (234) (DB), *Umed Ali v. Municipal Committee, Jhang-Maghiana*.

(24) 11 AIR 1924 Lah 401 (401), *Shahadat v. Hukam Singh*. (Copy of order appealed against unstamped.)

(29) 16 AIR 1929 Nag 294 (295), *Shyam Lal v. Gauri Shankar*.

Section 3
Notes 6-7

under S. 149 of the Civil Procedure Code to allow court-fee to be paid after the date of the presentation of the appeal and where the Court does so, the memorandum of appeal becomes valid from the date of its original presentation.^{8a}

(s) See also the undermentioned cases.⁹

II. CRIMINAL APPEAL.

See the undermentioned cases.¹⁰

7. Application, when made. — The section does not provide anything as to when an *application* is to be deemed as made for purposes of limitation. Hence, the question depends on the Civil Procedure Code and the rules made thereunder. For instance, under

('35) 22 AIR 1935 Lah 124 (125), *Mohammad Fazal v. Ram Lal*. (Copy of decree insufficiently stamped.)

('34) 21 AIR 1934 Lah 272 (273), *Imam Din v. Sahib Din*. (Copy of order not stamped.)

('37) 24 AIR 1937 Lah 688 (688), *Ihsan Ilahi v. Ata Ullah*. (Section 149, C. P. C.)

('35) 22 AIR 1935 Pat 201 (201), *Singasan v. Gaya*.

('31) 18 AIR 1931 Rang 38 (38) (DB), *U Shin v. Maung Tha Gywe*. (Section 28 Court-fees Act.)

[See also ('37) 39 P L R 502 (503), *Har Narain v. Jai Gopal*. (Where the copies of judgment and decree accompanying the memo of appeal were not properly stamped till after the period of limitation had expired, the appeal held time-barred.)]

8a. ('37) 24 AIR 1937 Lah 688 (688), *Ihsan Ilahi v. Ata Ullah*.

('37) 24 AIR 1937 Oudh 414 (416) (DB), *Husain Ali Khan v. Ambika Prasad*.

9. ('45) 32 AIR 1945 Lah 15 (16) (DB), *Kuljas Rai v. Pala Singh*. (Appeal presented in time but subsequently returned — Loss of the memo of appeal — Fresh appeal filed — No question of limitation.)

('23) 10 AIR 1923 Lah 484 (485) (DB), *Shib Devi v. Ralla Ram*, (Memorandum written by a petition-writer is valid.)

('13) 18 Ind Cas 37 (39) (DB), *Fakirchand v. Municipal Committee of Hazro*. (Respondent's name in memo necessary.)

('76) 1 All 260 (260) (DB), *Jagan Nath v. Lalman*. (Court to specify time for correction of memo.)

('12) 14 Ind Cas 744 (744) (FB) (All), *Thakur Din v. Hari Das*. (Presentation at Judge's residence after Court hours, on last day of limitation, held sufficient.)

('23) 10 AIR 1923 Pat 150 (151), *Anand Ram v. Ram Ghulam*. (Memo of appeal received on holiday.)

10. ('92-96) 1 Upp Bur Rul 130 (130), *Bagawathi v. Queen-Empress*. (Presentation of criminal appeal to Superintendent of jail is equivalent for purposes of limitation to presentation in Court.)

('92-96) 1 Upp Bur Rul 129 (129), *Nga Po Thaung v. Queen-Empress*. (Criminal appeal — Presentation to officer in charge of jail in which appellant is confined is equivalent for purposes of limitation, to presentation to Court.)

('90) 1890 Pun Re No. 29 Cr. p. 96 (97), *Muhammad v. Empress*. (Appeal by prisoner presented to officer in charge of jail in time under S. 420, Cr. P. C. — Delay in forwarding it to proper Court is no delay of appellant.)

('86) 9 Mad 258 (259) (DB), *Queen-Empress v. Lingayya*. (Jail appeal — Presentation to Jail Superintendent equivalent to presentation to Court.)

('92) 15 Mad 137 (138) (DB), *Queen-Empress v. Arlappa*. (By post — No presentation.)

('96) 19 Mad 355 (355) (DB), *Queen-Empress v. Vasudevayya*. (Deposit in petition box — No presentation.)

('98) 21 Mad 114 (115), *Queen-Empress v. Ramasami*. (Pleader through his clerk.)

the rules of the various High Courts, an application to the High Court is sometimes required to be made by means of what is known as "a notice of motion." The procedure of a notice of motion consists in the fact that first, the proper officer of the Court is moved to issue a notice to the opposite party informing him that on a certain date therein specified, the person at whose instance the notice is issued will make a certain application to the Court. The question has arisen whether the date on which the application must be deemed as made for purposes of limitation is the date on which the proper officer of the Court is moved to issue the notice to the other side, or the date on which the application is made to the Court. There is a conflict of decisions on the question.¹ For full discussion of this point, see Note 3 to Art. 183. For further illustrations, see the undermentioned cases.²

Section 3 — Note 7

1. (24) 11 AIR 1924 Bom 36 (39) (DB), *Venkapaiya v. Nazerally*. (Date of moving proper officer of Court is date of application.)
- ('29) 16 AIR 1929 Cal 193 (194), *Atarmoni Dasi v. Bepin Behari*. (Do.)
- ('07) 17 Mad L Jour 215 (216) (DB), *Kuttayan v. Manna Ellappa*. (Do — Even though affidavits supporting application are filed subsequently.)
- ('93) 20 Cal 899 (902, 903) (DB), *Khetter Mohun v. Kassy Nath*. (Date of application to Court is date on which it is made.)
- ('24) 11 AIR 1924 Bom 289 (289), *Nazerally v. Venkapaiya*. (Do. — 17 M L J 215 distinguished.)
- ('04) 31 Cal 150 (154), *Hinga Bibee v. Munna Bibee*. (Do. — 20 Cal 899 followed.)
2. ('41) 28 AIR 1941 Oudh 169 (171) (DB), *All India Barai Mahasaleha v. Jangi Lal*. (Application under Sch. II para 20 presented by a pleader whose certificate had expired before date of presentation — Presentation is irregular and cannot be cured at appellate stage when application has become barred by time.)
- ('38) 25 AIR 1938 Nag 46 (47), *Kisanlal v. Narain*. (Court or officer has discretion to accept application presented beyond office hours — Execution application to proper officer beyond office hours on last day of limitation — Presentation is proper.)
- ('37) 24 AIR 1937 Mad 239 (240) (DB), *Nandamani v. Modono Mohono Deo*. (Application filed by pleader having no written authority — Pleader has no power or capacity to act — Application has no legal effect as not having been made in accordance with law.)
- ('78) 1 Cal L R 291 (291), *Desputty v. Doolar* (Application may be made at any time in the day.)
- ('03) 26 Mad 101 (103) (DB), *Raghunatha v. Venkatesa*. (Order 21 Rule 17, C. P. C., no doubt contemplates that an unverified petition may be returned for amendment but it does not follow that a petition which is not verified is an application which will prevent the operation of the statute of limitation.)
- ('22) 9 AIR 1922 P C 225 (226) (P C), *Thiruvengataswamy v. Pavadai*. (Presentation of execution application — Pleader appointed by agent of party under special power held entitled to present on behalf of party.)
- ('24) 11 AIR 1924 All 804 (805), *Santi Lal v. Raj Narain*. (Application should be allowed to be signed by parties by way of amendment where their signature is necessary but had not originally been made.)
- ('70) 1870 Pun Re No. 43, *Goor Charan v. Roosee*. (Petition could be legally received on a Gazetted holiday, where the Court had given notice that it would receive such petitions on such holiday.)
- ('89) 12 All 57 (59) (DB), *Munro v. Cawnpore Municipal Board*. (Presentation of application to Munsarim of the District Court instead of to the Judge held improper.)
- ('37) 24 AIR 1937 Lah 720 (720), *Lorindchand v. Lorindchand*. (Time given under S. 149, C. P. C., to pay court-fee on an application — Court-fee paid within time but beyond limitation — Application is not barred.)

Section 3
Note 8

8. "Period of limitation prescribed therefor by the first schedule." — The article in the first schedule applicable to a suit must be determined with reference to the nature of the plaintiff's claim.¹ Where the suit as framed falls under an article which allows a longer period of limitation, it is not for the defendant to say that the suit ought to have been framed in a different manner so as to make another article, which provides a shorter period, applicable.² But, in determining the nature of the plaintiff's claim, regard must be had to the *substance* of the claim and not merely to the formal and verbal expression of it.³ Further, where the facts found are different from those alleged in the plaint, and the plaintiff asks for relief on the basis of facts found, the question of limitation must be

Section 3 — Note 8

1. ('50) 37 AIR 1950 Bom 401 (Prs. 9, 10) (DB), *Gulabchand v. Suryaji Rao*. (The provisions of the Limitation Act applicable to a suit can only be ascertained on the allegations made in the plaint and the reliefs prayed for and not by speculating as to what relief the plaintiff should have prayed for.)
 - ('45) 32 AIR 1945 Lah 164 (166) (DB), *Punjab Government v. Baij Nath*. (It is not the basis of a suit or the recitals of events given in the plaint that ordinarily determine the application of an article of the Lim. Act but it is the relief and the cause of action on which the suit is founded that determines the article of the Act applicable to the case.)
 - ('26) 13 AIR 1926 Mad 1190 (1192) (DB), *Narayana v. Venkataswamy*. (When applying law of limitation the pleadings and not result of suit is to be looked at.)
 - ('33) 20 AIR 1933 Lah 404 (405) (DB), *Des Raj Hukam Chand v. Lachhi Ram Prabh Dayal*. (And not on the basis of defence set up.)
 - ('33) 20 AIR 1933 Lah 491 (492), *Umrî v. Kalu*. (Limitation must be dependent to some extent on the form and substance of suit.)
 - ('33) 20 AIR 1933 Bom 276 (281) (DB), *Shri Sharda Peeth Math v. Shri Rajarajeswarashram*.
 - ('27) 14 AIR 1927 Nag 10 (12), *Secy. of State v. Bagmal Kisan Dayal*.
 - ('32) 19 AIR 1932 All 358 (359) (DB), *Zia Uddin v. Akbar Ali*.
[See also ('38) 25 AIR 1938 Nag 335 (339) (FB), *Asaram v. Ludheshwar*.
 2. ('32) 19 AIR 1932 All 358 (359, 360) (DB), *Zia Uddin v. Akbar Ali*.
[See ('75) 12 Bom H C R 97 (112), *Dayal v. Khataw*. (Suit for contribution by one partner against some other partners—Suit held maintainable in the circumstances of the case - Defendant pleading that if general accounts are taken, it would be found that nothing was due from him but that the plaintiff's right to have such accounts taken was barred by limitation — Held that such a defence was not open to the defendant.)]
- See also Preamble, Note 13.
3. ('42) 29 AIR 1942 Oudh 33 (37) (DB), *Mohammad Bakhsh v. Allah Din*. (For the purpose of considering which article of the Lim. Act applies, Courts should have regard to the suit, not as framed but to the suit as it ought to have been framed. ('23) 10 AIR 1923 Bom 62 (DB), *Nagabhatta v. Nagappa*, Rel. on.)
 - ('34) 21 AIR 1934 Lah 725 (727) (DB), *Milkha Singh v. Ram Kishen*. (Case under Punjab Limitation (Custom) Act, I of 1920.)
 - ('24) 11 AIR 1924 Nag 125 (126, 127, 128), *Narbadaprasad v. Akbar Khan*.
 - ('29) 16 AIR 1929 Mad 313 (317) (DB), *Ramaswamy v. Govindammal*.
 - ('25) 12 AIR 1925 Lah 385 (386) (DB), *Kaura v. Ram Chand*.
 - ('27) 14 AIR 1927 Lah 826 (827), *Kirpa Ram v. Sawan Mal*. (A plaintiff by wording of clever plaint cannot avoid the proper limitation for his suit.)
- See also Articles 142 and 144, Note 3.

determined with reference to such facts and not the facts alleged in the plaint.⁴

Where a decree passed by a Court in a Native State is transferred for execution to a Court in British India, an application to the latter Court for the execution of the decree is governed by the law of limitation contained in this Act and not by the law in force in the Native State : the principle being that a proceeding must be governed by the law of limitation applicable to the place wherein it is brought.⁵ See Note 2 under section 11.

8a. Special or local law—Applicability of S. 3.—See Notes on S. 29.

9. "Shall be dismissed." — The section requires that a suit or other proceeding instituted after the period of limitation shall be *dismissed*.¹ This, however, does not fetter any power that the Court may have under O. 23, R. 1 of the Civil Procedure Code, to allow a suit to be *withdrawn*.²

The procedure of *dismissal* on the ground of limitation applies only where a proceeding has been *duly* instituted. Where the proceeding has not been duly instituted, the proper procedure is to *reject* it and not to *dismiss* it.³

An order dismissing a suit or appeal from a decree as being barred by limitation is a decree.⁴

See also Note 35.

4. ('29) 16 AIR 1929 Nag 124 (125), *Ibrahim Khan v. Nagoji*.

See also Preamble, Note 23.

5. ('16) 3 AIR 1916 Bom 200 (202) (DB), *Nabibhai v. Dayabhai*.

Section 3—Note 9

1. ('35) 22 AIR 1935 Pat 177 (178) (DB), *Nanak Ram Motilal v. Jugal Kishore Marwari*. (Appeal prohibited or barred by time — It cannot be treated as revision application.)

('17) 4 AIR 1917 Cal 79 (80) (DB), *Barkat Ali v. Basant Nunia*. (Where proceeding is dismissed, law under which and facts on which suit is barred must be stated.)

('92-96) 1 Upp Bur Rul 130 (130), *Bagawathi v. Queen-Empress*. (Held that returning an appeal on ground of limitation is not correct procedure — It must be *rejected* — Submitted that the proper procedure is to *dismiss* the appeal.)

[See also ('42) 29 AIR 1942 Pat 335 (337) (DB), *Bauwari v. Ramhari*. (Provisions are mandatory — Limitation cannot be applied on equitable grounds.)

('40) 27 AIR 1940 All 29 (31) (DB), *Asharfi Lal v. Zamir Fatima Bibi*. (Even causes of action which have accrued before the enactment of a law of limitation are affected.)]

2. ('18) 5 AIR 1918 Sind 6 (8), *Ludhomal v. Secretary of State*. (Withdrawal not allowed — Bar of limitation not formal defect under O. 23, R. 1 (2) (a), C. P. Code and there was no sufficient ground for allowing withdrawal under clause (b) of that sub-rule.)

('10) 6 Ind Cas 285 (285) (Mad), *Valliammai v. Shanmugam*. (Withdrawal not allowed.)

[See ('82) 6 Bom 103 (107), *Narronji v. Mugniram*. (Court may allow the plaintiff to withdraw to enable him to sue in foreign country.)]

3. ('30) 17 AIR 1930 All 112 (112) (DB), *Muhammad Qamar Shah Khan v. Muhammad Salamat Ali Khan*. (Presentation of memo of appeal by unauthorized person.)

4. ('84) 7 All 42 (43, 44) (DB), *Gulab Rai v. Mangli Lal*.

('86) 12 Cal 80 (81) (DB), *Gunga Dass Dey v. Ramjoy Dey*.

Section 3
Notes 10-12

10. "Although limitation has not been set up as a defence." — Under this section where the Court finds that the suit, appeal or application before it has been instituted after the period of limitation, the Court is bound to dismiss such suit or other proceeding although limitation may not have been set up as a defence.¹ In other words, the bar of limitation under this section does not depend on its being set up by any party. See also Note 2 above.

11. Explanation to the section. — See Notes 4 and 5 above.

12. Pauper proceedings and limitation. — According to the explanation to the section, a suit by a pauper must be deemed as instituted on the day on which the application for leave to sue as a pauper is made.¹ Such application must be signed and verified in the manner prescribed for the verification of pleadings (O. 33, R. 2, C. P. C.). But such signature and verification are not essential for the consti-

('85) 9 Bom 452 (453) (DB), *Rajhunath Gopal v. Nilu Nathaji*.

('04) 27 Mad 21 (22) (DB), *Saminathan v. Venkatasubba*.

[See ('41) 28 AIR 1941 Pat 108 (109), *Gajadhar v. Motichand*. (Rejection of memo of appeal as being out of time is a decree and is appealable.)]

Section 3—Note 10

1. ('48) 35 AIR 1948 Nag 41 (44) (DB), *Alaf v. Kurban*.

('35) 22 AIR 1935 PC 85 (88) (PC), *Maqbul v. Onkar*.

('38) 25 AIR 1938 All 89 (90) (DB), *Collector of Benares v. Jai Narain*.

('35) 22 AIR 1935 All 946 (948, 949) (FB), *Udeypal Singh v. Lakshmi Chand*.

('34) 21 AIR 1934 All 386 (387) (DB), *Radha Mohan v. Amichand*. (12 All 461 followed.)

('35) 22 AIR 1935 All 92 (93) (DB), *Sudama v. Bisheshar*. (Appeal.)

('16) 3 AIR 1916 All 324 (325) (DB), *Beni Prasad v. Lajja Ram*.

('89) 11 All 438 (454) (DB), *Parmanand v. Sahib Ali*.

('26) 13 AIR 1926 Bom 54 (55) (DB), *Visveshwar v. Sadashiv*.

('17) 4 AIR 1917 Cal 188 (192) (DB), *Asutosh v. Upendra*.

('16) 3 AIR 1916 Cal 651 (652, 653) (DB), *Tara Sankar v. Nasaruddi*. (Application to set aside *ex parte* decree.)

('02) 29 Cal 167 (185) (PC), *Ghoolam Gilani v. Mahammad Hasan*.

('75) 24 Suth W R 339 (340) (DB), *Wodoy Tara v. Syed Abdul Jubbar*.

('90) 12 All 461 (483) (FB), *Bechi v. Ahsanullah*.

[See also ('32) 19 AIR 1932 All 16 (18) (DB), *Shariful Hasan v. Lachmi Narain*.]

Section 3 — Note 12

1. ('39) 26 AIR 1939 Bom 418 (419), *Keshavlal v. Bai Dahi*.

('36) 23 AIR 1936 Mad 853 (854), *Jogarao v. Chinnayya*.

(1864) 1864 Suth W R 53 (53) (FB), *Golucknath v. Seetaram*. (Case under Act of 1859 which did not contain any provision corresponding to the Explanation.)

('67) 4 Bom H O R A C 39 (40), *Dhavle v. Samvat*. (Do.)

[See ('44) 31 AIR 1944 Bom 63 (67), *Umanrao v. Pramlal*. (The explanation is intended to show when limitation begins to run on a suit being instituted and not to affirm that an application for leave to sue as a pauper is tantamount to the filing a suit.)]

[See also ('73) 1873 Bom P J 1, *Balwantrao v. Chabildas*. (Date of presentation and not of registration of petition after it is permitted, is commencement of suit.)]

('40) 27 A I R 1940 Oudh 441 (442) (DB), *Raisuddin v. Basti Sugar Mills Ltd*. (For the purposes of S. 10, C. P. C., the plaint in a suit in *forma pauperis* should be deemed to have been filed on the date when the application for leave to sue as pauper was presented and not on the date when the application was allowed and the suit registered.)]

tution of the application and although they are made on a later day, the application must be deemed as made on the date on which it was originally presented.²

Section 3
Notes 12-13

The provision in the explanation to the section as to a suit by a pauper applies only to cases where a person is allowed to sue as a pauper and does not apply to cases where leave to sue as a pauper is refused and full court-fee is paid thereafter.³ Where during the pendency of an application for leave to sue in *forma pauperis* the applicant pays the full court-fee the suit must be deemed as instituted when the application for leave is filed, and not when the court-fee is paid.⁴ Where the application for leave is refused, the question arises whether the application for leave to sue as a pauper (which under O. 33, R. 2 of the Civil Procedure Code is required to contain all the particulars of a plaint) may be treated as a plaint so as to enable the Court under S. 149, Civil Procedure Code, to extend the time for the payment of the court-fees so that the date of the presentation of the application could be treated as the date of the institution of the suit notwithstanding the omission to pay the court-fee at such date. For a discussion of the subject, see the A. I. R. Commentaries on the Civil Procedure Code, 5th (1950) Edition, O. 33, R. 7, Notes 5 and 6. See also S. 5 Note 29 and Art. 170, Note 6.

The explanation does not provide when an appeal in *forma pauperis* to be deemed as preferred. But, under O. 41, R. 1 and O. 44, R. 1, Civil Procedure Code, such appeal must be deemed as preferred on the date on which the application for leave to appeal as pauper is filed. As to the date up to which limitation is to be calculated where leave to appeal as pauper is refused and full court-fee is paid thereafter or where full court-fee is paid pending the application for leave, see the A. I. R. Commentaries on the Civil Procedure Code, 5th (1950) Edn., O. 44, R. 1, Note 7.

As to the power of the Court to consider whether the suit is barred by limitation while deciding whether a person should be allowed to sue as a pauper, see the A. I. R. Commentaries on the Civil Procedure Code, 5th (1950) Edition, O. 33, R. 5, Note 5.

13. Company in liquidation — Proceedings by or against.

—Proceedings for the winding up of a company do not stop the running of limitation under the Limitation Act both with reference to suits and other proceedings *against* as well as those *on behalf* of the

2. ('31) 18 AIR 1931 Bom 47 (49), *Vora v. Japan Cotton Trading Co. Ltd.*

3. ('43) 30 AIR 1943 Bom 292 (296, 297) (DB), *Mahadev v. Bhikaji.*

('39) 26 AIR 1939 Cal 394 (398), *Biswa Nath v. Khejerali Molla.*

('01) 28 Cal 427 (432) (DB), *Janakdhary v. Janki.*

4. ('49) 36 AIR 1949 Pat 465 (Pr 3) (DB), *Amar Rai v. Dharichhan Rai.* (Observations in AIR 1936 All 584 (FB), *Chunna Mal v. Bhagwant Kishore* held *obiter.*) [See also ('43) 30 AIR 1943 Bom 292 (296, 297) (DB), *Mahadev v. Bhikaji.* (Pauper application — Order refusing leave — Subsequent grant of time for payment of court-fee for regular suit — Date of institution of suit — Plaintiff cannot avail himself of time spent in pauper proceedings to save limitation.)]

Section 3
Notes 13-14

company.¹ Hence, with regard to such proceedings, limitation must be calculated up to the very date of their institution. But in the case of a *suit against* a company which is being wound up by the Court, the date of the institution is, for purposes of limitation, advanced to an earlier date, *viz.*, the date on which the claim was first sent in to the official liquidator² (*vide* explanation to the section).

An application by the official liquidator under S. 186 of the Companies Act, 1913, for the recovery of money due from a contributory is neither a suit nor an application which is governed by this Act and hence is not directly subject to any period of limitation. But, as the expression "money due" in the above section means money which is due and recoverable by suit, such an application will not be maintainable after the expiry of limitation for a *suit* for the money.³

The liability of a contributory to pay money due on shares in a company in liquidation is a statutory liability under section 156, Companies Act, 1913, and is enforceable even after a *suit* for such money may be barred by limitation.⁴

A claim against a company in liquidation which is not made by the presentation of a plaint is not a suit and is not directly subject to any period of limitation.⁵ Such claim, however, would be allowed if a *suit* for its enforcement would have been within time at the date of the winding up order and would fail if such suit would have been time-barred at such date.⁶

The order of a Court under the Companies Act, 1913, is enforceable as a decree (*vide* section 199 of that Act) and hence, an application for the execution of such an order is governed by this Act.⁷

See also Note 26.

14. Limitation bars remedy but does not destroy right.—This section only bars the *remedy* but does not destroy the *right* to which the remedy relates. Such right continues to exist notwith-

Section 3 — Note 13

1. ('33) 20 AIR 1933 P C 63 (66) (P C), *Hansraj v. Dehra Dun Mussoorie Electric Tramway Co. Ltd.*
2. ('33) 20 AIR 1933 P C 63 (64) (PC), *Hansraj v. Dehra Dun Mussoorie Electric Tramway Co. Ltd.*
3. ('33) 20 A I R 1933 P C 63 (64, 66) (P C), *Hansraj v. Dehra Dun Mussoorie Electric Tramway Co. Ltd.*
- ('24) 11 A I R 1924 Lah 53 (54) (DB), *Sri Narain v. Liquidator, Union Bank of India.* (The words "at any time" in S. 186, Companies Act, mean in course of liquidation proceedings.)
- See also Note 26.
4. ('16) 3 A I R 1916 All 317 (318) (DB), *Jagannath Prasad v. U.-P. Flour and Oil Mills Co. Ltd.* See also Note 26.
5. ('33) 20 A I R 1933 P C 63 (64) (PC), *Hansraj v. Dehra Dun Mussoorie Electric Tramway Co. Ltd.*
6. ('27) 14 AIR 1927 All 161 (162) (FB), *Upper India Rice Mills Ltd. v. Jaunpur Sugar Factory Ltd.*
7. ('26) 13 A I R 1926 Oudh 289 (290) (DB), *Peoples Industrial Bank Ltd., Allahabad v. Mahesh Charan.*

standing that the remedy is barred by limitation. But there are certain special cases in which, on the remedy becoming barred by limitation, the right itself is destroyed. Thus, under section 28 of the Act, on a suit for possession of certain property becoming barred by limitation, the *right* to the property itself is destroyed. Except in such special cases, which are specifically provided for, the fact that a remedy is barred by limitation does not by itself put an end to the right to which the remedy relates.¹ But although the *existence* of the right is not affected by the remedy becoming barred by limitation, the fact that the remedy is so barred may prevent the right from being available in some *other* way also. In what other ways the right can be availed of and whether its availability in a particular manner is prevented by the suit or other proceeding being barred by limitation depend on other branches of law. The following are some of the points bearing on the subject :

- (1) Although a *suit* to enforce a right may be barred by limitation, a *defence* based on such a right is not barred. (See Note 15.)
- (2) Where after the expiry of limitation for a suit for the recovery of a debt the debtor pays the debt to the creditor, he cannot claim back the amount.²

Section 3 — Note 14

1. ('50) 37 A I R 1950 All 598 (Pr 16) (F B), *Rameshwar v. Ganga*. (Though the right remains, it cannot be enforced by judicial process.)
 - ('50) 37 AIR 1950 All 7 (Pr 7), *Bal Jit v. Chand Kiran*.
 - ('49) 36 AIR 1949 East Punj 29 (32) (DB), *Ram Sarup v. Ram Chandur*.
 - ('47) 34 AIR 1947 Bom 375 (377) (DB), *Muppanna v. Shree Gajanan Urban Co-Op. Bank*.
 - ('47) 34 A I R 1947 Oudh 195 (199) (F B), *Deputy Commr., Sultanpur v. Kallu Mal*.
 - ('41) 28 AIR 1941 All 278 (279), *Thakur Prasad v. Official Liquidator, Benares Bank, Ltd.* (The right remains, but the remedy is destroyed.)
 - ('39) 26 A I R 1939 Bom 494 (496), *Surat Borough Municipality v. Sarifa Karunnissa*.
 - ('39) 26 AIR 1939 Cal 163 (166) (DB), *Nakul Chandra v. Kalipada*.
 - ('39) 26 AIR 1939 Pat 138 (139) (DB), *Baskuar v. Gaya Municipality*.
 - ('31) 18 AIR 1931 All 635 (649) (FB), *Ram Karan v. Ram Das*.
 - ('32) 19 AIR 1932 All 543 (544) (DB), *Bhajja v. Muhammad Said Khan*.
 - ('32) 19 AIR 1932 All 199 (206) (DB), *Abdul Rafiq v. Bhajan*.
 - ('30) 17 AIR 1930 All 858 (860) (DB), *Mahomed Raza v. Zahoor*.
 - ('35) 22 A I R 1935 Bom 326 (328, 329), *Gopal v. Jagannath*. (Section 3 refers only to the remedy of plaintiff and not to his rights.)
 - ('21) 8 AIR 1921 Lah 351 (352) (DB), *Akbar Hussain v. Ragnandan*.
 - ('80) 5 Cal 897 (899) (DB), *Nursing v. Hurryhur*.
 - ('31) 18 A I R 1931 Lah 668 (670) (DB), *Dalip v. Gurudwara Praladhak Committee, Amritsar*.
 - ('77) 1 Mad 267 (276) (DB), *Administrator-General of Madras v. F. N. Hawkins*.
 2. ('24) 11 AIR 1924 All 543 (545) (DB), *Gauri Shankar v. Sheo Nandan*.
 - ('40) 27 A I R 1940 Lah 166 (169), *Punjab National Bank Ltd. v. Official Receiver, Karnal*.
 - ('39) 26 AIR 1939 Bom 494 (496), *Surat Borough Municipality v. Sarifa Karunnissa*.
 - ('32) 19 AIR 1932 All 543 (544) (DB), *Bhajja v. Mahomed Said*, (Such debt may furnish sufficient consideration if the amount is paid.)
- See also Preamble, Note 16.

Section 3
Note 14

- (3) Where A, who owes several debts to B, pays a sum of money to him, the latter can adjust the payment towards any of these debts, although a suit for the recovery of such debt may be barred by limitation.³
 - (4) Under S. 25 (3) of the Contract Act, 1872, an agreement in writing undertaking to pay a time-barred debt is valid and binding.⁴
 - (5) A time-barred debt is a valid consideration for a transfer of property.⁵ As to whether a transfer by the manager of a Hindu joint family, the guardian of a minor, etc., in consideration of a time-barred debt is valid, see the undermentioned cases.⁶
 - (6) As to whether the pious obligation of a Hindu son to pay off the debts of his father extends to time-barred debts, see the undermentioned cases.⁷
 - (7) In a suit for accounts, a decree may be passed in favour of the defendant for the balance found due to him although a suit by him for such balance would have been barred by limitation.⁸
 - (8) In a suit for the administration of the estate of a deceased person, a debt due by an heir to the deceased may be deducted
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3. ('40) 27 A I R 1940 Lah 166 (169), *Punjab National Bank Ltd. v. Official Receiver, Karnal*.
 - ('23) 10 AIR 1923 Bom 82 (84) (DB), *Salappa v. Annappa*.
 - ('30) 17 AIR 1930 Mad 594 (595), *Krishnaswami v. Natesa*.
 4. ('29) 16 A I R 1929 All 586 (586) (D B), *Asa Ram v. Karam Singh*. (But a Hindu son is liable on a bond for his father's time-barred debt only to the extent of joint family property.)
 - ('22) 9 AIR 1922 All 402 (402, 403) (DB), *Ram Kishen v. Chhedi*.
 - ('23) 10 A I R 1923 Lah 481 (483) (D B), *David Sutherland v. Rose Grim Shaw*. (('99) 23 Mad 94 (DB), *Appa Rao v. Suryaprakasa Rao* followed.)
 5. ('25) 12 AIR 1925 Oudh 267 (268), *Zohra Bibi v. Ganesh Prasad*.
 - ('29) 16 AIR 1929 All 657 (657) (D B), *Nathu Singh v. Girwarsingh*. (AIR 1924 All 551 followed.)
 - ('24) 11 AIR 1924 All 551 (554) (FB), *Gajadhar v. Jagannath*. (('10) 33 Mad 308 *Subramania v. Gopala*, followed.)
 6. ('24) 11 A I R 1924 All 551 (554) (F B), *Gajadhar v. Jagannath*. (Hindu law — Joint family — Alienation by father for debt barred at the date of alienation binds sons.)
 - ('26) 13 A I R 1926 Oudh 266 (267), *Bharath Singh v. Sheodat*. (Hindu law — Alienation by father—Though personal remedy against him is barred, debt can be regarded as antecedent debt.)
 - ('27) 14 AIR 1927 Oudh 52 (52) (DB), *Brahmhadin v. Ram Lakhan*. (Mother as guardian of the minor son is not competent in law to revive time-barred debt due from the deceased father.)
 - ('25) 12 AIR 1925 Nag 2 (5) (DB), *Chitnavis v. Nathu Sao*. (Do.)
 7. ('26) 13 AIR 1926 Pat 427 (430) (DB), *Achutnand v. Surja Narain*. (Does not extend.)
 - ('27) 14 AIR 1927 Oudh 52 (52, 53) (DB), *Brahmhadin v. Ram Lakhan*.
 8. ('16) 3 A I R 1916 Mad 720 (726) (D B), *Chidambara v. Krishnaswamy*. (Suit against trustee for accounts—Claim of trustee against trust for moneys spent by him may also be considered and a decree may be passed in his favour for such sums although his right to sue in respect of those items is barred by limitation.) See also A. I. R. Commentaries on Civil Procedure Code 5th (1950) Edition, O. 20, R. 19, Note 3.

from the share payable to the heir although a suit for the recovery of such debt may be barred by limitation.⁹

- (9) Under O. 34, R. 6, Civil Procedure Code, an application for a personal decree against the mortgagor can be made if the sale proceeds of the mortgaged property are not sufficient for discharging the mortgage debt. But such application will lie only if the personal remedy has not become barred by limitation at the date of the institution of the suit on the mortgage.¹⁰
- (10) In a suit for the redemption of a mortgage, under which the mortgagee has been in possession of the mortgaged property, the mortgagee is bound to account for the rents and profits of the property although if a separate suit were to be brought for such rents and profits, it would have been barred by limitation.¹¹
- (11) The fact that a suit for the enforcement of the personal liability of a mortgagor for the mortgage debt is barred by limitation does not preclude a suit for the enforcement of the mortgage (See Note 4.)
- (12) An attorney's lien for costs against his client can be availed of although a suit for the recovery of such costs may be time-barred.¹²
- (13) See also the undermentioned cases.¹³

See also Note 16 to the Preamble and Note 1 to S. 28.

9 ('81) 7 Cal 644 (647), *Lokanath v. Odoychurn*. (('80) 6 Cal 340 (D B), *Mohesh Lal v. Busunt Kumaree* followed.)

(12) 14 Ind Cas 508 (509, 510) (Low Bur), *Momein Bee Bee v. Arrif Ebrahim*. (Suit for administration of a Muhammadan estate.)

10. See AIR Commentaries on Civil Procedure Code, 5th (1950) Edition, Order 34, Rule 6, Notes 12 and 17.

11. ('25) 12 AIR 1925 Mad 825 (829), *Narasimha v. Immani*. (No question of limitation can arise so long as relation of mortgagor and mortgagee continues.) [See also ('85) 8 Mad 381 (383) (DB), *Kanna Pisharodi v. Kombiachan*. (Suit to recover property demised on *kanom* to defendant—Plaintiff *jenmi* is entitled to deduct arrears of rent from the amount of *kanom* amount including rent for the years in respect of rent for which a suit would have been barred by limitation. It is no doubt true that, where a set-off is pleaded, only so much of it can be allowed as falls within the period of limitation, if the set-off consists of a debt resulting from an independent transaction—But the claim that a deduction should be made from the *kanom* amount on account of rent is not properly described as a set-off.)]

12. ('21) 8 AIR 1921 Cal 67 (68), *Narendra Lal v. Tarubala Dasi*.

[See also ('23) 10 AIR 1923 Rang 84 (86) (DB), *Leiboak Syndicate v. Finlay Fleming & Co.* (Agent is entitled to a lien or retainer upon moneys of his principal which are in his hands for all expenses properly incurred. There is no time limit for the exercise of lien.)]

See also Article 84 Note 6.

13. ('48) 35 AIR 1948 Pat 443 (Para 10) (DB), *Rajib Nath v. Chota Nagpur Banking Assocn.* (Creditor having lien on debtor's property for debt. Lien comes to an end on debt passing into decree and thereafter creditor's rights are confined to enforcing decree—If decree is timebarred, he cannot fall back upon his lien.)

('47) 34 AIR 1947 Bom 375 (377) (DB), *Muppanna v. Shree Gajanan Urban Co.-Op. Bank*. (Execution of award under S. 59 (1) (a), Bombay Co-operative

Section 3
Note 15

15. Limitation does not bar defence. — As seen in Note 14 above, limitation only bars the *remedy* but generally does not destroy the *right*. Hence, although a *suit* to enforce a right may be barred by limitation, such right may be set up in *defence*.¹

Soceties Act, 1925, barred by limitation—Alternative remedy provided for in S. 59 (1) (b) is still available).

('39) 26 AIR 1939 Bom 494 (496), *Surat Borough Municipality v. Sarifa Karunnissa*. (Bombay Municipal Boroughs Act—Powers of Municipality acting under Ss. 104 and 105 are not governed by Limitation Act—Municipality can recover amount by issuing distress warrants under S. 105 even if civil suit under S. 203 to recover it is time-barred.)

('10) 32 All 51 (54) (DB), *Lalla Pershad v. Babu Pershad*. (Suit for dissolution of partnership—Receiver appointed to discharge the debts and liabilities of the firm—The mere fact that a claim, which was within time when made, is not adjudicated upon by the Court until after the expiration of more than three years, does not render the claim a bad claim against the partnership assets.)

('18) 5 AIR 1918 Mad 258 (261, 262) (DB), *Vellayappa v. Krishna*. (Suit for partition—Plaintiff claiming sum in addition to his proper share on account of certain matters in respect of which a separate suit would have been barred by limitation—*Held* that the claim for the additional sum cannot be decreed—Set-off can be claimed only by a defendant.)

('29) 16 AIR 1929 Sind 230 (232, 233), *Munshi Lal v. Bishen Lal*. (Suit for partnership accounts—Accounts of other partnerships may be gone into. If necessary, notwithstanding that a suit for such accounts may be time-barred.)

Section 3—Note 15

1. ('49) 36 AIR 1949 East Punj 29 (32) (DB), *Ram Sarup v. Ram Chandar*.

('43) 30 AIR 1943 Mad 370 (372), *Ananthana-rayana v. Sivaramakrishna*. (Even if a mortgage is barred by limitation, it is still available to the mortgagee as a shield to defend his possession. That the mortgage did not confer upon the mortgagee a right to possession is immaterial where the suit is one for partition calling for the adjustment of mutual rights and liabilities.)

('39) 26 AIR 1939 Cal 163 (165) (DB), *Nakul Chandra v. Kalipada*. (There is no bar of limitation to defence under S. 53A, T. P. Act—Right of defence is not lost even if there is no present right to enforce contract.)

('38) 25 AIR 1938 Lah 286 (288) (DB), *Nizam Din v. Ram Sukh*.

('16) 3 AIR 1916 P C 172 (179) (P C), *Sri Kishen Lal v. Kasmiro*. (No bar of time to a plea of fraud set up by way of defence.)

('29) 16 AIR 1929 All 77 (78), *Bengali Lal v. Panna Lal*.

('35) 22 AIR 1935 Bom 326 (328, 329), *Gopal v. Jajannath*. (Section 3 does not refer at all to a defendant.)

('26) 13 AIR 1926 Bom 33 (34) (DB), *Dodhassappa v. Pradhanappa*. (Judgment-debtor allowing confirmation of sale can set up defence of fraud in suit by auction purchaser for possession.)

('17) 4 AIR 1917 Cal 514 (515) (DB), *Deodhari v. Dayanad*. (Suit for possession on basis of document—Defendant can impugn document though his right to get the document set aside by suit is barred.)

('17) 4 AIR 1917 Mad 190 (191) (DB), *Thiruvengkata v. Seshadri*.

('16) 3 AIR 1916 Mad 350 (357) (DB), *Rajah of Ramnad v. Arunachellam*.

('07) 30 Mad 169 (178) (FB), *Lakshmi Doss v. Roop Lal*.

('06) 30 Bom 395 (408) (DB), *Minalal v. Kharsetji*.

('04) 28 Bom 639 (642) (DB), *Rangnath v. Govind*.

('90) 14 Bom 222 (225, 226, 227) (DB), *Hargovindas Lakshmidas v. Bajibhai Gijibhai*.

('05) 32 Cal 1107 (1125) (DB), *Narendra Lal v. Jogi Hari*. (Per Woodroffe, J.)

('98) 2 Cal W N 260 (262) (DB), *Mohendra Nath v. Jogendra Nath*. (Court should under S. 92, Evidence Act, allow oral evidence by defendant to prove mutual mistake though separate suit to rectify it is barred by time.)

*Illustrations.*Section 3
Note 15

1. Where a transaction is voidable at the instance of A, he may defend, on this ground, a suit to enforce the transaction although the period of limitation for a suit to set aside the transaction may have expired.²

- (1978) 2 Cal L R 5 (6) (DB), *Ram Narain v. Poolin Behary*.
 (1925) 12 AIR 1925 Lah 32 (34) (DB), *Bholi Bai v. Dawarka Das*. (In suit for partition defendant can claim to be reimbursed for expenses incurred by him from his private property though suit on it would be barred.)
 (1916) 3 AIR 1916 Lah 229 (229) (DB), *Gokalchand v. Niadar Mal*. (Plaintiff purchasing house sold by Receiver — Defendant's suit for cancellation of sale time-barred — He can still impeach the sale in plaintiff's suit for possession.)
 (1907) 1907 Pun L R No. 26 p. 51 (52), *Baldeo v. Gajwa*. (Plaintiff claiming land as adopted son — Defendant cannot be prevented from pleading invalidity of adoption by reason of lapse of time.)
 (194) 17 Mad 255 (256) (DB), *Orr v. Sundra Pandia*. (Plaintiff suing for possession as lessee — Defendant can plead that lease was obtained by fraud though suit for cancellation of lease on that ground is time-barred.)
 (1919) 6 AIR 1919 Oudh 370 (373), *Gaya Prasad v. Gur Dayal*.
 (1919) 6 AIR 1919 Oudh 379 (381) (DB), *Meharban v. Rajhunath*.
 [See also (1938) 25 AIR 1938 All 497 (502) (DB), *Beni Prasad v. Om Prakash*. (Decree-holder applying to enforce decree — Objection by defendant that decree is nullity owing to plaintiff's failure to comply with terms of decree can be raised at any time.)]
 [But see (1939) 26 AIR 1939 Mad 678 (680), *Krishna v. Subba*. (It is not the law that limitation can never affect a plea urged in defence.)]
 (1988) 12 Bom 501 (504), *Jugaldas v. Ambashankar*. (Sale by landlord of land in possession of tenant — Fraud in sale — Suit by purchaser against tenant—Plea by tenant impeaching sale held could not be allowed as remedy by landlord to set aside sale deed was time-barred — The case can be distinguished on the ground that the fraud set up was not practised on defendant but his landlord who was not party to the suit.)
 (1905) 7 Bom L R 772 (787), *Mahomed Cassum v. Joseph Ezekiel*. (12 Bom 501, followed.)
 2. (1950) 37 AIR 1950 All 7 (Pr 7), *Bal Jit v. Chand Kiran*. (The right of a reversioner to challenge an alienation by a Hindu widow continues to exist even after the period of limitation for a suit to challenge it has expired.)
 (1949) 36 AIR 1949 East Punj 29 (31, 32) (DB), *Ram Sarup v. Ram Chandar*. (Suit by landlord to avoid transfer under S. 60, Punjab Tenancy Act, dismissed as barred by limitation — Landlord can still set up plea under S. 60 in a suit for possession against him.)
 (1946) 33 AIR 1946 Oudh 129 (141) (DB), *Sant Bux v. Ali Raza*. (Suit for possession by lessee — Defendant lessor can plead that lease was obtained by undue influence or misrepresentation even if suit to set aside lease is barred.)
 (1935) 22 AIR 1935 Bom 326 (328), *Gopal v. Jagannath*.
 (1918) 5 AIR 1918 Mad 1332 (1335), *Athan Kutti v. Sutarjanam*.
 (1904) 28 Bom 639 (642) (DB), *Ranganath v. Govind*. ((1988) 12 Bom 501 *Jugaldas v. Ambashankar*, distinguished.)
 (1990) 14 Bom 222 (226), *Hargovandas v. Bajibhai*.
 (1918) 5 AIR 1918 Mad 751 (754) (DB), *Sethurama v. Chotta Raja*, ((1916) AIR 1916 P C 172 (P C), *Sri Kishan v. Kashmirar*, relied on.)
 (1907) 30 Mad 444 (445) (DB), *Venkatachallapathi v. Robert Fischer*.
 (1907) 30 Mad 248 (250) (DB), *Ramanasari v. Muthusamy*.
 (1907) 30 Mad 169 (178) (FB), *Lakshimi Doss v. Roop Laul*. (12 Bom 501 distinguished.)
 (1997) 20 Mad 305 (311), *Krishna Menon v. Kesavan*. ((1993) 17 Mad 255, *Orr v. Sundra*, relied on.)
 (1928) 15 AIR 1928 Nag 262 (264), *Maroti v. Raiwant*.
 [See also (1949) 1 Pepsu L R 36 (48), *Gamdoor Chand v. Boja Ram* (Compromise decree against minor without complying with O. 32, R. 7, Civil P. C.—Suit for

Section 3
Note 15

2. Although the period of limitation for a suit to set aside a decree obtained by fraud may have expired, the fraudulent character of the decree may be set up in defence when the decree is sought to be enforced.³

3. In a suit for the redemption of a mortgage against a mortgagee in possession, the latter can claim the mortgage money from the plaintiff although a suit for such money would have been barred by limitation.⁴

4. Where a puisne mortgagee sues to enforce his mortgage, the prior mortgagee or a person who is subrogated to his rights may set up the prior mortgage as a shield although a suit for enforcing such mortgage may be barred by limitation.⁵

5. Where a mortgagor expressly covenants with the mortgagee that he will not be entitled to redeem the mortgage unless he pays not only the amount due under the mortgage but also other debts owed by him which are charged on the same property, the mortgagee can defend a suit for the redemption of the mortgage by claiming also such (other) debts although a suit for the enforcement of their payment may be time-barred.⁶

possession on leases of compromise decree — Minor is entitled to plead in defence that the decree is not binding on him especially when his right to set aside decree is not barred by limitation on the date when he filed his written statement.)]

3. (1900) 27 Cal 11 (23) (DB), *Rajib Panda v. Lakhan Sendh Mahapatra* (Per Banerjee J.)

('28) 15 AIR 1928 Cal 810 (811) (DB), *Bhola Nath v. Nagendra Bala*. (It is not necessary for him to bring a suit to set it aside.)

See also Art. 95 Note 18.

4. ('51) 38 AIR 1951 T O 17 (Pr 7) (DB), *Varaha Deveswom v. Ummer Sait*.

('23) 10 AIR 1923 Bom 199 (200) (DB), *Rangappa v. Vithu*.

('18) 5 AIR 1918 Mad 657 (658, 659). *Nathamuni v. Vengammal*.

('21) 8 AIR 1921 Lah 351 (352) (DB), *Akbar Hussain v. Ragnandan*. (Limitation is not applicable to fix the period for which interest on the mortgage debt is payable by a mortgagor to a mortgagee.)

('22) 9 AIR 1922 Lah 254 (256) (FB), *Motan Mal v. Mohammad Baksh*. (Do).

[But see ('27) 14 AIR 1927 Mad 631 (634, 635) (DB), *Kotappa v. Raghavayya*. (The decision simply lays down that the subrogee is bound by the same period of limitation as the mortgagee whom he has paid off. It overlooks the fact that in the particular case, the subrogee does not seek to enforce the mortgage to which he is subrogated, by means of a suit but only raises it by way of defence to the mortgagor's suit for redemption and in such a case, the defence cannot be barred by limitation.)]

5. ('48) 27 Pat 332 (337) (DB), *Rajnarain v. Saligram*.

('38) 25 AIR 1938 Lah 286 (288) (DB), *Nizam Din v. Ram Sukh Das*.

('22) 9 AIR 1922 Mad 249 (254) (DB), *Venkataramana v. Rangiah*.

('29) 16 AIR 1929 Mad 465 (467) (DB), *Karuppan v. Venkataperumal*. (AIR 1922 Mad 249, followed.)

('33) 20 AIR 1933 Oudh 9 (13) (DB), *Kanhaiya v. Gulab*.

('31) 18 AIR 1931 Oudh 157 (159) (DB), *Mathura Prasad v. Ghanshiyam Das*.

[But see ('39) 26 AIR 1939 Mad 678 (681), *Krishna Aiyar v. Subba Reddiar*.

(Right of subrogation cannot be set up as defence when mortgage discharged is time-barred—Following ('27) AIR 1927 Mad 631, *Kotappa v. Raghavayya*.)]

See also Art. 132 Note 26.

6. ('28) 15 AIR 1928 All 99 (101) (DB), *Ram Kishore v. Ram Nandan Ram*. (AIR 1915 All 480 not followed.)

('26) 13 AIR 1926 Lah 633 (634) (DB), *Sultan Muhammad v. Ladha Singh*.

('21) 8 AIR 1921 Lah 170 (171) (DB), *Nathwa v. Kanhiya*.

('26) 13 AIR 1926 Oudh 228 (229) (DB), *Raisun Nisa v. Zorawar Sah*.

('28) 15 AIR 1928 Oudh 273 (276) (DB), *Ram Ratan v. Aditya Prasad*.

[But see ('17) 4 AIR 1917 All 405 (405) (DB), *Achhaibar Singh v. Mt. Radhi*. AIR 1917 All 480 followed.)]

6. Where in a sale deed the property intended to be sold is by a mistake wrongly described, but the vendee gets into possession of the right property and the vendor subsequently sues to eject him from such proportion the ground of the property not having been sold to him according to the sale deed, the vendee can show that the property really intended to be conveyed was the one of which he was in possession and that by a mistake it was wrongly described in the sale deed, although a suit by him for the rectification of the deed may be time-barred.⁷

7. Where a tenant is dispossessed of any portion of his holding by his landlord, he can set up such dispossession in defence to a suit for rent by the landlord although a suit by the tenant for recovery of possession may be barred by limitation.⁸

8. Where a person enters into possession of property under a contract of sale, he can set up his rights under the contract in defence to a suit for possession against him although a suit for the specific performance of the contract may be barred by limitation.⁹

But where the expiry of limitation destroys the right itself (*vide* section 28 of the Act), such right can neither be sued upon nor set up in defence to a suit.¹⁰

16. Duty of Court to raise and decide question of limitation.—As seen in Note 2 above, it depends on the law of procedure whether a Court is bound to decide or whether it is competent to decide if the suit or other proceeding before it has been instituted after the period of limitation. The following are some of the rules bearing on the subject :

1. Where on the facts proved or admitted before the Court the suit or other proceeding does not appear to be barred by limitation, the Court is not bound to raise the question of limitation *suo motu*.¹
2. Where the question of limitation is purely one of law capable of determination on the facts admitted or proved before the Court, the Court is bound to raise the question *suo motu* and decide it.²

(15) 2 AIR 1915 All 480 (480, 481) (DB), *Mt. Kesar Kunwar v. Kashi Ram*. (Because in effect this would mean that defendant is asking Court to enforce a barred claim.)]

7. (27) 14 AIR 1927 All 355 (356), *Kesho v. Roopan*.

[See also (06) 30 Bom 395 (404) (DB), *Minalal v. Kharsetji*. (Defendant who has sued for cancellation of a bond on ground of fraud and has failed on ground of limitation can set up in defence the same plea.)]

8. (26) 13 AIR 1926 Pat 513 (514), *Jagat Narain v. Tulsi*.

9. (29) 16 AIR 1929 Rang 251 (252) (DB), *Mg. Po Kywe v. Mg. Po Tin*. (Principle in (24) AIR 1924 Rang 214 (FB), *Ma Myat Tha Zan v. Ma Dun*, applied.)

10. (21) 8 AIR 1921 Bom 257 (258), *Mahadev Narain v. Sadashiv Keshav*, ((07) 30 Mad 444 (DB), *Venkatchalapathi v. Robert Fisher*, followed.)

Section 3 — Note 16

1. See (14) 1 AIR 1914 Cal 155 (157) (DB), *Kali Das v. Giri Bala*. (Court not bound to dismiss suit as barred if not pleaded and not apparent.)

2. (49) 1949 K L T 194 (Pr 4) (DB), *Janaki Amma v. Uthupunni Paily*.

(40) 27 AIR 1940 Rang 207 (210) (DB), *Official Trustee v. Raeburn*.

(18) 5 AIR 1918 Low Bur 140 (142), *Kaliyaparama Padiyachi v. C. U. A. R. Chetty*.

(25) 12 AIR 1925 Oudh 182 (183), *Ram Chhor v. Ram Surat*. (Question of adverse possession being one of limitation Court is bound to raise it.)

(05) 9 Cal W N 56 (58), *Nadhu v. Kartic*.

(01) 28 Cal 86 (89) (DB), *Deo Narain v. C. R. H. Webb*.

(94) 16 All 390 (393) (DB), *Ramu v. Daya*. (Execution application.)

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Note 16

3. Where the defendant raises the question in his written statement the Court is bound to go into it.³ The provisions of Sch. I App. A, Civil Procedure Code requiring the defendant to specify the article or articles of the Limitation Act, under which the suit is, according to him, barred, are salutary and must be complied with as far as possible. The failure to do so may put the plaintiff at a disadvantage^{3a}.
4. Where the question of limitation raises issues of fact not arising from the plaint, the defendant is bound under O. 8, R. 2, Civil Procedure Code, to raise such question in his written statement. If he fails to do so, thereafter it is within the discretion of the Court to allow the question to be raised or not.⁴
5. It is open to a defendant to plead a substantive right or in the alternative that the plaintiff's suit is barred by limitation.⁵
6. Where a decree is transferred for execution by one Court to another Court, the question arises as to which of the two Courts is competent to decide whether application for execution is barred by limitation. For a discussion of the subject, the reader is referred to the A. I. R. Commentaries on the Civil Procedure Code, 5th 1950 Edn. S. 42, Note 1.
7. As to the order in which issues must be tried in cases in which an issue of limitation is raised, see the undermentioned cases.⁶

See also Notes 17 to 20 below.

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- (19) 6 AIR 1919 Mad 698 (699) (DB), *Najappa v. Sidda Lingappa*.
 (30) 17 AIR 1930 All 815 (816), *Nathu Ram v. Ganga Bux*. (Review application.)
 (12) 17 Ind Cas 638 (639), *Ganeshdas v. Nimbi*.
 3. (67) 7 Suth W R 212 (213) (DB), *Borlee v. Hurobuns Narain*.
 (22) 9 AIR 1922 Cal 544 (545) (DB), *Janendra Mohan v. Umesh Chandro* (Per Walmsley J.)
 [See (11) 13 Ind Cas 792 (794) (DB), *Shah Muhammad v. Piara Mal*. (In the original Court, if a plea of limitation is taken before the issues are fixed, it must be entertained and decided.)
 (66) 6 Suth W R 79 (79) (DB), *M. Smith v. Kishen Chunder*.
 (66) 3 Bom H C R O C 164 (166) (DB), *Pirbhai v. Nenbai*.]
 3a. (42) 29 AIR 1942 Mad 386 (387), *L. V. D. S. Nidhi v. Varalakshmi*.
 4. (40) 27 AIR 1940 Rang 207 (210, 211) (DB), *Official Trustee v. Raeburn*.
 (02) 25 Mad 367 (378) (P C), *Venkatanarasimha v. Bhashyakarl*.
 [See (24) 11 AIR 1924 Pat 664 (664, 665) (DB), *Hasan Imam v. Debi Prasad*. (It is open to defence to raise substantive plea of limitation on statement of plaintiff's witnesses even if facts are not stated in written statement.)]
 See also AIR Commentaries on Civil Procedure Code, 5th 1950 Edition, Notes under O. 8, R. 2.
 5. (03) 7 Cal W N 294 (296) (DB), *Keamuddi v. Hara Mohan*. (Party can plead tenancy and limitation in the alternative.)
 (74) 21 Suth W R 70 (74), *Dino Monee v. Doorga Pershad*. (Do.)
 6. (24) 11 AIR 1924 Rang 148 (151), *Tin Tin Nyo v. Maung Ba Saing*. (Proper procedure, when a preliminary question of limitation is raised, is to hear that question and decide it as a preliminary point.)
 (89) 11 All 176 (180), *Husaini Begam v. Collector, Muzaffarnagar*. (Do.)
 (66) 10 Moo Ind App 476 (488) (PC), *Tarakant v. Puddomoney*. (It is much to be desired that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinion on all the important points.)

17. New plea as to limitation.— The question whether a point as to a suit or other proceeding having been instituted after the period of limitation can be raised for the first time at a late stage of the proceedings, for instance, in appeal or second appeal, depends on the law of *procedure*. (See Note 2 above.) The following are some of the rules governing the matter :

1. Where a plea of limitation depends on a question of fact, the plea cannot be raised for the first time in appeal, as a matter of right ¹ But the appellate Court has a discretion to allow such a question to be raised.² Where a question cannot be decided without taking fresh evidence,

('12) 15 Ind Cas 10 (12) (All), *Bhole v. Bhagwant*. (Defendant cannot be put to defence of his title unless plaintiff claims relief within time prescribed for the particular case.)

('01) 3 Bom L R 667 (672) (DB), *Apaji v. Nilakanta*, (It is desirable for lower appellate Court to find on all material issues of fact rather than to dispose of case on some point of law.)

('76) 25 Suth W R 393 (394) (DB), *Moni Roy v. Rajbunsee Koer*. (Merging of issue of limitation in issue of possession is not an error in law.)

('70) 14 Suth W R 267 (268) (DB), *Sham Churn v. Goono Moye*. (Trial of issue of limitation after issue on merits is an irregularity which if committed in appellate Court is not necessarily disadvantageous even to defendant.)

('69) 12 Suth W R 286 (286), *Mahomed Azim v. Sumeeroodee*. (It is discretionary with Court to try plea of limitation with merits though as a general rule such plea should be tried before plaintiff can go into merits.)

('66) 6 Suth W R 218 (219) (DB), *Shibo Durga v. Syud Hossein Ali*. (Court deciding case on limitation ought also to go into merits.)

(1865) 4 Suth W R 61 (61) (DB), *Doorgah Ram v. Ruttum Monee*. (Whether a plea of limitation should be decided before merits depends on the peculiar circumstances of each case.)

(1865) 4 Suth W R 101 (101) (DB), *Gopal Chunder Chatterjee v. Raj Koomaree Debia*. (Court should try issue on limitation first.)

('1864) 1864 Suth W R (Gap) Civ 247 (248) (DB), *Maharajah Rajendra Kishore Singh Bahadur v. Roy Goodhur Sahary*. (Decision on plea of limitation is unnecessary where decision on merits is clearly against plaintiff.)

(1864) 1 Suth W R 59 (59) (DB), *Greesh Chunder v. Narain Das*. (If first Court tries issue on limitation and decrees plaintiff's suit, appellate Court should try that issue before going into merits.)

Section 3 — Note 17

1. See the AIR Commentaries on Civil Procedure Code, 5th (1950) Edn., Order 8, Rule 2, Notes 1 and 5.

('49) 36 AIR 1949 East Punj 283 (284) (DB), *Gopal v. Sis Ram*, (A plea of limitation, where it is not a pure question of law, will not be permitted to be argued in appeal, if it was not raised in the trial Court and it has not been set up in the grounds of appeal.)

('37) 24 AIR 1937 Nag 184 (185), *Dular Singh v. Sitaram*, (Finding by lower Court as to limitation—No ground of appeal as to finding - Question not allowed to be raised for first time in second appeal.)

[See also ('40) 27 AIR 1940 Cal 113 (114) (DB), *Bajroga Khatun v. Province of Bengal*. (Case decided with reference to S. 184, Bengal Tenancy Act.)]

2. ('01) 3 Bom L R 682 (683) (DB), *Balwantrao v. Ramkishna*, (Plea allowed as no fresh evidence was necessary for its determination.)

('27) 14 AIR 1927 Cal 30 (31) (DB), *Abdul Gafur v. Abdul Jabbar*. (Case remanded for decision on plea under S. 18, Limitation Act.)

(1846-51) 4 Moo Ind App 403 (414) (PC), *Imam Bandi v. Hargovind*. (Plea disallowed on the ground that not having been raised in lower Court, appellants had no opportunity of meeting it by evidence.)

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the appellate Court will generally refuse to entertain the plea.³
This will specially be so in the case of a second appellate Court⁴

('01) 3 Bom L R 420 (421, 422) (DB), *Gopal v. Krishna*. (Second appeal—Plea not taken in Court of first instance but in lower appellate Court—Case remanded to lower appellate Court for decision on the point.)

('93) 1893 Bom P J 394 (DB), *Desai Girdharlal v. Desai Santukrai*. (Lower appellate Court dismissing suit on point of limitation without giving parties opportunity of adducing evidence on the point—Case remanded for taking evidence.)

('20) 7 AIR 1920 All 172 (173), *Debi Din v. Sarkar & Co.* (Plea allowed to be raised in revision—Case remanded for retrial as plea depended on evidence.)

3. ('39) 26 AIR 1939 Rang 42 (44) (DB), *Ramanna Reddy v. Abdul Rashid*.

('37) 24 AIR 1937 Lah 312 (312), *Rama Nand v. Nand Kishore*.

('29) 16 AIR 1929 P C 158 (160, 161) (PC), *Skinner v. Naunihal Singh*. (High Court allowing plea to be argued for first time in appeal, although no evidence had been given in lower Court in support of it—Decision not approved by Privy Council.)

('36) 23 AIR 1936 Cal 382 (385, 386) (DB), *Bejoy Kumar v. Firm Satish Chandra*.

('19) 6 AIR 1919 Cal 1025 (1026) (DB), *Kedar Nath v. Mohesh Chandra*.

('21) 8 AIR 1921 Cal 661 (671, 672) (DB), *Secretary of State v. Ananda Mohan*.

('24) 11 AIR 1924 Cal 463 (463), *Sadakali v. Janakinath*.

('29) 16 AIR 1929 Lah 432 (432), *Lajpat Rai v. Sohna*.

('26) 13 AIR 1926 Lah 511 (512), *Teju v. Ralla*.

(1900) 27 Cal 205 (206, 207) (DB), *Umrao Bibi v. Muhammad Rojahi*. (Quaere.)

('10) 5 Ind Cas 205 (207) (DB), *Raja Ranjit Sinha Bahadur v. Kalidasi Debi*.

('12) 13 Ind Cas 792 (794) (DB), *Shah Muhammad v. Piramal*.

('14) 1 AIR 1914 Sind 27 (28) (DB), *Bherumal v. Duhlanomal*.

('93-1900) 1893-1900 Low Bur Rul 539 (539), *Maung Shwe v. Maung Shwe Gon*.

[See also ('68) 10 Suth W R 59 (60) (DB), *Kedarnath v. Mathuranath*.

('67) 1867 Pun Re No. 92, *Gopal Dass v. Ruthee Ram*.

(1864) 1864 Suth W R (Gap) Act X Rule 6 (7), *The Collector of Rajshahye v. Hursoondery Debea*.

(1864) 1864 Suth W R (Gap) Act X Rule 9 (9), *Brindabun Chunder Sircar v. G. Clarke*,

(1864) 1 Suth W R Misc 1 (1), *Digamburree Debee v. Mundgopal*.]

4. ('37) 24 AIR 1937 All 696 (699), *Kishun Prasad v. Shubratn*. (Plea not raised in pleadings—No issue framed—Plea also not raised in grounds of first appeal—Plea not allowed.)

('14) 1 AIR 1914 Mad 495 (501) (DB), *Ayderman Kutty v. Syed Ali*.

('09) 4 Ind Cas 1167 (1167) (DB) (Mad), *Appavu v. Muthusamy*.

('37) 24 AIR 1937 Lah 312 (312), *Rama Nand v. Nand Kishore*.

('28) 15 AIR 1928 Nag 329 (331), *Mahepat v. Mukund*.

('25) 12 AIR 1925 Nag 178 (179), *Bhuvan Lal v. Manhori*.

('03) 30 Cal 687 (689) (DB), *Ambica v. Vyas Nityanand*.

('20) 7 AIR 1920 Pat 735 (737) (DB), *Bhadai Sahu v. Manowar Ali*.

('29) 16 AIR 1929 Mad 38 (40) (DB), *Alagarswamy v. Ramabadra*.

('27) 14 AIR 1927 Mad 455 (455), *Gundappa v. Narasappa*.

('16) 3 AIR 1916 Mad 535 (535, 536) (DB), *Peruma v. Rama* (Plea can be allowed only if it rests on pleadings and not on facts.)

('29) 16 AIR 1929 Lah 154 (155), *Bhagwan Das v. Fazal Khan*.

('24) 11 AIR 1924 Lah 468 (469) (DB), *Wazir Chand v. Nathu Ram*.

('20) 7 AIR 1920 Cal 846 (848) (DB), *Bhushan Chandra v. Narendra Nath*. (Following ('07) 34 Cal 941 (SB), *Balaram v. Mangta*.)

('22) 9 AIR 1922 Pat 398 (399) (DB), *Khuh Lal v. Jugdish Prasad*.

('84) 8 Bom 535 (536, 537) (DB), *Dattu v. Kasai*.

('34) 21 AIR 1934 Cal 467 (469) (DB), *Bahbadeb v. Hemanta Kumari*.

('30) 17 AIR 1930 Cal 385 (387) (DB), *Ahamadar Rahaman v. Jaminiranjan Barua*.

or the Privy Council.⁵ So also a new point of limitation which involves an investigation into fresh facts will not be allowed to be raised for the first time in revision.⁶

2. Where the plea of limitation involves only a question of law which can be decided on the facts proved or admitted before the Court, it can be raised at any stage of the proceedings.⁷ Thus, in such cases,

- (21) 8 AIR 1921 Cal 816 (817, 818) (DB), *Bipin Behari v. Charu Chandra*.
 (17) 4 AIR 1917 Cal 817 (817, 818) (DB), *Priyanath v. Anath Nath*.
 (26) 13 AIR 1926 Bom 40 (42) (DB), *Rachappa v. Ningappa*.
 (23) 10 AIR 1923 Bom 254 (255) (DB), *Diganmbar v. Lahyadeo Bhau*.
 (29) 115 Ind Cas 680 (681) (DB) (Pat), *Md. Sayed Khan v. Abdul Gafoor*.
 (17) 4 AIR 1917 All 359 (362) (DB), *Babu Lal v. Jalakia*.
 (84) 1884 All W N 327 (328) (DB), *Atma Ram v. Sardar Kuar*.
 (68) 10 Suth W R 425 (426) (DB), *Ram Dhun v. Ram Ruttan*.
 (68) 10 Suth W R 389 (389) (DB), *Kisto Mohun v. Noyan Tara*.
 (68) 9 Suth W R 493 (494) (DB), *Bunode Putnaik v. Doyanidhee Bullior*.
 (09) 3 Ind Cas 711 (712) *Po Mya v. Ma Le*.
 (05) 9 Cal W N 56 (58), *Nadhu v. Kartic*.
 (22) 65 Ind Cas 601 (602) (DB) (Cal), *Hari Charan v. Jitendra Nath*.
 (87) 11 Bom 114 (119) (DB), *Shivappa v. Dod Nagaya*.
 (1864) 1864 Suth W R (Gap) Civ 212 (212) (DB), *Bechoo v. Ramadheen*.
 (75) 24 Suth W R 298 (298) (DB), *Shaikh Peer Nuzur v. Lall Muhammad*.
 (72) 18 Suth W R 252 (252) (DB), *Rajah Mokoond v. Pershad Mudduck*.
 (69) 12 Suth W R 215 (217) (DB), *Sheo Golam v. Roy Dinkur Dayal*.
 (1862) 1 Mad H C R 358 (359) (DB), *Narasu v. Krishna*.
 (72) 8 Beng L R 78 (79, 80, 83) (DB), *Borokhasia v. Jata Sirdar*.
 [See (22) 9 AIR 1922 Mad 57 (59) (DB), *Krishnan Pattar v. Lakshami*.]
 5. (21) 8 AIR 1921 P C 27 (27) (PC), *Maharaj Bahadur Singh v. A. H. Forbes*.
 (22) 9 AIR 1922 P C 336 (338, 339) (PC), *Radha Krishna v. Bisheshar*.
 (16) 3 AIR 1916 P C 5 (7) (PC), *Srinivasdas Bavri v. Meherbai*.
 (14) 1 AIR 1914 P C 129 (132) (PC), *Raghunath v. Sunder Das*.
 (16) 3 AIR 1916 P C 182 (185) (PC), *Tricomdas v. Gopi Nath*.
 (28) 15 AIR 1928 P C 47 (48) (PC), *Khushaldas v. Chimanlal*.
 6. (25) 12 AIR 1925 Mad 986 (988), *Chinnammal v. Pappathiammal*.
 (15) 2 AIR 1915 Mad 688 (689), *Natesa v. Ramachandra*.
 (27) 14 AIR 1927 Lah 555 (555), *Abdul Kadir v. Nur Din*.
 7. (49) 1949 K. L. T. 194 (DB), *Janki Amma v. Uthupunni Paily*. (Appeal.)
 (16) 3 AIR 1916 Pat 331 (332, 333), *Gunjra v. Lakhar*. (Facts upon which objection was based, patent on face of the record.)
 (06) 33 Cal 257 (259) (DB), *Harihar v. Dasarathi*.
 (05) 32 Cal 129 (133, 134) (PC), *Jagadindra Nath v. Hemanatha Kumari*.
 (33) 20 AIR 1933 Nag 130 (133), *Maharaj Sai v. Kedar Nath*.
 (72) 1872 Pun Re No. 32, *Maya Singh v. Gunesh Das*.
 (75) 1875 Pun Re No. 2, *Shama v. Azim*. (Appeal from decree based on award — Objection of limitation not apparent on face of award — Facts and circumstances not before Court — Objection disallowed.)
 (70) 13 Suth W R 52 (55) (DB), *Raj Koonwar v. Inderjit Kunwar*. (Facts for decision of plea not patent on record — Plea disallowed.)
 (16) 3 AIR 1916 Pat 396 (397), *Bankey Behari v. Bhagwandas*.
 (25) 90 Ind Cas 827 (828) (Cal) (DB), *Kumud Charan v. Sambhu Chandra*. (Held Court was bound to take cognizance of plea of limitation under S. 3, although raised for first time in second appeal.)
 [See (67) 4 Bom H C R A C 197 (197, 198) (DB), *Davalata v. Beru*.
 (16) 3 AIR 1916 Pat 269 (271) (DB), *Sheobux v. Dayal*. (Question of limitation can be raised at any stage.)]

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the plea can be raised in appeal,⁸ second appeal⁹ or even before the

8. ('41) 28 AIR 1941 Sind 158 (159) (DB), *Rupomal v. Janat*.
 ('39) 26 AIR 1939 Bom 425 (425) (DB), *Narbheramji v. Vivekramji*.
 ('33) 20 AIR 1933 Pat 224 (227) (DB), *Jurawan v. Ramsarekh*. (Plea considered only so far as it raised question of law.)
 (1865) 4 Suth W R Misc 21 (21) (DB), *Anundee v. Takoar*.
 ('26) 13 AIR 1926 Pat 192 (193, 194) (DB), *Batisa v. Raja Ram*.
 ('34) 21 AIR 1934 Rang 329 (330), *M. S. Chettyar Firm v. S. E. Bholat*.
 ('13) 17 Ind Cas 638 (639), *Ganesh v. Nimbi*. (Plea, when arising upon facts before Court must be heard and determined, whether or not it is directly raised in pleadings or grounds of appeal.)
 ('89) 14 Bom 222 (224) (DB), *Hargovandas v. Bajibhai*.
 ('23) 10 AIR 1923 Cal 283 (284), *Hem Chandra v. Biraja Sundari*.
 ('26) 13 AIR 1926 Lah 451 (452) (DB), *Dulo v. Muhammad Nathu*.
 ('24) 11 AIR 1924 All 473 (473) (DB), *Abdul Hasan v. Fida Husain*.
 ('21) 8 AIR 1921 Bom 381 (383) (DB), *Dhanji Jairam v. Secretary of State*.
 ('19) 6 AIR 1919 Cal 634 (635) (DB), *Purna Chandra Pal v. Barada Prasanna Bhattacharjee*.
 ('08) 1908 Pun Re No. 27, *Bhag Singh v. Dharta Singh*.
 ('33) 20 AIR 1933 Lah 1044 (1044), *Ram Chand v. Dewan Chand*.
 ('08) 1908 Pun L R No 87 p. 241 (241), *Bhagwan Singh v. Mohan Lal*.
 ('66) 3 Mad H C R 258 (259) (DB), *Saraswati v. Pachanna*.
 ('69) 11 Suth W R 288 (289) (DB), *Taroo v. Obhoy*.
 ('74) 1874 Bom P J 132 (DB), *Balu v. Narayan*.
 ('25) 12 AIR 1925 Lah 566 (567), *Mulchand v. Champa*.
 ('74) 22 Suth W R 263 (264) (DB), *Chummun Lall v. Soorujmun*.
 ('76) 25 Suth W R 335 (342) (DB), *Puddo Monee v. Dwarkanath*.
 ('72) 17 Suth W R 429 (429), *Beem Goyalle v. Khoobun Sahoo*. (As when landlord sues for six years' rent or a tradesman sues for price of goods sold ten years before suit.)
 ('66) 1866 Pun Re No. 98, *Dera Singh v. Dhurm Singh*.
 (1900) 1900 Pun L R No. 13 p. 45 (48) (DB), *Har Chandi v. Mehbub*.
 9. ('28) 15 AIR 1928 Cal 870 (871) (DB), *Baikunth Nath v. Shekh Azidulla*.
 ('25) 12 AIR 1925 Cal 819 (820) (DB), *Sarada Prasad v. Mohan*.
 ('81) 4 All 102 (105) (DB), *Brij Mohan v. The Collector of Allahabad*.
 ('90) 12 All 461 (464) (FB), *Bechi v. Ashan Ullah*.
 ('20) 7 AIR 1920 Cal 963 (964) (DB), *Panchanan v. Aporna Kul*.
 ('28) 15 AIR 1928 All 689 (695) (DB), *Rangacharya v. Revti*.
 ('22) 9 AIR 1922 Lah 240 (241) (DB), *Nighaia Ram v. Bhagu*.
 ('36) 23 A I R 1936 Cal 497 (503) (F B), *Bejoy Kumar Addya v. Nagendra Nath Palit*.
 ('32) 19 AIR 1932 Cal 195 (196) (DB), *Ram Charan v. Madan*.
 ('30) 17 AIR 1930 Cal 703 (704) (DB), *Afi uddi v. Joy Chandra*.
 ('27) 14 AIR 1927 All 177 (179), *Munawar Ali v. Jagmilan*.
 ('15) 2 AIR 1915 Mad 150 (156) (DB), *Grace Rosmaund Rhodes v. Padmanabha*.
 ('02) 6 Cal W N 903 (904) (DB), *Swarnamoyee Debi v. Hari Das*.
 ('14) 1 AIR 1914 Lah 210 (210, 211): 25 I C 354 (DB), *Gulab Mal v. Shujawal*.
 ('19) 6 AIR 1919 Cal 671(671): 47 IC 25 (DB), *Narasinga v. Prolhadman Tewari*.
 ('68) 10 Suth W R 71 (71, 72): 1 Beng L R A C 25 (DB), *Mozaffur Ally v. Girish Chandra*.
 ('16) 3 AIR 1916 Mad 774 (775): 29 I C 36 (D B), *Ramasamy v. Tirucha Man-nadiar*.
 ('18) 5 AIR 1918 Pat 504 (504): 43 I C 955 (DB), *Lachman v. Dil Jan*.
 ('97-1901) 1897-1901 Upp Bur Rul 446 (447), *Ma Pon v. Maung San Baw*.
 ('73) 20 Suth W R 1 (1), *Bishonath v. Sree Mutty Shoshi Mookhes*. (Point allowed to be raised in special appeal, from the very nature of suit — Suit by reversioner for declaration of his rights affected by transfer by Hindu widow.)
 ('30) 17 AIR 1930 Pat 256 (260) (FB), *Gajadhar v. Ramcharan*.

Privy Council.¹⁰ But, even in such cases, an appellant would not be entitled *as of right* to urge at the hearing of an appeal any ground not taken by him in his memorandum of appeal (See Civil Procedure Code, O. 41, R. 2). It would, however, be open to the appellate Court, in such cases, to allow the appellant to argue the point or to raise the point *suo motu*, and usually, the appellate Court would do so.¹¹

3. Where the plea of limitation raises a question of fact and has been abandoned by a party, he cannot subsequently raise the plea as a matter of *right*.¹² Though the Court has a discretion to allow such a point to be raised,¹³ it will generally refuse to do so where it involves the taking of fresh evidence.¹⁴ If, however, the plea raises only a question of law, it can be raised notwithstanding such abandonment.¹⁵

(98) 21 All 22 (23), *Muhammad Husen v. Muzaffar*.

(99) 2 Ind Cas 559 (561) (DB), *Ram Kumar Saha v. Ram Gaur*.

(14) 1 AIR 1914 All 80 (83) (DB), *Balkaran v. Gaya Din*.

(08) 30 All 402 (404) (DB), *Mulkunwar v. Chattar Singh*.

(20) 7 AIR 1920 Cal 842 (843) (DB), *Motu Dasi v. Behari Lal*. (As, however, the question was not raised in the lower Courts, the parties were ordered to bear their own costs throughout.)

[See (37) 24 AIR 1937 Nag 314 (316), *Agarwal Jorawarmal v. Kasam*. (But if plea of limitation not merely raises question of law but also involves facts plea cannot be raised in second appeal for first time.)]

10. (1850) 4 Moo Ind App 466 (509, 510) (P C), *Maharajadheeraj Raja Mahatab Chund v. Government of Bengal*.

(11) 13 Ind Cas 257 (259) (PC), *Jit Singh v. Maharaj Singh*.

11. (07) 34 Cal 941 (945, 946, 949) (SB), *Balaram v. Mangta Dass*.

12. (40) 27 A I R 1940 Lah 475 (485), *Sharifa Begam v. Court of Wards*. (Plea raised in trial Court and given up before issues were raised, cannot be re-agitated in appeal—Nor can further evidence be allowed.)

(96) 19 Mad 416 (419) (DB), *Rengayya v. Narasimha*. (If a party gives up a plea of limitation in the lower Court, he cannot thereafter insist on raising it in second appeal especially if it will involve questions of fact.)

(30) 17 AIR 1930 P C 18 (21) (PC), *Virayya v. Adenna*. (Plea, although mentioned in written statement and grounds of appeal, no issue before trial Judge, nor point taken at trial—Plea disallowed.)

(13) 18 Ind Cas 445 (446, 447) (DB) (Lah), *Atar Singh v. Allah Din*. (Plea not pressed in first Court nor revived in first appeal, overruled.)

(68) 9 Suth W R 452 (453) (D B), *Kashee Chunder v. Kally Prosunno*. (Plea overruled in Court of first instance, and not brought before the lower appellate Court, cannot be entertained by the High Court in special appeal.)

13. (25) 12 AIR 1925 Pat 549 (550, 551), *Pallakdhari v. Bankey*. (Point allowed to be raised where fresh evidence not necessary.)

[See (14) 1 A I R 1914 Bom 47 (51) (D B), *Pirsab v. Gurrappa*. (Admission to the effect that claim is barred—Point of limitation on ground of adverse possession can be raised in second appeal)]

14. (02) 25 Mad 55 (60) (DB), *Seshachala v. Varadachariar*.

(96) 19 Mad 416 (419) (DB), *Rengayya v. Narasimha*.

(30) 17 AIR 1930 All 467 (468) (DB), *Raj Narayanrao v. Ramsarup*.

15. (18) 5 AIR 1918 Lah 374 (375), *Hukam Singh v. Sahab Din*.

(33) 20 AIR 1933 Lah 404 (404), *Des Raj v. Lachmi Ram*.

(17) 4 AIR 1917 Lah 60 (63) (DB), *Gullu v. Khuda Bakhsh*.

(34) 21 AIR 1934 All 386 (387) (DB), *Radha Mohan v. Ami Chand*.

(32) 19 AIR 1932 All 108 (109) (DB), *Ram Charitter v. Suraj Teli*.

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See also the undermentioned cases.¹⁶

18. Duty of appellate Court under this section.— Where an appeal is presented out of time, it is the duty of the appellate Court, under this section, to dismiss the appeal although the respondent has not raised the plea of limitation,¹ unless the appellate Court decides to excuse the delay under section 5. An appellate Court can, in proper cases, treat an appeal filed beyond limitation as cross-objections in another appeal.²

This section is not confined in its application to the Court in which a proceeding is *instituted*. The duty under the section applies also to any higher Court before which the proceeding may go up in its further stages from the Court of institution. Hence, where an appellate Court finds that the suit in the lower Court was instituted after the prescribed period of limitation, it is the duty of the appellate Court (equally with that of the lower Court) to dismiss such suit although the defendant had not set up the plea of limitation.³ But, as seen in Note 2 above, this section does not impose on any Court the duty of raising and deciding the question whether a proceeding has been instituted after the period of limitation and that it depends on the law of procedure whether in any case the Court is bound to decide such question. In the case of the appellate Court, it is provided by Order 41 Rule 2 that an appellant shall not be entitled to urge at the hearing of an appeal any ground in support of his appeal which he has not mentioned in his memorandum of appeal. The duty of the

('07) 7 Cal L Jour 152 (163) (DB), *Abdullah Sircar v. Asraf Ali Mandal*.

('81) 3 All 846 (848) (DB) *Bhawani Prasad v. Bisheshar Prasad*.

('98) 8 Mad L Jour 217 (218) (DB), *Nilkanta v. Gangapani*.

('27) 14 AIR 1927 Mad 273 (274), *Patrachariar v. Alamelumangai Ammal*.

('13) 20 Ind Cas 360 (361), *Nga Tok v. Nga E Gyan*.

('25) 12 AIR 1925 Rang 313 (313), *Maung Mya v. Ma Thin Tin*.

16. ('34) 21 AIR 1934 All 11 (12) (DB), *Lugdi v. Har Prasad*. (Point not raised in proceedings but extracted in cross-examination cannot form basis of decision.)

('67) 8 Suth W R 451 (451, 452) (DB), *Beharee Lall v. Kalee Doss*. (New point of limitation raised after remand—Point not arising on materials before Court—Point not allowed.)

('66) 6 Suth W R 178 (178, 179) (DB), *Moonshee Buzl Ruheem v. Sreenath Bose*. (Do.)

('24) 11 AIR 1924 Cal 633 (634) (DB), *Jogunnessa v. Satish Chandra*. (Objection to interlocutory order on ground of limitation not taken at any stage of proceedings—Objection disallowed in appeal from final order.)

('30) 17 A I R 1930 Cal 547 (551, 552) (D B), *Kanto Mohan Mullick v. John Carapiet Galstoun*. (Remand—Point of limitation not raised before appellate Court—On remand it cannot be so raised if reference is limited.)

Section 3 — Note 18

1. ('35) 22 AIR 1935 All 92 (93) (DB), *Sudama v. Bisheshar*.

('89) 12 All 79 (85, 90, 91) (DB), *Parbati v. Bhola*.

2. ('22) 9 AIR 1922 Lah 423 (423, 424), *Bawa Singh v. Thakur Singh*.

('34) 21 A I R 1934 Lah 273 (273), *Mihan Singh v. Tilak Ram*. (('24) A I R 1924 All 867 *Prabhu Dayal v. Murlidhar* distinguished.)

('25) 12 AIR 1925 Lah 57 (57) (DB), *Bhagat Ram v. Raghbar Dial*.

3. ('39) 26 AIR 1939 Pat 421 (425) (DB), *Byomesh Mukharji v. Madhabji Mepa*.

('36) 23 AIR 1936 Nag 285 (288), *Jiwandas v. Babulal*.

('03) 30 Cal 761 (768) (DB), *Troylokyanath v. Jyoti Prokash*.

appellate Court to go into the question of limitation is subject to the provisions of this rule and hence, where the point of limitation has not been taken in the memorandum of appeal, the appellate Court is not bound to go into the question.⁴ But, at the same time, the rule reserves power to the appellate Court to allow such point to be argued at the hearing of the appeal although not raised in the memorandum of appeal. The Court has also power under the rule to go into the question *suo motu*. As a general rule, if no new question of fact is involved, the appellate Court will exercise its discretion in favour of going into the question although not raised in the memorandum of appeal.⁵

Where a decree has been passed against several defendants and one of them appeals against the decree, it is open to the appellate Court under Order 41, Rules 4 and 33 to go into the question whether the suit as against all the defendants was instituted after the period of limitation, and if it finds that it was so instituted, to dismiss the suit as against all the defendants.⁶ Similarly, although an appeal may be only from a portion of the decree, the appellate Court has power under Order 41, Rule 33 to consider whether the whole suit was barred by limitation and to dismiss such suit if it was so barred.⁷

4. ('38) 25 AIR 1938 Pat 323 (324), *Etvari v. Ganga*.

('18) 5 A I R 1918 Mad 1173 (1173), *British India Steam Navigation Co. Ltd. v. Hussain Kasim*. (Failure of appellate Court to adjudicate on plea of limitation not pressed before it, is not material irregularity.)

('03-04) 2 Low Bur Rul 237 (237, 238), *Kyin Baw v. Maung Lon*. (Statement in ground of appeal that "plaintiff had no cause of action" does not amount to raising of plea of limitation.)

('93) 15 All 123 (127, 128) (DB), *Ahmad Ali v. Waris Hussain*.

('91) 13 All 580 (580, 581) (DB), *Ram Kishen v. Dipaupadhia*.

('84) 8 Bom 535 (537) (DB), *Dattu v. Kasai*.

('29) 16 AIR 1929 All 485 (488, 489) (DB), *Baldeo v. Sukhdeo*.

[See also ('12) 16 Ind Cas 418 (419) (DB) (Cal), *Lahar Singh v. Johun Munda*. (Appellate Court not bound to re-investigate unless pressed.)]

[But see ('07) 34 Cal 941 (945, 946, 949) (S B), *Bala Ram v. Mangata Das*. (Plea allowed to be raised as it arose on the face of the pleadings and on facts found.)]

('12) 17 Ind Cas 638 (639) (Nag), *Ganeshdas v. Nimbi*.

(1864) 2 Bom H C R 162 (166, 167) (DB), *Saluji v. Rajsangji*.]

5. See Note 17 above.

[See ('48) 35 AIR 1948 Nag 41 (44) (DB), *Alaf v. Kurban*. (Where in an appeal by the plaintiff against an order of remand the suit appears to be patently time-barred as against certain defendants and the point can be decided without any evidence being taken, it is the duty of the appellate Court to take judicial notice of the law and to dismiss the suit as against them even though they have not appealed.)]

('25) 12 AIR 1925 Rang 223 (223), *Maung Yan Kwin v. Maung Po Ka*. (Where suit is not on face of it barred by limitation, appellate Court does not exercise a wise discretion in taking up question of limitation on its own initiative.)]

6. ('23) 10 A I R 1923 Mad 392 (402) (D B), *Gopala Iyengar v. Mummachi Reddiar*.

('16) 3 AIR 1916 Mad 887 (887) (DB), *Subbarayalu v. Pappammal*.

7. ('41) 28 A I R 1941 Oudh 1 (3) (D B), *Daulat v. Raghubir*. (Decree awarding damages - Appeal against only part of decretal amount—Claim to damages found time-barred and appeal allowed — Court can dismiss entire claim and set aside

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The undermentioned decisions⁸ to the contrary, which were given prior to the enactment of the above Rule in the present Civil Procedure Code, are no longer good law.

As to whether a question of limitation decided by an order of remand can be re-opened in the appeal from the decree passed after remand, see the A. I. R. Commentaries on the Civil Procedure Code, 5th (1950) Edn., section 105 Note 8.

See also Note 17.

19. Res judicata and plea of limitation.— The doctrine of *res judicata* applies as well to the decision of a question of limitation as to that of any other question and hence, the decision of a question of limitation may be concluded in a particular way by reason of the operation of the above doctrine.¹ Thus, where the question whether an application for execution is within time depends on whether a prior application was within time and it was decided in that application that it was within time, the decision operates as *res judicata* and cannot be re-opened in the subsequent application.² Similarly, a final

decree as a whole — Court should however require appellant to pay court-fee on entire decretal amount in such case.)

('12) 17 I C 638 (639) (Nag), *Ganeshdas v. Nimbi*. (Appellate Court is compelled by S. 3 to dismiss suit whichever party may have made the appeal.)

[See also ('18) 5 A I R 1918 Cal 13 (14, 15) (SB), *Shib Chandra Kar v. A. C. Dulcken*. (O. 41, R. 33 should not be invoked in favour of litigant so as to enable to him to evade provisions of other statutes such as Limitation Act.)

('37) 166 Ind Cas 1007 (1107) (Cal), *Munish Chandra Datta v. Ajit Sankar De*. (In appeal by plaintiff against decree dismissing his suit, defendant is at liberty to support the decree of dismissal on grounds of limitation and title which the trial Court had found against him and in favour of the plaintiff, although no cross-objections have been filed by him.)]

8. ('80) 6 Cal L R 267 (269), *Alimunnissa v. Hosseinali*.

('83) 9 Cal 635 (636, 637) (DB), *Raghunath v. Pareshram*.

('92) 1892 Bom P J 87 (DB), *Shirekali v. Sanna Ganapaya*.

[See also ('05) 28 Mad 67 (68, 69) (DB), *Kandaswamy Chetty v. Annamalai Chetty*. (Obligation cast upon Court by S. 4 of Act of 1877, to dismiss suit, although limitation has not been set up as defence, is only in cases where Court is in a position to dismiss whole claim or suit.)]

Section 3 — Note 19

1. ('82) 8 Cal 51 (60) (PC), *Mungal Pershad v. Grija Kant*.

('02) 24 All 282 (284, 285) (DB), *Sheoraj v. Kameshar*.

('13) 19 Ind Cas 399 (400) (Lah), *Jhanda v. Budha*. (Date of mortgage material for seeing whether suit is barred by limitation — Decision in former suit as to date of mortgage is binding in later suit also as *res judicata*.)

('21) 8 AIR 1921 P C 23 (24) (PC), *Raja of Ramnad v. Velusami Tevar*.

('82) 6 Bom 54 (58) (DB), *Manjunath v. Venkatesh*.

2. ('82) 8 Cal 51 (60) (PC), *Mungne Pershad v. Grija Kant*.

('35) 22 AIR 1935 Cal 664 (665) (DB), *Bir Bikram v. Khaliler Rahaman*.

('34) 21 AIR 1934 Pesh 64 (66) (DB), *Muhammad Nawaz v. Shiva Ram*.

('36) 23 AIR 1936 Pesh 9 (10), *Nand Ram v. Kabul*.

('01) 24 Mad 669 (671) (DB), *Lakshmanan v. Kuttayan*.

('24) 11 AIR 1924 Pat 122 (125) (DB), *Jago Mahton v. Khirodhar Ran*.

('32) 19 AIR 1932 Sind 116 (119, 120) (DB), *Khemchand v. Fakhruddin*.

('22) 67 Ind Cas 56 (57) (Lah), *Kedar Nath v. Radha Kishen*.

('28) 113 Ind Cas 92 (93) (Mad) (DB), *Srirama Raghavachariar v. Narasama*.

('21) 8 AIR 1921 P C 23 (24) (PC), *Raja of Ramnad v. Velusami Tevar*.

decision between the parties to a proceeding (as for instance an application for execution) that it is not barred by limitation cannot be gone back upon in the subsequent stages of the proceedings.³ It depends on the facts and circumstances of each case whether the question of limitation is *res judicata*.⁴ See also the A. I. R. Commentaries on the Civil Procedure Code, 5th (1950) Edition, S. 11, Note 23.

- (199) 27 Cal 210 (213, 215) (DB), *Harendra Lal Roy v. Sham Lal Sen.* (In this case, however, the question was held not barred by *res judicata* as the parties were not the same.)
- (17) 4 AIR 1917 Pat 158 (159) (DB), *Janki v. Banwamalle.* (Objection is not *res judicata* as against judgment-debtor who was ward of Court and not properly served with notice of previous proceedings.)
3. See (83) 1883 Pun Re No. 143, *Fatteh Muhammad v. Lalji Mal.*
- (10) 8 Ind Cas 22 (24, 25) (Cal) (DB), *Sripati Charan v. Belchambers.*
4. (50) 37 AIR 1950 Cal 513 (Pr 9) (DB), *Karali Prasad v. Probodh Chandra.* (Court failing to do its duty under S. 3 of dismissing execution — Judgment-debtor is not precluded from raising point of limitation in subsequent execution. *Note.* — Does this mean that the principle of constructive *res judicata* does not apply to a point which the Court is bound, *suo motu*, to take, as in such a case it cannot be said that the party ought to have taken the point ?)
- (40) 27 AIR 1940 Oudh 226 (227), *Ramji Lal v. Mandai.* (Effective order for further execution involves adjudication that execution application is in time — Awarding costs of execution to decree-holder and noting balance due under decree do not involve any such adjudication.)
- (41) 28 AIR 1941 Mad 440 (443) (DB), *Venkataranga v. Sithamma.* (Order under O. 21, R. 23 (1), C. P. C. passed on judgment-debtor's failure to appear in response to notice and object — Order precludes judgment-debtor from raising plea of limitation in subsequent proceedings.)
- (41) 28 AIR 1941 Nag 152 (153, 154), *Nathmal v. Balkrishna.* (Court dismissing execution application for absence of decree-holder — No decision on merits — No *res judicata*.)
- (40) 27 AIR 1940 Nag 87 (87, 88), *Abdul Sattar v. Rahimuddin.* (Execution application rejected in absence of decree-holder for failure to correct inaccuracy as to costs — It does not amount to implied finding that it is not in accordance with law — No *res judicata*.)
- (35) 22 AIR 1935 Pat 485 (486) (DB), *Keshar Kuer v. Rajeshwari.* (An order on execution application sending decree to another Court for execution is not one for execution so as to attract the principle of constructive *res judicata*.)
- (17) 4 AIR 1917 All 370 (370) (DB), *Ramjas v. Ram Narain.* (Decision on prior execution application that Court had no jurisdiction to execute decree operates as *res judicata*.)
- (38) 25 AIR 1938 All 89 (90) (DB), *Collector of Benares v. Jai Narain.* (Order in execution on question of limitation cannot operate as *res judicata* unless it is decided specifically or it can be implied that decision was arrived at.)
- (37) 24 AIR 1937 Cal 581 (583), *Sureshwar Prasad v. Maharaj Bahadur Sinha.* (Execution application dismissed for failure of decree-holder to take further steps — Subsequent application for execution — Judgment-debtor held could raise plea of limitation in respect of previous application.)
- (30) 17 AIR 1930 Oudh 65 (67), *Drigbijai Singh v. Bhagwandas.* (Objection to application for execution once adjudicated as without force, operates as *res judicata*.)
- (25) 12 AIR 1925 Nag 82 (89), *Khairulla v. Dhanrupmal.* (Ordering execution to proceed after limitation period, can operate as *res judicata* where the order is not set aside.)
- (35) 22 AIR 1935 Oudh 198 (201) (DB), *Ramanuja v. Manraj Kuer.* (Court-fee made good and notice of restoration application sent to opposite party — Restoration order after hearing parties — Objection to restoration on ground of limitation cannot be subsequently raised.)

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- (22) 9 AIR 1922 Bom 118 (119) (DB), *Gullapa Rudrappa v. Erava Basangowda*. (Application for making decree final accepted as being in time—Decision cannot be reconsidered in later execution proceedings.)
- (34) 21 AIR 1934 Oudh 289 (291), *Narottam v. Atul Chandra*. (Application to bring person on record as representative of judgment-debtor—Objection taken but person impleaded—Subsequent objection that execution is barred can be raised.)
- (25) 12 AIR 1925 Oudh 462 (464) (DB), *Bibi Batul v. Kedar Nath*. (In this case, the question of limitation regarding a certain relief was kept open to be decided at the proper time.)
- (26) 13 AIR 1926 Oudh 291 (292, 293) (DB), *Raghubar v. Gokaran*. (Adjudication on question of limitation by interlocutory order is final in same or subsequent proceedings.)
- (27) 14 AIR 1927 Oudh 488 (489) (DB), *Fatima Begum v. Ranjit*.
- (83) 6 Mad 237 (238), *Gangathara v. Rathabai*. (After a sale of land in execution of a decree and before its confirmation the judgment-debtor cannot object to the validity of the sale on the ground that the execution of the decree is barred.)
- (37) 24 AIR 1937 Nag 87 (88), *Revansiddappa v. Shankar Appa*.
- (10) 6 Ind Cas 746 (748) (DB), *Kaniz Fatima v. Muhammad Jafar Ali*. (In an execution application the decree-holder failed to pay process-fees for issuing notice and the application was thrown out. The question of limitation was not determined.)
- (67) 8 Suth W R 141 (144) (DB), *Bharutchundar v. Issurchunder*. (When once an appeal is admitted as within time, the question that is beyond time cannot be again gone into.)
- (70) 13 Suth W R 351 (352) (DB), *Syed Jaffur Hossein v. Sheikh Mahomed Amir*. (Registration of appeal is purely a proceeding of ministerial character and has not the force of a conclusive judicial determination on point of limitation.)
- (01) 28 Cal 122 (126) (DB), *Bholanath Dass v. Prafulla Nath*.
- (36) 23 AIR 1936 All 21 (31, 32) (FB), *Genda Lal v. Hazari Lal*. (Court can entertain judgment-debtor's plea of limitation at any time while execution application is pending.)
- (21) 8 AIR 1921 Cal 606 (608) (DB), *Govinda Nath v. Basiruddin*. (Judgment-debtor having notice but not raising objection as to limitation—He cannot attack execution sale.)
- (30) 17 AIR 1930 Cal 353 (354, 355) (DB), *Basanta Kumari v. Tolsi Charan*.
- (35) 22 AIR 1935 Cal 230 (231) (DB), *Rafatulla v. Kundarmal*. (*Ex parte* finding that execution application is within time—Application dismissed both parties being absent—In subsequent application the judgment-debtor can raise objection that first application was not within time.)
- (35) 22 AIR 1935 Cal 306 (307) (DB), *Boidya Nath v. Bijoy Chandra*.
- (20) 7 AIR 1920 Pat 570 (574) (DB), *Kesho Prasad v. Harbans Lal*. (So long as an execution application is pending, the judgment-debtor can show at any stage that the application is barred.)
- (24) 11 AIR 1924 Mad 673 (675) (DB), *Rajitagiripathy v. Bhavani Sankaran*. (In execution proceedings on application for transfer of decree, failure to plead limitation creates constructive *res judicata*.)
- (20) 7 AIR 1920 Pat 615 (616), *Sobran Mahton v. Sibilas Kuer*. (*Ex parte* order without notice does not estop judgment-debtor from raising plea of limitation.)
- (27) 14 AIR 1927 All 589 (589, 590) (DB), *Mithu Lal v. Deojit*. (In this appeal fresh ground was raised with Court's permission—Plea as to its being barred by limitation can be raised at any time before decision.)
- (19) 6 AIR 1919 Mad 197 (197, 198) (DB), *Mydeen Rowther v. Abdul Gaffur*. (The failure to plead the saving of the limitation bar in an application for execution will not operate as *res judicata* for a subsequent application.)
- (28) 15 AIR 1928 Mad 1052 (1053) (DB), *Lakshmanan v. Palaniappa*.
- (26) 13 AIR 1926 Mad 177 (177, 178), *Bhadrappa v. Jaggaraaju*.
- (30) 17 AIR 1930 Pat 330 (331) (DB), *Atul Krishna Ghosh v. Brindaban Naik*.
- (28) 15 AIR 1928 Pat 471 (472) (DB), *Richharam v. Pasupati Banerji*.

20. Consent decree for time-barred claim.— Under O. 23, R. 3, Civil Procedure Code, where the Court is satisfied that the parties have entered into a lawful compromise, the Court is bound to record such compromise and pass judgment and decree in accordance with it. In such cases, the Court is not entitled to raise the question whether the claim is barred by limitation. The only question before the Court, when a compromise is reported, is whether the alleged compromise has really been entered into, and whether it is a lawful compromise. The fact that it is based on an agreement to satisfy a time-barred claim will not make it unlawful within the meaning of S. 23, Contract Act.¹

21. Admission on point of limitation — Effect.— In considering the question whether a suit or other proceeding is barred by limitation, the Court will be entitled to take into account the *admissions* of the parties. But such admissions will be binding on the parties making them only where they are admissions of *fact*. Admissions on questions of *law* will not bind the parties on whose behalf they are made. Thus, an admission of a counsel on a point of law as to limitation will not bind his client.¹

22. Abandonment of plea of limitation.—See Note 17.

(‘33) 20 AIR 1933 Pat 210 (217) (DB), *Bansidhar v. Hazari Ram*. (For operation of the doctrine of *res judicata*, there must be reciprocity.)

(‘24) 11 AIR 1924 Mad 695 (696) (DB), *Kalyani v. Thiruvengatasamy*. (Executing Court cannot allow plea of bar of limitation where the decree directs execution to proceed—An executing Court cannot go behind the decree.)

(‘27) 14 AIR 1927 Mad 149 (151), *Subbarayudu v. Bapayya*.

(‘29) 16 AIR 1929 Lah 334 (334, 335), *Farangu v. Harikishan*. (In previous execution application notice was not properly served on the judgment-debtor. The question of limitation would not be *res judicata* in subsequent application.)

(‘28) 15 AIR 1928 Lah 653 (654) (DB), *Ralia Ram v. Hiralal*.

(‘33) 20 AIR 1933 Cal 855 (856, 857) (DB), *Lalit Mohan v. Sarat Chandra*.

[See (‘22) 9 AIR 1922 All 100 (100) (DB), *Mahamadi Begam v. Umda Begam*. (Judgment-debtor knowing that question of limitation was at issue but failing to oppose it—Decision on that issue cannot be subsequently questioned—This, however, did not rest on a question of *res judicata* but as being decision in the very litigation.)]

Section 3 — Note 20

1. (‘20) 7 AIR 1920 P C 139 (140) (PC), *Ramchandra v. Chaitana*.

(‘26) 13 AIR 1926 Oudh 311 (313) (DB), *Chandoo v. Murlidhar*. (It is incorrect to say that where a compromise or confession of judgment prevents any consideration of legal bar, it is invalid on the ground that if the legal question had been gone into, a legal bar would have been obvious.)

Section 3 — Note 21

1. (‘38) 25 AIR 1938 Lah 368 (368), *Panna Lal v. Jain Bank of India Ltd., Lahore*.

(‘27) 14 AIR 1927 Lah 284 (285), *Fateh Ali v. Ahmad Din*.

[See (‘67) 8 Suth W R 63 (63) (DB), *Chunder Kant v. Ramnarain*. (Any admission by parties other than the executors to the will, would not bind the estate of the deceased.)

(‘06) 10 Cal W N 959 (961) (DB), *Baijnath v. Hem Chundri*. (Admission of receiver that estate owes debt to a creditor—Effect of.)]

See also A. I. R. Commentaries on the Civil Procedure Code, 5th (1950) Edn., O. 3, R 4, Note 5.

Section 3
Notes 23-24

23. Waiver of plea of limitation.—The Court is bound under this section to dismiss a suit or other proceeding which has been instituted after the period of limitation although limitation has not been set up as a defence. Hence, it is not competent to a party to *waive* a plea of limitation so as to absolve the Court from this duty.¹ Even if such plea is waived, the party or the Court itself can take it up again.² Similarly, waiver of the plea of limitation by one of the judgment-debtors cannot bind the others. It is, therefore, open to them to insist on a decision on the plea of limitation.³

24. Contract or custom cannot override the statute. — Under S. 28, Contract Act, an agreement which limits the time within which a party thereto may enforce his rights by the usual legal proceedings in the ordinary tribunals is void. Hence, an agreement which *curtails* the period of limitation provided by this Act for any suit is void and such a suit cannot be dismissed although instituted after the period agreed upon, provided that it is instituted within the period prescribed by the law of limitation. But, where the agreement is to the effect that if no suit is brought within a certain time the right itself should cease to *exist*, it does not amount to an agreement to limit the time within which a right may be *enforced* and hence does not come within the mischief of the above section.¹ Thus, a clause in a policy of fire insurance that if no suit is instituted within a particular period after the rejection of the claim by the insurance company all rights under the policy shall be forfeited, is valid.² Whether the effect of an

Section 3 — Note 23

1. ('40) 27 AIR 1940 Lah 75 (78), *Kundo Mal v. Daulat Ram Vaidya Parkash Firm*.

('24) 11 AIR 1924 Oudh 127 (128) (DB), *Samuel Burge v. Improvement Trust, Lucknow*. (Case under the Land Acquisition Act, Section 18.)

('15) 2 AIR 1915 Mad 979 (980, 981) (DB), *Sitarama v. Krishnaswami*.

[See also ('38) 25 AIR 1938 Lah 368 (368), *Panna Lal v. Jain Bank of India Ltd., Lahore*.]

[But see ('72) 18 Suth W R 497 (498) (DB), *Roy Luchmeput Singh Bahadur v. Moonshee Jowahar Ali*. (Proceedings in execution application - The corresponding S. 1 of the Act of 1859 did not apply to execution applications—Submitted cannot be good law now.)]

See also section 29, Note 3.

2. ('40) 27 AIR 1940 Lah 75 (78), *Kundo Mal v. Daulat Ram Vaidya Parkash Firm*.

[But see ('50) 37 AIR 1950 T C 79 (Pr 2) (DB), *Narayanan v. Chitraru*.]

3. ('40) 27 AIR 1940 Lah 75 (77), *Kundo Mal v. Daulat Ram Vaidya Parkash Firm*.

Section 3 — Note 24

1. ('34) 21 AIR 1934 Rang 15 (17), *A. N. Ghose v. Reliance Insurance Co.*

('09) 2 Ind Cas 573 (584, 586) (DB), *South British Fire and Marine Insurance Co., New Zealand v. Braja Nath*.

2. ('27) 14 AIR 1927 Rang 196 (196) (DB), *Universal Fire and General Insurance Co., Ltd. v. Japan Cotton Trading Co., Ltd.*

('26) 13 AIR 1926 Rang 3(4) (DB), *G. Rainey v. Burmah Fire and Marine Insurance Co., Ltd.*

('24) 11 AIR 1924 Rang 351 (352), *Rainey v. Burma Fire & Marine Ins. Co. Ltd.* (A I R 1914 Bom 225 followed.)

agreement is to make the right itself cease to exist after a particular time, or whether it is simply to cut down the period of limitation within which a suit to enforce the right may be brought, depends on the interpretation to be placed on the terms of each contract.

Thus, in the undermentioned cases³ the material words in a contract of insurance were: "No suit shall be brought against the company in connexion with the said policy later than one year after the time when the cause of action accrues." It was held that although interpreted literally, the above clause might come within the provisions of s. 28, Contract Act, the terms used in an insurance contract must be interpreted with reference to the object and exigencies of insurance and that so interpreted, the above words meant that after the specified period of one year, the right under the contract itself should *come to an end* and that, therefore, the clause in question was valid.

An agreement to *extend* the period of limitation is not governed by s. 28, Contract Act. But such an agreement would come within the provisions of s. 23, Contract Act, as tending to defeat the provisions of the Limitation Act and would, therefore, be void.⁴ Similarly, an agreement not to plead limitation would be void under s. 23, Contract Act, and cannot be relied upon in answer to a plea of limitation.⁵

('14) 1 AIR 1914 Bom 225 (228) (DB), *Baroda Spinning and Weaving Co. Ltd. v. Satyanarayan Marine and Fire Insurance Co. Ltd.*

('24) 11 AIR 1924 Cal 186 (187) (DB), *Girdharilal v. Eagle Star and British Dominions Insurance Co., Ltd.*

3. ('12) 16 Ind Cas 1001 (1001) (Bom) (DB), *Hirabhai Narotomdas v. Manufacturers Life Insurance Co.*

[See also ('09) 36 Cal 516 (535) (SB), *South British Fire and Marine Insurance Co., New-Zealand v. Brojo Nath Shaha*. (In this case the contract of insurance provided that no suit against the company for the recovery of any claim under the policy shall be sustainable in any Court of law unless such suit shall be commenced within six months after the loss or damage—It was held that a suit brought after six months should be dismissed—The validity of such a condition was taken for granted.)

4. ('69) 4 Beng L R 101 (105) (FB), *Krishna Kamal v. Hiru Sirdar*. (The executing Court cannot add or in any way alter the terms of the original decree in consequence of any consent of the parties.)

('73) 20 Suth W R 395 (397) (DB), *Lalla Ram v. Dodraj*.

('72) 17 Suth W R 396 (398) (DB), *Meheroonnissa v. Ramee Rowshan Jehan*. (Consent of parties cannot extend the period allowed by law for enforcing a decree or keeping it in force.)

('25) 12 AIR 1925 Oudh 502 (503) (DB), *Pherai v. Pudai Ram*.

('17) 4 AIR 1917 Pat 132 (134) (DB), *Midnapore Zamindary Co. Ltd. v. Deputy Commissioner of Manbhum*.

('32) 19 AIR 1932 All 273 (280, 281) (FB), *Gobardhandas v. Dau Dayal*.

('13) 18 Ind Cas 595 (596) (Cal) (DB), *Khetra Mohan v. Mohim Chundra*.

('23) 10 AIR 1923 All 1 (3) (FB), *Shib Dayal v. Meherban*.

('36) 164 Ind Cas 416 (417) (Cal) (DB), *Sarada v. Rokeya Khatun*.

('15) 2 AIR 1915 Mad 979 (980, 981) (DB), *Sitarama v. Krishnaswami*.

[See ('38) 25 AIR 1938 Rang 328 (330) (DB), *Chokalingam v. Narayana*. (Per Sharpe J. — It is impossible for parties by consent or agreement to extend or alter the period of limitation — Parties cannot waive the statute.)]

5. ('17) 4 AIR 1917 Mad 892 (894) (DB), *Ramamurthy v. Gopayya*.

(1849) 5 Moo Ind App 43 (70) (PC), *The East India Co. v. Oditchurn*.

Section 3
Notes 24-26

Under s. 63, Contract Act, it is open to the promisee under a contract to extend the time for the performance of the promise by the other party. Such an agreement is not one to extend the period of limitation applicable to a suit and its validity is not, therefore, affected by s. 23, Contract Act.⁶

Entries in a *wajib-ul-arz* cannot override the law of limitation.⁷

25. Estoppel against pleading limitation. — As seen in Note 2, this section makes the question whether a suit has been instituted after the period of limitation a material question in every case. Hence, the effect of the section is to confer on every person against whom a suit has been instituted the right of contending that it has been instituted after the prescribed period of limitation and he cannot be *estopped* from raising such a contention,¹ the principle being that there can be no estoppel against the statute. Thus, it is open to a defendant to plead the bar of limitation even though the delay in the institution of the suit has been due to his own conduct in having made the plaintiff waste his time in fruitless inquiries and negotiations.²

The fact that the counsel has waived the plea of limitation does not estop his client from raising the plea. The reason is that the counsel's admissions on a point of law are not binding on his client.³

26. Proceedings to which section applies. — The section applies to suits, appeals and applications for which a period of limitation is prescribed by the first schedule to the Act. A proceeding which does not fall within any of these categories is not subject to any period of limitation under this Act.¹ But the maintainability of

(17) 4 AIR 1917 Pat 132 (134) (DB), *Midnapore Zamindary Co., Ltd. v. Deputy Commissioner of Manbhum*.

(20) 7 AIR 1920 Pat 280 (281), *Chaturbhuj v. Md. Habib*.

(26) 13 AIR 1926 Oudh 311 (313) (DB), *Chando v. Murlidhar*.

(15) 2 AIR 1915 Mad 979 (980, 981) (DB), *Sitarama v. Krishnaswami*.

(13) 18 Ind Cas 595 (596) (Cal), *Khetra Mohan v. Mohim Chandra*.

6. (27) 14 AIR 1927 All 451 (452) (DB), *Jugal Kishore v. Chari & Co.*

(17) 4 AIR 1917 Mad 539 (541) (FB), *Annamalai v. Velayuda*. (Suit on promissory note payable on demand—Collateral agreement postponing time for payment.)

7. (04) 26 All 337 (341) (DB), *Jai Ram v. Makunda*.

Section 3 — Note 25

1. (32) 19 AIR 1932 All 273 (281) (FB), *Gobardhan Das v. Dau Dayal*.

(81) 3 All 585 (596) (FB), *Debi Rai v. Gokal Prasad*.

(21) 8 AIR 1921 Bom 252 (254, 255) (DB), *Multanmal v. Budhumal*.

(15) 2 AIR 1915 Mad 244 (246) (DB), *Sita Rama v. Krishnasamy*.

[See (18) 5 AIR 1918 Mad 94 (95, 96) (DB), *Abdulla v. K. Kanaran*.]

[See however (19) 6 AIR 1919 Cal 261 (262, 263) (DB), *Haridas v. Raj Kumar*.]

2. (23) 10 AIR 1923 All 22 (23, 24) (DB), *Jugal Kishore v. G. I. P. Rl. Co.*

(1900) 2 Bom L R 407 (409) (DB), *Sitaram v. Naro*.

3. (38) 25 AIR 1938 Lah 368 (368), *Panna Lal v. Jain Bank of India, Ltd. Lahore*.

Section 3 — Note 26

1. (48) 35 AIR 1948 Bom 387 (391), *Charles v. Collector of Bombay*. (Rent Controller exercising powers under Bombay Act 7 [VII] of 1944 is not a Court—

such proceeding may, in certain cases, be affected by the fact that a *suit* to obtain the same relief would have been barred by limitation at the date of the institution of such proceeding. The question whether a proceeding is so affected depends on the facts and circumstances of each case. Thus, although an application by the liquidator of a company for an order under section 186, Companies Act, for the recovery of money due from a contributory may neither be a "suit" nor an application to which the first schedule of the Act applies and may be free from any bar of limitation *directly*, yet such application will not be maintainable if at the date of the application the recovery of the sum by *suit* is barred by limitation. The reason is that in view of the place and context in which the words "money due" occur in section 186, Companies Act, they must be confined to money due and recoverable in a suit by the company and they do not include any moneys which at the date of the application under the section could not have been so recovered.²

Similarly, an application by the Official Assignee under section 7, Presidency Towns Insolvency Act, for the recovery of money due from a debtor to the insolvent's estate, though not a "suit" is *equivalent* to a suit for purposes of limitation.³ In other words, such application must fail if a suit for the recovery of the money is barred by limitation at the date on which the application is made. The principle seems to be that, when the law dispenses with the necessity of filing a *suit* and enables moneys to be recovered by *summary proceedings*, although such proceedings may not be directly governed by any period of limitation, the law must be deemed to intend that such proceedings will lie only in respect of moneys the recovery of which by *suit* is not barred by limitation. Where the normal remedy for the recovery of money is by suit and the law provides a summary and concurrent remedy by means of an application, it cannot be the object of the law to make it possible to recover by the summary proceeding money, the recovery of which by a *suit* is barred by limitation.⁴

Limitation Act does not apply to proceedings before him — Hence Art. 173 does not apply to an application for review.)

(17) 4 AIR 1917 Low Bur 17 (17, 18), *K. Hill v. M. N. Greenberg*. (Limitation Act does not apply to references to Judge on order by Deputy Registrar of Chief Court of Lower Burma.)

[See ('40) 27 AIR 1940 Cal 113 (113) (DB), *Bajroja Khatun v. Province of Bengal*. (Suit to recover possession of land claimed by the plaintiff as a raiyat is governed by S. 184, Bengal Tenancy Act, and not by S. 3 or S. 29, Limitation Act.)]

2. ('33) 20 AIR 1933 P C 63 (64, 65) (PC), *Hansraj v. Dehra Dun Mussoorie Electric Tramway Co., Ltd.* (Claim against company in liquidation not made by presentation of plaint is not suit instituted within S. 3.)

('24) 11 AIR 1924 Lah 53 (54) (DB), *Sri Narain v. Liquidator, Union Bank of India*.

See also Note 13.

3. ('36) 23 AIR 1936 Mad 778 (779) (FB), *Mulhusamy v. Official Assignee, Madras*.

See also Note 30.

4. See observations in ('33) 20 AIR 1933 P C 63 (66) (PC), *Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co., Ltd.*

Section 3
Note 26

But, the liability of a contributory to pay the money due on shares in a company in liquidation is a *statutory* liability under section 156, Companies Act, and although a suit for such money may be barred by limitation under Article 112, Limitation Act, the liability under section 156, Companies Act, can be enforced against him.⁵

As seen in Note 20 to the Preamble, the Act does not apply to *all* applications under the Civil Procedure Code. For example, it does not apply to applications to the Court to do anything which the Court can do of its own motion and for which no application is necessary.⁶ Thus, an application for the amendment of clerical and arithmetical errors in judgments and decrees is not subject to any period of limitation, it being open to the Court to amend such errors *suo motu*.⁷ Similarly, the powers of revision of the High Court under

(24) 11 AIR 1924 Lah 53 (54) (DB), *Sri Narain v. Liquidator, Union Bank of India*.

[See also (36) 23 AIR 1936 Mad 778 (779) (FB), *Muthusamy v. Official Assignee, Madras*.]

5. (96) 20 Bom 654 (657, 658) (DB), *Sorabji Jamsetji v. Ishwardas*.

(08) 31 Mad 66 (67) (DB), *Vaidiswara v. Siva Subramania*.

(16) 3 AIR 1916 All 317 (318) (DB), *Jagannath v. U. P. Flour and Oil Mills Co., Ltd.*

See also Note 13.

6. (24) 11 AIR 1924 Lah 331 (333) (DB), *Pirthi Nath v. Basheshar*. (Power of Insolvency Court under S. 37 of the Provincial Insolvency Act, III of 1907, to set aside alienation.)

(95) 22 Cal 425 (433, 434) (DB), *Dwarka Nath v. Barinda Nath*. (Application for partition under preliminary decree for partition.)

(06) 30 Bom 415 (420, 421) (DB), *Balaji v. Kushaba*. (Duty of the Mamlatdar to order village officers to give effect to his order — Duty absolute and unqualified — Limitation Act not applicable.)

(83) 7 Bom 316 (321, 322) (DB), *Iswardas v. Dosibai*. (Application for passing judgment in terms of award which had been filed not governed by Art. 178 of Act of 1877 (now Article 181).)

(86) 8 All 519 (533, 534) (DB), *Dhano Singh v. Basant Singh*. (The mere fact that one of the parties has made an application asking the Court to amend its decree, will not render the action of the Court subject to the rule of limitation.)

(24) 11 AIR 1924 Lah 553 (554), *Daryai Singh v. Kunjlal*. (Court can take action under S. 53 of the Provincial Insolvency Act at any time during pendency of proceedings when a transfer open to objection under the said section is brought to its notice by an application made to it by a creditor of the insolvent.)

(81) 4 Mad 172 (173) (DB), *Kylasa v. Ramasamy*. (The provisions of the Limitation Act do not extend to an application by a purchaser of land at a Court sale under a decree to obtain a certificate.)

(82) 6 Bom 586 (587), *Vithal v. Vithojirav*.

7. (86) 8 All 519 (533, 534) (DB), *Dhan Singh v. Basant Singh*. (Per Mahmood, J.)

(87) 9 All 364 (365), *Darbo v. Kesho Rai*.

(87) 11 Bom 284 (285) (DB) *Shivapa v. Sivpanch Lingapa*.

(85) 7 All 276 (280) (DB), *Raghunath Das v. Raj Kumar*. (Per Mahmood, J.)

(29) 16 AIR 1929 All 337 (337), *Hukum Singh v. Suraj Pal Singh*.

(27) 14 AIR 1927 Rang 57 (57) (DB), *Mt. Sara Bi v. Hamid Kassim*.

(26) 13 AIR 1926 Oudh 223 (224), *Jagmohan Singh v. Sitapatram*. (Amendment of the decree can be made so as to represent the intention of the Judge when he made the decree.)

(24) 11 AIR 1924 Oudh 408 (409), *Sheo Dharshan v. Mata Din*. (Error may be amended though twenty years old.)

section 115, Civil Procedure Code, can be exercised by it without any application by the parties and hence, there is no period of limitation for such application.⁸ But, where the matter rests with the discretion of the Court, the fact that there has been undue delay in approaching the Court will be a factor for consideration by the Court.⁹ Thus although there is no period of limitation governing an application for revision, the High Court will refuse to interfere where such application has been made after an undue delay.¹⁰

It has been held that proceedings under the Workmen's Compensation Act are not governed by the Limitation Act.¹¹ But an application to execute an award under the Bombay Co-operative Societies Act falls within this section as such award is executable as a decree.¹²

(14) 1 AIR 1914 All 61 (62), *Sheo Balak v. Sukhdei*.

(97) 1897 Pun Re No. 12, *Dévidas v. Gurdatta*.

(29) 16 AIR 1929 Oudh 385 (387) (FB), *Mahomed Raza v. Ram Saroop*.

(29) 16 AIR 1929 Nag 34 (36) (DB), *Dhannabai v. Keshrichand*.

See also Article 181 Note 19.

8. (50) 37 AIR 1950 Assam 6 (Pr 6) (DB), *Sampatlal v. Baliprasad*.

(22) 9 AIR 1922 Pat 525 (526) (DB), *Ram Prasad v. Mahesh Kant*.

(30) 17 AIR 1930 Oudh 401 (401), *Naim Ata v. Emperor*.

(33) 20 AIR 1933 Pesh 51 (52), *Ghulam Rasul v. Samundar*.

9. (23) 10 AIR 1923 Nag 109 (110), *Udajiram v. Rajeshwar*.

(28) 15 AIR 1928 Nag 149 (149), *Udajiram v. Rajeshwar*. (Laches may disentitle a party to relief under S. 152, C. P. C.)

(24) 11 AIR 1924 Rang 45 (45), *Maung Hman v. Ma Shin*.

10. (51) 38 AIR 1951 Him Pra 16 (Pr 3), *Beg Ram v. Charan Das*. (Practice of Himachal Pradesh J. C.'s Court is not to entertain revision if filed after more than 90 days.)

(42) 29 AIR 1942 Oudh 392 (393, 394), *Kallu Mal v. Nawabganj Municipality*. (Ordinarily if an application for revision is filed beyond the period of limitation prescribed for an appeal it ought to be considered to have been unduly delayed.)

(42) 29 AIR 1942 Pat 251 (254) (DB), *Krishnadevanand v. Kapildeo*. (Practice of Patna High Court not to entertain revision filed beyond 90 days.)

(33) 20 AIR 1933 Lah 175 (175, 176), *Kailash & Bros. v. Durga Prasad*.

(22) 9 AIR 1922 Mad 68 (64), *Yagnasami Iyer v. K. Chidambaranath Mudaliar*. (Revision application was delayed for more than 90 days—Court has discretion to excuse delay.)

(21) 8 AIR 1921 Oudh 141 (142), *Mahabali Pershad v. Balbhaddar Singh*.

(23) 10 AIR 1923 Oudh 272 (272), *Binda Prasad v. Banarsi Das*.

(25) 12 AIR 1925 Oudh 608 (608), *Mahadeo Prasad v. Mt. Ganeshi*.

(33) 20 AIR 1933 Pat 582 (582), *Kesho v. Mohendra*. (C. P. C., S. 115—Practice is to entertain civil revision only if filed within three months of order.)

(26) 13 AIR 1926 Nag 65 (65), *Udairam v. Thakur Prasad*. (C. P. C., S. 115 — Time for filing revision is 45 days in C. P. and Berar.)

(29) 16 AIR 1929 Oudh 383 (383), *Jagannath v. Bikarmajit Singh*.

(30) 17 AIR 1930 Oudh 496 (496) (DB), *Hamidulnissa v. Mohammad Anwar*.

(30) 17 AIR 1930 Oudh 401 (402), *Naim v. Emperor*.

(26) 13 AIR 1926 All 577 (578), *Emperor v. Ramnarain*.

(26) 13 AIR 1926 All 767 (768), *Ram Deo v. Emperor*. (Revision to High Court against order under S. 107, Cr. P. C., should be made within 30 days.)

(28) 15 AIR 1928 Mad 528 (530) (DB), *Muthu v. Narayanan*. (In an exceptional case mere lapse of time is no ground for rejecting revision petition.)

(81) 4 All 154 (155) (DB), *Durga Prasad v. Sheo Charan Lal*.

11. (38) 25 AIR 1938 Cal 348 (351) (DB), *Salamat v. E. I. Railway*.

12. (38) 25 AIR 1938 Bom 424 (425) (DB), *Maratha Co-operative Credit Bank, Dharwad v. Keshav*.

Section 3 Notes 26-27

As to the applicability of this section to an application for settlement of debt under the Bengal Agricultural Debtors Act, see the undermentioned case.^{12a}

The section applies to every suit and applies without distinction to suits concerning both sacred and secular property.¹³ There is also no provision in the Act which exempts suits relating to wakf properties from its operation. Hence, a suit relating to a mosque is subject to the rules of limitation prescribed in the Act.¹⁴

Suits by juristic persons like other suits are subject to the law of limitation and enjoy no special privilege in this respect.¹⁵

27. Applicability of Act to arbitration proceedings. — Under S. 37 of the Arbitration Act, X of 1940, all the provisions of the Limitation Act are applicable to arbitrations as they apply to proceedings in Court. Before the passing of the above Act, the position was as follows : The Limitation Act only applied to suits, appeals and certain applications to Courts. As arbitration proceedings did not come within any of these categories, the Act did not directly apply to them.¹ But in making their award it was the duty of the arbitrators to have regard to the provisions of the law of limitation and not to allow claims which were barred under such law.² Where the arbitrators failed in this respect and the error was apparent on the face of the award, the award could be remitted to the arbitrators for re-consideration.³

12a. ('45) 32 AIR 1945 Cal 399 (399), *Hajizuddin v. Mahim Chandra*. (Application for settlement of debt under S. 8, Bengal Agricultural Debtors Act (7 of 1936) — Debt Settlement Board has jurisdiction to determine whether debt is barred by limitation — Application made after limitation must be dismissed by virtue of this section.)

13. ('38) 25 AIR 1938 Lah 369 (376, 377) (FB), *Masjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar*.

14. ('38) 25 AIR 1938 Lah 369 (380) (FB), *Masjid, Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar*.

15. ('38) 25 AIR 1938 Lah 359 (385) (FB), *Masjid, Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar*.

Section 3 — Note 27

1. ('29) 16 AIR 1929 P C 103 (105, 107) (P C), *Ramdutt Ramkissen v. E. D. Sassoon & Co.*

2. ('48) 35 AIR 1948 Nag 334 (337) (DB), *Fatechand v. Vasudeo*. (AIR 1929 P C 103 (PC) Rel. on.)

('43) 30 AIR 1943 All 162 (167) (DB), *Behari Lal v. Punjab Sugar Mills*. (In the absence of any agreement to the contrary, the Lim. Act is applicable to a proceeding before arbitrators.)

('29) 16 AIR 1929 P C 103 (105, 107, 108) (P C), *Ramdutt Ramkisson v. E. D. Sassoon & Co.*

('83) 1883 Bom P J 339, *Babaji v. Kano*.

[See ('37) 24 AIR 1937 Rang 363 (364), *Maung Kyaw Tha v. Co-operative Town Bank, Henzada*. (It is not the intention of the Legislature that the arbitrator should arrogate to himself the right to ignore the law of limitation.)

('92-96) 2 Upp Brr Rul 9 (10), *Ma Min Ku v. Maung Tha Nyun*.]

3. ('31) 18 AIR 1931 Mad 619 (624) (DB), *Alagapa v. Chidambaram*.

('97) 24 Cal 469 (473) (DB), *Saturjit Pertap Bahadur v. Dulhin Gulab Koer*. (In this case, it was held that the award was not vitiated by any error apparent on the face of it.)

Where A and B enter into an agreement to refer future disputes that may arise out of a contract to arbitration, it has been held that after the expiry of limitation for a suit for the enforcement of the claims arising out of the contract, there would be no subsisting differences which could be referred to arbitration and that a reference to arbitration under such circumstances is invalid.⁴

After a suit is referred to arbitration by order of the Court, the Court has no power to dismiss the suit as barred by limitation.⁵

28. Inherent power and limitation. — As seen in Note 3, the Court has no inherent power to relieve against the bar of limitation. As the Court can exercise its inherent power of its own motion, an application to the Court to exercise its inherent power is not governed by any period of limitation.¹ As to whether the Court has inherent power to act in any particular case depends upon the question whether any definite remedy is provided for governing such a case. The general principle is that where the law provides a definite remedy in regard to any matter, the Court has no inherent power in respect of such matter. Hence, a person who has failed to avail himself of a definite remedy provided by law within the prescribed period of limitation, cannot invoke the inherent power of the Court.² Further, as it is discretionary with the Court to exercise its inherent power, it can refuse to do so if there has been undue delay in invoking such power.³

(197) 1897 All W N 162 (163), *Ramjatan v. Sheobalak*.

(1926) 13 AIR 1926 Sind 209 (211), *Official Receiver v. Kersondas*.

4. (1929) 16 AIR 1929 Sind 55 (58) (DB), *Uttamchand v. Balmokand*.

[But see (1927) 14 AIR 1927 Sind 177 (181), *Balmokand v. Uttamchand*. (Claim time-barred at the time of reference can validly form subject-matter of reference—AIR 1926 Sind 209 dissented from.)]

5. (197) 1897 All W N 162 (163), *Ramjatan v. Sheobalak*.

(1966) 1 Agra Rev 53 (54) (DB), *Ameen Chund v. Mendhoo Khan*.

(1975) 1875 Pun Re No. 2, *Shama v. Azim*.

[See (1981) 1881 All W N 17 (18) (DB), *Jagmandar Das v. Piare Lal*.

(1971) 3 N W P H C R 177 (178) (DB), *Monowar Khan v. Abdoollah Khan*. (Where the reference to arbitration has fallen through, the Court regains power to go into the question of limitation.)]

Section 3 — Note 28

1. (1949) 36 AIR 1949 Pat 112 (Pr 2) (DB), *Minnie Lal v. Mahadeo Lal*.

(1927) 14 AIR 1927 All 439 (441) (DB), *Chandra Shekhar v. Amir Begam*.

2. (1943) 30 AIR 1943 Sind 132 (134) (DB), *Md. Shah v. Abdul Jabbar*. (Order dismissing appeal under O. 41, R. 18 Civil P. C.—Appellant not pursuing his remedy under O. 41, R. 19 within time—Court has no inherent power to set aside the order.)

(1935) 22 AIR 1935 Cal 336 (337) (DB), *Saratchandra v. Mritunjay*.

(1931) 18 AIR 1931 Cal 319 (320), *Madha Ram v. Tupoo*.

(1925) 12 AIR 1925 Lah 321 (321), *Duni Chand v. Pritam Das*.

(1933) 20 AIR 1933 Mad 258 (258, 259) (DB), *Sundaresa v. Subba Rao*.

(1924) 11 AIR 1924 Rang 274 (275) (DB), *S. G. M Samson v. Silvaran*.

(1932) 19 AIR 1932 Oudh 220 (222) (DB), *Jagmohan v. Mahadeo*.

(1928) 15 AIR 1928 Nag 91 (92), *Saba v. Dayaram*.

(1927) 14 AIR 1927 Nag 197 (198), *Sabuddin v. Pundlik*.

3. (1925) 12 AIR 1925 All 236 (237) (DB), *Imtiaz-ul-nissa v. Chuttan Lal*.

Section 3
Note 29

29. Set-off and counter-claim — Limitation. — A claim of set-off by the defendant to a suit is not a proceeding to which this Act applies and hence is not *directly* subject to any period of limitation. But whether a set-off can be claimed may depend in certain cases on the question whether a *suit* for the amount sought to be set off would have been barred by limitation. Thus, a *legal* set-off cannot be claimed, unless a *suit* for the amount sought to be set off would have been within time at the date on which the suit wherein the set-off is claimed was filed.¹ But there is a conflict of decisions whether an *equitable* set-off can be claimed where a suit for the amount claimed would have been barred by limitation.² In proceedings for the winding up of a company, the Official Liquidator in exercising his rights under the mutual credit clause (see S. 46 of the Provincial Insolvency Act of 1920 and S. 229 of the Companies Act of 1913) can set off against a debt due from the company a debt which the debtor owes to the company although the latter debt may be time-barred.³

Counter-claim : Where the defendant in a suit makes a counter-claim against the plaintiff, such counter-claim virtually amounts to a suit and hence can be made only where at the date when it is *made* an independent suit for the amount claimed would have been in time.⁴ Thus, in the case of a set-off, the date with reference to which the test of limitation is applied (in cases in which such test is applicable) is the date of the institution of the suit wherein the set-off is claimed;

Section 3 — Note 29

1. ('47) 1947 Rang L R 478 (482), *Nanigram Jagannath v. Shaik Mohamed*. ('41) 28 AIR 1941 All 278 (279), *Thakur Prasad v. Official Liquidator, Benares Bank*, (Under O. 8, R. 6, C. P. C., the money sought to be set off should be legally recoverable by the defendant from the plaintiff.)
- ('30) 122 Ind Cas 490 (490) (Lah) (DB), *Bishambar Das v. Salig Ram*. ('21) 8 AIR 1921 Cal 67 (68), *Narendra Lal v. Tarubala Dassi*. [See also ('21) 8 AIR 1921 Mad 688 (688) (DB), *Subraya v. Janardana*.]
2. ('26) 13 AIR 1926 Pat 77 (79) (DB), *Nathan Prasad v. Kali Prasad*. (A time-barred debt may be claimed by way of equitable set-off.) ('25) 12 AIR 1925 Cal 1146 (1146, 1147) (DB), *Abdul Majid v. Kulsam Bibi*. (Do.) ('15) 2 AIR 1915 Cal 649 (650), *Ramdhari v. Permanunda*. (Do.) ('07) 12 Cal W N 60 (62) (DB), *Gajadhar v. Raghubar*. (Do.) ('82) 6 Bom 628 (639), *Merwanji v. Rustomji*. (Do.) [Contra ('47) 1947 Rang L R 478 (482), *Nanigram Jagannath v. Shaik Mohamed*. (Cannot be claimed if time barred.) ('19) 6 AIR 1919 Cal 916 (917) (DB), *Kanailal v. Nitya Saran*. (Claim barred at the date of filing written statement cannot be allowed to be set off.) ('17) 4 AIR 1917 Mad 258 (258, 259) (DB), *Vyavan Chetty v. Natraja Desikar*. (But where there is a fiduciary relationship between the parties, and there is accountability, even barred claims may be taken into account in passing the final accounts.)]
3. ('41) 28 AIR 1941 All 278 (279), *Thakur Prasad v. Official Liquidator, Benares Bank Ltd*.
4. ('25) 12 AIR 1925 Nag 445 (446, 447), *Beni v. Bisan Dayal*. ('20) 7 AIR 1920 Mad 819 (821) (DB), *Narsimha v. Srinivasa*. [See ('37) 24 AIR 1937 Nag 210 (210, 211), *Sundermal v. Ganesh Narayan*. (Counter claim — Allegation of loan put forward by defendant not as a ground of defence but as a ground of attack—Limitation—Written statement more than three years after date of payment—Counter-claim held barred.)]

whereas in the case of a counter-claim, the date with reference to which limitation is determined is the date on which the written statement making the counter claim is filed.⁵

30. Insolvency proceedings and limitation.—A debt which is not barred by limitation on the date of *adjudication* is provable in insolvency, although it may be barred on the date of the proof.¹

An application by a creditor under the Provincial Insolvency Act to be brought on the schedule of creditors is not governed by any period of limitation. But such application may be refused on the ground of undue delay on the part of the creditor.²

An application by the Official Assignee under S. 7 of the Presidency Towns Insolvency Act for the recovery of moneys due to the estate of the insolvent is equivalent to a suit, and cannot be allowed if at the date of the application a suit for the recovery of the moneys would have been barred by limitation.³

As to whether the period during which insolvency proceedings are pending against a person can be deducted in calculating the period of limitation for suits and other proceedings by or against such person, see Notes under S. 15.

31. Plea of exemption from limitation.—Order 7, Rule 6 of the Civil Procedure Code provides that where a suit is instituted after the prescribed period of limitation, the plaint should show the ground upon which exemption from the bar of limitation is claimed. Hence,

5. ('34) 21 AIR 1934 All 427 (428, 429, 430) (DB), *Bharata v. Chet Ram*.

('21) 8 AIR 1921 Cal 67 (68) : 48 Cal 817 : 66 Ind Cas 209, *Narendra Lal v. Tarubala Dassi*.

('23) 10 AIR 1923 Bom 113 (118), *Najan Ahmed v. Salemahomed*.

[See ('98) 1898 Pun Re No. 53, *Sohna v. Nand Ram*.

('85) 7 All 284 (287) (DB), *Pragi Lal v. Maxwell*.]

[But see ('19) 6 AIR 1919 Cal 916 (917) (DB), *Kanai Lal v. Nitya Saran*. (Claim which has become barred by limitation at the time of filing the written statement in a suit is not a debt legally recoverable by the defendant from plaintiff and cannot therefore be allowed to be set off.)]

Section 3 — Note 30

1. ('24) 11 AIR 1924 Oudh 351 (352) (DB), *Ijaz Hussain v. Lachman Das*.

('25) 12 AIR 1925 Pat 438 (440) (DB), *Babu Lal v. Krisha*.

('26) 13 AIR 1926 Oudh 621 (621) (DB), *Damodar Das v. Hamidul Rahman*.

[See also ('32) 19 AIR 1932 Mad 287 (288) (FB), *Fatma v. Nagoor Khan*. (Limitation expiring during holidays — Debtor adjudged insolvent on re-opening day — Debtor is "subject" to the debt within S. 46 (3), Presidency Towns Insolvency Act, at the time of his adjudication and the debt is provable in the insolvency.)]

2. ('27) 14 AIR 1927 Rang 263 (264, 265) (DB), *Jhan Bahadur v. Bailiff of the District Court of Toungoo*.

3. ('36) 23 AIR 1936 Mad 778 (779) (FB), *Muthuswami v. Official Assignee, Madras*.

[See also ('50) 37 AIR 1950 Bom 399 (Pr 2) (DB), *Raoji Bapuchand v. Bavachekar*. (Although the Limitation Act does not apply to an application made by the Receiver under S. 4, Provincial Insolvency Act, inasmuch as the defence under the Limitation Act is open to an opponent if the suit is filed by the Receiver, the defence is equally applicable to him when an application is made.)]

Also see Note 26.

Section 3 Note 31

where the allegations in the plaint show that the suit has been instituted after the period prescribed by the first schedule and the plaintiff relies on the provisions of any of the sections from 4 to 25 of this Act as saving his suit from the bar of limitation, the plaint itself must show the ground on which such exemption is claimed.¹ Where the plaint does not comply with this requisite, it must be rejected under O. 7, R. 11 of the Code,² and the plaintiff cannot be allowed to rely on any ground, not shown in his plaint as saving his suit from the bar of limitation.³ But the Court can allow the plaint to be amended by including such ground of exemption.⁴ As to when such amendment can be allowed,

Section 3 — Note 31

1. ('47) 34 AIR Oudh 91 (93), *Ram Sukh v. Ram Pher*.
 ('37) 24 AIR 1937 Mad 826 (828), *Madappaya v. P. Mahabala Rao*,
 ('35) 22 AIR 1935 Cal 255 (256), *Debji Ghelabhai & Bros v. Mehta & Co., Asansol*.
 (Written statement filed in suit itself cannot be called in aid for the purpose of S. 20 of the Act — A suit must be tried on the cause of action as laid in the plaint.)
 ('10) 7 Ind Cas 455 (457) (DB), *Ghulam Hussain v. Muhammadali*.
 ('95) 22 Cal 952 (note), *Administrator-General of Bengal v. Chunder Cant*.
 ('33) 20 AIR 1933 Lah 491 (492), *Umri v. Kalu*.
 ('29) 16 AIR 1929 Lah 266 (266, 267), *Pahumal v. Chunni Lal*.
 ('22) 9 AIR 1922 Lah 39 (40) (DB), *Uttam Chand v. Mt. Thakar Devi*. (But a plaintiff having mentioned one ground of exemption in the plaint is not debarred by the provisions of O. 7, R. 6, C. P. C., from taking another ground to get over the bar of limitation.)
 ('09) 4 Ind Cas 902 (906) (DB), *Abdul Ali v. Von Goldstein*. (Held that in this case, the plaint did make the intention of the plaintiff clear, viz., the intention to rely on the alleged acknowledgments which saved the bar of limitation.)
 ('09) 4 Ind Cas 923 (924) (Lah) (DB), *Gauhar v. Ghulam Muhammad*.
 ('33) 20 AIR 1933 Mad 675 (677), *Ramaswami v. Palaniappa*.
 ('19) 6 AIR 1919 Mad 332 (333), *Marudai v. Chinnakannu*.
 ('24) 11 AIR 1924 Nag 80 (80), *Vithoba Yadeo v. Suryabhan*.
 ('21) 8 AIR 1921 Nag 94 (95), *Jago v. Mahadeo*.
 ('24) 11 AIR 1924 Pat 806 (806) (DB), *Chatterdhari v. Nasib Singh*.
 ('14) 1 AIR 1914 Sind 70 (73) (DB), *Gulrajmal v. Pamanmal*.
 ('14) 1 AIR 1914 Lah 337 (338), *Govindamal v. Santa*.
 ('10) 8 I C 999 (1011) (DB), *Nihal Devi v. Kishore Chand*.
 2. ('23) 10 AIR 1923 Nag 30 (31), *Sawalram v. Ganesh Lal*.
 ('24) 11 AIR 1924 Nag 80 (80), *Vithoba Yadeo v. Suryabhan*.
 3. ('22) 9 AIR 1922 Lah 39 (40) (DB), *Uttam Chand v. Thakar Devi*.
 ('07) 17 Mad L Jour 281 (282) (DB), *Jagannadha v. Seshayya*.
 ('04) 31 Cal 195 (201) (DB), *Jogeshwar v. Rajnarain*.
 [See ('17) 4 AIR 1917 Mad 845 (845), *Nagendran v. Kuppusway*. (Objection that the plaintiff did not set out the ground of exemption from limitation will not be allowed to be taken in revision in the High Court.)]
 [See also ('03) 30 Cal 699 (708), *Benode Behari v. Raj Narain*. (Quære).]
 See also cases in foot-note (1) above.
 4. ('09) 3 Ind Cas 159 (160) (DB), *Gunnaji v. Makanji*.
 ('86) 1886 Bom P J 169 (DB), *Gangabai v. Venkaji*.
 ('18) 5 AIR 1918 Lah 220 (220), *Ramsukh v. Ghulam Muhammad*.
 ('27) 14 AIR 1927 Mad 504 (505), *Vasudeva v. Venkalakshmi*.
 ('18) 5 AIR 1918 Mad 1200 (1200) (DB), *Muthiah v. Chithambaram*.
 ('10) 7 Ind Cas 797 (797) (Mad), *Nathamuri Narayana v. Balasubramaniya*.
 ('20) 7 AIR 1920 Nag 200 (202), *Tekchand v. Patto*. (Limitation expired during vacation—Suit filed on the re-opening day — Plaint failing to show on what ground exemption was claimed—Held that, proper course was not to dismiss the suit but to require plaint to be amended.)

the matter is within the discretion of the Court.⁵ Generally speaking, a plaintiff will not be allowed to plead a ground of exemption at a late stage of the proceedings where such ground raises new questions of fact and cannot be disposed of, on the facts before the Court.⁶ But, where the questions raised are capable of determination on the facts before the Court, the point can be allowed to be raised at any stage.⁷

The Court has also power to allow an amendment of the plaint by introducing an additional ground of exemption or substituting a new one.⁸

As to whether a plaintiff who has relied on one ground of exemption in his plaint can raise another ground at the trial without an amendment of the plaint, see the A. I. R. Commentaries on the Civil Procedure Code, 5th (1950) Edition, O. 7, R. 6, and the undermentioned cases.⁹

The requirement of O. 7, R. 6, that the plaint should contain the ground of exemption from limitation only applies to cases in which the suit appears *prima facie* to be barred by limitation on the allegations of the plaint itself, and not where the bar appears only during the

(1935) 22 AIR 1935 Oudh 501 (503) (DB), *Gappoo v. Har Charan*.

5. See Civil Procedure Code, Order 6 Rule 17.

6. (1934) 21 AIR 1934 P C 208 (210) (P C), *Kalyan Mal v. Ahmed Uddin*.

(1941) 28 AIR 1941 Nag 100 (101), *Shivjiram v. Gulabchand*. (Plea of minority cannot be raised for first time in second appeal—(1912) 17 Cal W N 667 (DB), *Panchu v. Isaf*, followed.)

(1908) 31 Mad 540 (543) (DB), *Krishnamachariar v. Kupppammal*.

(1923) 10 AIR 1923 Lah 645 (646) (DB), *Ram v. Gaman Ram*. (A remand, in order to enable the plaintiff to ascertain whether or not a demand was made within three years of the institution of the suit which would save limitation, was refused.)

7. (1918) 5 AIR 1918 Mad 238 (239) (DB), *Palaniappa v. Veerappa*.

[See (1931) 18 AIR 1931 Cal 670 (671) (DB), *Hari Charan v. Kamal Kumari*. (New plea as to applicability of particular article of Limitation Act can be taken in second appeal provided defendant is not prejudiced by such course of action.)

(1927) 14 AIR 1927 Bom 398 (398) (DB), *Mahomadsa v. Khadirsa*.]

8. (1948) 35 AIR 1948 Nag 334 (340, 341) (DB), *Fatechand v. Wasudeo*. (Amendment seeking additional ground of exemption from limitation based on letter relied on by defendant—Amendment should be allowed even at a late stage as there would be no change of cause of action and defendant would not be taken by surprise.)

(1935) 22 AIR 1935 Mad 158 (159, 160), *Muthammal v. Gurusami*. (No new relief is prayed on the same cause of action, nor fresh cause of action added—Amendment should be allowed.)

9. (1935) 22 AIR 1935 All 946 (949) (FB), *Udeypal Singh v. Lakshmi Chand*. (Plaintiff can rely on ground of exemption different from that mentioned by him in the plaint under Order 7 Rule 6.)

(1935) 22 AIR 1935 Bom 213 (214) *Percy v. Ardeshir*. (Do.)

(1910) 8 Ind Cas 788 (789) (Cal) (DB), *Nistarini v. Chandi Dasi*. (Do.)

(1933) 20 AIR 1933 Mad 874 (876), *Mahadeva v. Marulai*. (Without amendment of plaint, new ground of exemption cannot be put forward.)

(1936) 23 AIR 1936 Mad 545 (547), *Ramasamy v. Anaiya*. (Do.)

(1937) 24 AIR 1937 Oudh 391 (392) (DB), *Satgurnath v. Brahmadat*. (Ground of exemption from limitation taken in plaint—Plaintiff is not precluded from subsequently taking another and inconsistent ground to get over limitation.)

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Notes 31-32

course of the trial. In such cases the failure of the plaintiff to plead in his plaint exemption from the ordinary rule of limitation will not preclude him from raising such point at the hearing.¹⁰ Moreover, to satisfy the provisions of O. 7 R. 6, it is sufficient if the plaint on the face of it shows the ground of exemption; it is not necessary that the ground of exemption should be set forth in explicit terms.¹¹

The above principles apply also to appeals and applications.¹²

32. Limitation only applies to institution of proceedings, not their continuation. — The bar of limitation arises only where a suit is instituted, an appeal preferred or an application made after the prescribed period of limitation. Thus, the bar only applies where a proceeding has been *instituted* after the period of limitation. The bar does not apply to steps which constitute a mere *continuation* of a pending proceeding. Thus, where a suit dismissed for default is restored to the file, it does not become a fresh suit but is only the continuation of the old suit.¹ So also, where a suit is validly instituted, but the plaint

10. ('19) 6 AIR 1919 Lah 20 (21), *Khandulal v. Fazal*.

('14) 1 AIR 1914 Lah 408 (410) (DB), *Dev Raj v. Shiv Ram*.

('19) 6 AIR 1919 All 227 (228) (DB), *Kamala Devi v. Gur Dayal*.

('22) 9 AIR 1922 Oudh 135 (137), *Ram Autar v. Beni Singh*.

11. ('08) 7 Cal L Jour 560 (562) (DB), *Raghunath v. Syed Samad*.

('09) 2 Ind Cas 77 (78) (Cal) (DB), *Gangadhar v. Abdul Ajiz*. (When the plaintiff or all the plaintiffs are minors, it is not usually necessary for them to plead exemption from the law of limitation—The Court can and must see from the record that, being minors, time against them has not yet begun to run.)

('23) 10 AIR 1923 Lah 591 (592) (DB), *Sukhbir Singh v. Piare Lal*. (No statement necessary where there was the endorsement of the Court returning the plaint giving the date of original presentation and the date of return and the circumstances entitling plaintiff to the benefit of S. 14, Limitation Act, appeared on the face of the record.)

[See ('12) 16 Ind Cas 804 (805) (DB), *Hardhian Singh v. The Delhi Cloth and General Mills Co. Ltd.* (If facts as stated in the plaint necessarily suggest fraud on the part of a defendant, the mere omission therein expressly to stigmatise the defendant's conduct as fraudulent would be no bar to plaintiff's relying on the provisions of S. 18, Limitation Act, and in such case, the Court should return the plaint to the plaintiff for amendment.)]

See also Section 6 Note 29.

12. ('33) 20 AIR 1933 Sind 365 (366) (DB), *Kaliandas v. Mohammad*. (Where a person relies upon a particular ground as reviving limitation for an *execution application*, it is incumbent upon him to specify that ground in the application—If he fails to do so, it is not open to him to take advantage of it subsequently.)

('28) 15 AIR 1928 PC 103 (103, 106) (PC), *Jijibhoy v. T. S. Chettyar*. (Appeal dismissed as time-barred—Application for review—Ground of exemption from limitation for the first time urged in application for review—Doubtful whether point could be raised—But the lower Court did allow the point to be raised—The Privy Council directed the applicant for review to pay the costs of the application.)

('11) 9 Ind Cas 157 (158) (DB) (Mad), *Yereni v. Vappulapati*. (Where application had been returned for presentation to proper Court, the endorsement of the Court on the application as to dates of receipt and return is substantial compliance with O. 7, R. 6, C. P. C., though application does not expressly mention how limitation was saved.)

Section 3—Note 32

1. ('09) 3 Ind Cas 484 (486) (DB) *Dhirta v. Kesri*.

is returned for some purpose and re-presented, such re-presentation is only a continuation of the suit and does not affect the question of limitation.² For other instances, see the undermentioned cases.³ See also Note 5.

See also Article 182 Note 143.

33. Amendment of plaint, etc. — The bar of limitation under this section only applies where a suit has been *instituted* after the period of limitation. The bar does not apply to the *amendment* of plaints. In other words, the amendment of a plaint does not amount to the institution of a fresh suit. When a plaint is amended, the amendment relates back to the date of the institution of the suit and the suit in the amended form must be deemed as instituted on such date, so that if on that date the suit is not time-barred, the suit in the amended form will not be time-barred, although at the date of the *amendment* limitation for the suit may have expired.¹

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[See also ('28) 15 AIR 1928 Nag 106 (108), *Shribalabh v. Gulab Mali*. (Ex parte decrees set aside on ground of minority and non-representation - On defendant attaining majority plaintiff applying for restoration of suits—Suits held should be restored and treated as pending cases.)]

2. ('30) 17 AIR 1930 Lah 480 (480), *Md. Baksh v. Sikandar Khan*.

('87) 1887 Pun Re No. 22, *Torobaz v. Pir Bakhsh*.

[See also ('29) 16 AIR 1929 Lah 409 (416) (DB), *Labhu Ram v. Charnu Fauju*.

('29) 16 AIR 1929 Lah 248 (249), *Amar Nath v. Hakim Rai*.

('39) 26 AIR 1939 Mad 397 (399), *Chendrayya v. Seethanna*. (Plaint returned for want of pecuniary jurisdiction—Re-presentation of plaint in same Court after omitting a portion of the relief—It can be treated as a continuation of the original suit.)]

3. ('50) 1950 A W R 563 (564) (DB), *Bajrang Bahadur v. Rameshwar Baksh*. (Devolution of interest pending suit—Application for continuation under O. 22 R. 10—No question of limitation arises.)

('47) 34 AIR 1947 All 357 (360) (DB), *Ali Yaqin v. Bhagwan Das*. (Suit against minor treating him as major—Ex parte decree—On attaining majority, minor suing and getting decree set aside—Suit restored—Limitation—Suit not barred if limitation had not expired at original institution of suit.)

('16) 3 AIR 1916 Nag 31 (33), *Abu Bakar Abdul Rahman & Co. v. Rambux*. (Transfer of suit from one Court to another can never raise a question of limitation.)

('25) 12 AIR 1925 Sind 330 (340), *Lakhmichand v. Firm of Khushaldas-Mangatram*. (Minor electing under O. 32, R. 12, C. P. C., to continue suit brought by next friend is not to be deemed as instituting a fresh suit.)

('72) 17 Suth W R 450 (451) (DB), *Kalee Kishore v. Nilamber*. (If instead of appealing from decision of previous suit plaintiff brings a fresh suit on same cause of action it cannot be treated as continuation of previous suit.)

('84) 1884 Bom P J 262 (DB), *Parikh v. Raval*. (Suit instituted by minor without next friend is not nullity and prevents statute of limitation from running, and may be proceeded with on a next friend being appointed.)

('38) 25 AIR 1938 All 552 (554), *Ramakant v. Satya Narain*. (On receipt of stay order from High Court application for restitution ordered to be filed for the time being in record-room—Application is not finally disposed of and no question of limitation arises as to its being continued.)

Section 3 — Note 33

1. ('50) 37 AIR 1950 Pepsu 21 (Pr 4), *Ganda Singh v. Zora Singh*. (Suit for mere declaration—Amendment after limitation by adding consequential relief due to subsequent change of circumstances—Suit does not become time-barred.)

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Note 33

But the power of allowing amendments of pleadings is a *discretionary* power and in exercising its discretion the Court will consider the question whether the proposed amendment alters the substantial character of the suit and whether a fresh suit would have been time-barred if instituted on the date on which the amendment is sought.² As a general rule, the Court will refuse the amendment, if it will alter the substantial character of the suit and if, at the time when the amendment is sought, a fresh suit would have been barred by limitation; the principle being that a defendant should not be deprived, by means of an amendment, of a defence of limitation which would otherwise be open to him.³ But, in exceptional circumstances, the

(1938) 25 AIR 1938 Pat 205 (208) (DB), *Kesho v. Hari*.

(1985) 9 Bom 373 (402), *The New Flaming Spinning and Weaving Co. Ltd. v. Kessowji*.

(1920) 7 AIR 1920 Cal 770 (770) (DB), *Nripendranath v. Hemanta Kumar*.

(1934) 21 AIR 1934 Lah 412 (412), *Topan Das v. Tharia Ram*. (AIR 1918 Cal 443 (DB), *Manindra v. Rangi Lal*, distinguished.)

(1933) 20 AIR 1933 Mad 153 (156), *Satyanarayana v. Venkataswami*.

(1995) 17 All 288 (291) (DB), *Barkhat-un-nissa v. Md. Asad Ali*.

(1914) 1 AIR 1914 Lah 263 (265) (DB), *Jalal Din v. Qaim Din*.

(1936) 23 AIR 1936 Rang 508 (509), *Krishna v. Ma Aye*.

(1914) 1 AIR 1914 Nag 77 (78), *Nemasa v. Ram Krishna*. (1 NLR 117, followed.)

(1921) 8 AIR 1921 PC 50 (51, 52) (PC), *Charan Das v. Amir Khan*.

(1863) 1 Mad HCR 427 (428) (DB), *Ismail Sahib v. Arumuga Chetti*.

(1905) 1 Nag L R 117 (121), *Mangal Prasad v. Chandramall*.

(1971) 16 Suth W R 47 (48) (DB), *Khellat Chunder v. Nusseebunissa*.

(1975) 23 Suth W R 447 (447) (DB), *Mengur Munder v. Baboo Huree Mohan*.

(1967) 7 Suth W R 157 (158) (DB), *Greesh v. Pran Kishen*.

(1966) 6 Suth W R 39 (39) (DB), *Husrutoollah v. Aboo Md. Abdool Kader*.

(1966) 5 Suth W R 207 (207) (DB), *Ram Coomar v. Dwarkanath*.

(1995) 19 Bom 320 (323) (DB), *Patel Mafatlal v. Bai Parson*.

(1911) 10 Ind Cas 731 (733), *Durgagir v. Kollu*. (Date of amendment is immaterial for purposes of limitation.)

(1980) 2 All 832 (834, 835) (DB), *Ram Lal v. Harrison*.

2. See AIR Commentaries on the Civil Procedure Code, 5th (1950) Edition, O. 6, R. 17, Note 3.

3. (1938) 25 AIR 1938 Pat 44 (47) (DB), *Ramkaran Thakur v. Baldeo Thakur*. (Application for amendment made when claim asked is time-barred — Although there is still discretion, it would be more wisely exercised by refusing amendment.)

(1938) 25 AIR 1938 Pat 205 (208) (DB), *Kesho v. Hari*.

(1937) 24 AIR 1937 Mad 122 (123), *Narayanamurthy v. Suryanarayana*.

(1929) 113 Ind Cas 87 (88) (Lah) (DB), *Kalyan Dass v. Oma Datta*.

(1932) 19 AIR 1932 Bom 367 (368), *Nanjibhai v. Popatlal*.

(1914) 1 AIR 1914 All 80 (83) (DB), *Balkaran v. Gaya Din*.

(1931) 18 AIR 1931 All 160 (162) (DB), *Allah Bakhsh v. Hamid Khan*.

(1905) 1 Nag L R 117 (120, 121), *Mangal Prasad v. Chandramall*.

(1914) 1 AIR 1914 All 302 (303) (DB), *Bisheshar Prasad v. Govind Ram*.

(1914) 1 AIR 1914 Sind 70 (72, 73) (DB), *Gulrajmal v. Pamanlal*.

(1924) 11 AIR 1924 Sind 144 (145) (DB), *Dipchand v. Firm of Parmanand Chimandas*.

(1925) 12 AIR 1925 Rang 49 (54) (DB), *Hirjee Devaraj & Co. v. Maung Nyun*.

(1925) 12 AIR 1925 Rang 264 (265) (DB), *Nagoor v. Haji Moideen*.

(1928) 15 AIR 1928 Mad 828 (829) (DB), *Seshacharlu v. Venkatasubba Rao*.

(1926) 13 AIR 1926 Cal 189 (189), *Macleod & Co. v. Ivan Jones & Co*.

(1927) 14 AIR 1927 Mad 650 (652) (DB), *Santhanakrishna v. Chellappa*.

amendment can be allowed even in such cases,⁴ as for instance, where

- (26) 13 AIR 1926 Mad 827 (828), *Lakshmanacharyulu v. Venkataramanuja*. (Amendments sought to be made in second appeal.)
- (25) 12 AIR 1925 Mad 441 (442), *Mayankutti v. Kathiri*, (Do.)
- (16) 3 AIR 1916 Mad 698 (698) (DB), *Narayanan v. Ratnasabapathy*. (Amendment can be allowed if it sets up no new cause of action but prays for additional relief on facts already alleged in plaint.)
- (27) 14 AIR 1927 Cal 733 (736) (DB), *Nalinakha v. Ram Taran*.
- (31) 18 AIR 1931 Nag 74 (79, 80), *Bhimrao v. Gangabai*.
- (30) 17 AIR 1930 Nag 295 (296), *Govind v. Baliram*.
- (32) 19 AIR 1632 Rang 26 (26), *Byash Chandra v. Ajodhyanath*. (Amendment not setting up new cause of action but only introducing fresh matter in plaint—Still if it deprives defendant of his defence of limitation it will not be allowed.)
- (32) 19 AIR 1932 Bom 117 (121) (DB), *Parbhu Das v. Lallubhai*.
- (10) 7 Ind Cas 455 (457) (DB), *Gulam Hussein v. Mahammadaly*.
- (23) 71 Ind Cas 270 (272) (DB) (Mad), *Thirumalasseri Kottayil Shreedharam Valia Rajah v. Parakkat*.
- (31) 18 AIR 1931 Bom 590 (591), *Bishamberdas v. Brijlal*.
- (31) 18 AIR 1931 Mad 1 (2) (DB), *Vaithilingam v. Kondaswamy*.
- (33) 20 AIR 1933 Lah 774 (774), *Rulia Ram v. Ram Chandar*.
- (31) 18 AIR 1931 Mad 542 (549) (DB), *Chandramma v. Seethan*.
- (21) 8 AIR 1921 Pat 485 (486), *Sinehai Ram v. East Indian Railway*.
- (09) 4 Ind Cas 726 (727) (DB), *Kisandas v. Rachappa*.
- (28) 110 Ind Cas 529 (530) (DB) (Cal), *Akshoy Coomar v. Kali Narayan*.
- [See (41) 28 AIR 1941 All 49 (49) (DB), *Banwari Ram v. Muhammad Yar Khan*. (Plaintiff having knowledge of plaint being defective given opportunity to amend—Defect not removed—Application for further amendment made beyond limitation—In circumstances of case held no further indulgence could be granted.)]
- [See also (25) 12 AIR 1925 All 355 (356) (DB), *Umar Daraz v. Shri Ram*. (When pre-emption suit is dismissed for joining a stranger, plaint cannot be allowed to be amended by striking off stranger's name.)]
- (23) 10 AIR 1923 All 187 (188) (DB), *Badri Singh v. Gobardhan*. (Do.)]
4. (21) 8 AIR 1921 PC 50 (51, 52) (PC), *Charan Das v. Amir Khan*. (Plaintiff through clumsy, blundering and asserting rights in form not permitted by statute—Amendment should be allowed.)
- (25) 12 AIR 1925 Cal 67 (74) (DB), *Niranka Chandra v. Atul Krishna*.
- (35) 22 AIR 1935 Cal 102 (105) (DB), *Indubala v. Lakshminarayana*.
- (29) 16 AIR 1929 Bom 51 (53, 54) (DB), *Bhogi Lal v. Jethlal* (Amendment can be allowed where through some blundering or inexperience plaintiff does not assert his rights in proper form.)
- (94) 17 Mad 67 (68, 69) (DB), *Sattappa v. Jogi Soorappa*.
- (24) 11 AIR 1924 Cal 517 (520) (DB), *Satchidanand v. Nritya Nath*.
- (27) 14 AIR 1927 Lah 819 (820, 821) (DB), *Md. Ismail v. Said-ud-din*. (Substantial justice is the aim and object of all rules of procedure.)
- (14) 1 AIR 1914 Low Bur 173 (174) (DB), *Palaniappa v. P. M. R. M. Firm*.
- (14) 1 AIR 1914 Nag 77 (78), *Nemasa v. Ramkrishna*. (Appellate Court can allow amendment even after limitation where request is made within time in original Court.)
- (11) 10 Ind Cas 218 (220) (Mad), *Seethi Kutti v. Achutan Nair*. (Authorities as to remedy open to plaintiff conflicting—Plaintiff taking one view—Amendment can be allowed.)
- (76) 2 Cal 1 (15, 16) (DB), *Ramdoyal v. Ajoodhia*.
- (36) 23 AIR 1936 Mad 785 (787, 788) (FB), *Official Assignee v. Kappuswamy*.
- (36) 23 AIR 1936 Mad 632 (633), *Chelam Sakha Raja v. Muthusami*.
- (25) 12 AIR 1925 Nag 9 (11), *Sitaram v. Nand Ram*. (Bona fide mistake found out on inspection taken by defendant—Amendment can be allowed.)

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Note 33

natural justice is not on the side of the defendant and his plea of limitation is a purely technical one.⁵

Where the proposed amendment does not alter the substantial nature of the suit,⁶ or where at the time the amendment is sought even a fresh suit would not be time-barred,⁷ there is no question of the defendant being deprived of any possible defence of limitation and

('27) 14 AIR 1927 Nag 310 (311, 312), *Bhuwan Lal v. Snmranlal*. (Defendant himself suggesting amendment—He was held to have waived plea of limitation.)

('25) 12 AIR 1925 Nag 155 (156), *Bulakidas v. Agent, B. N. Ry Co.*

('29) 116 Ind Cas 871 (874) (DB) (All), *Sheo Prasad v. Naval Kishore*. (Suit for possession on deed of compromise—Amendment into one for possession allowed.)

('25) 12 AIR 1925 Sind 173 (175), *Jessaram v. Ratanchand*.

('34) 21 AIR 1934 Sind 33 (33), *Jethanand Mooorijmal, In re*.

[See also ('39) 26 AIR 1939 Mad 397 (399), *Chendrayya v. Seethanna*. (Plaint returned for want of pecuniary jurisdiction—Re-presentation in same Court after omitting portion of the relief—It can be treated as a continuation of the original suit.)

('35) 22 AIR 1935 Mad 202 (203), *Srirangam v. Sornam Pillai*. (Insolvency proceedings.)]

5. ('68) 9 Suth W R P C 9 (14) (PC), *Mahomed Zahoor Ali v. Thakooranee Rutta Kooer*. (Suit wholly misconceived—Instead of dismissing the suit, the Privy Council allowed it to be amended as the defence of limitation, if a new suit had to be filed, would be most inequitable in the circumstances of the case.)

See also Note 39.

6. ('48) 35 AIR 1948 Nag 334 (340, 341) (DB), *Fatechand v. Wasudeo*. (Amendment seeking additional ground of exemption from limitation based on letter relied on by defendant—No substantial change in cause of action—Amendment should be allowed even at a late stage.)

('39) 26 AIR 1939 Nag 23 (25), *Ram Nath v. Mohanlal*. (Merely furnishing particulars and introducing no new cause of action—No question of limitation arises.)

('20) 7 AIR 1920 Low Bur 92 (93, 94), *Ma E Gywe v. Ma Le Wa*. (Amendment nothing more than original claim in another form and one that the other party had already to meet.)

('26) 13 AIR 1926 Mad 128 (129), *Ramaswami v. Venkatanarayana*. (Amendment asking for change not in cause of action but in its date.)

('25) 12 AIR 1925 Nag 9 (11), *Sitaram v. Nandram*. (To disclose further details of facts which support a cause of action already sued upon is not to introduce a new relief.)

('11) 10 Ind Cas 476 (477), *Muhammad Sadiq v. Abdul Majid*. (Amendment amounting to a mere correction of the description of the property.)

('93) 1893 All 112 (113), *Ajudhia Ram v. Muhammad Munir*. (Amendment of clerical error, no question of limitation.)

('95) 22 Cal 692 (712) (DB), *Dhani Ram v. Bhagirath*. (Proposed amendment not likely to result in the inclusion of any new claim or cause of action barred by limitation at date of the proposed amendment.)

('11) 10 Ind Cas 737 (737, 738), *Bansidhar v. Raghabir*. (Suit bad for multifariousness—Amendment asking for restricting relief so as to avoid multifariousness.)

('37) 24 AIR 1937 Cal 485 (487) (DB), *Jogendra v. Debendra*. (Petitioner, by amendment, not wanting to substitute one cause of action for another nor to change subject-matter of suit but simply wanting to add another ground of exemption from limitation—Amendment was allowed.)

[See ('34) 21 AIR 1934 Cal 554 (555) (DB), *Ramendra v. Keshab Chandra*. (Facts on which the amendment was based were indicated in the plaint itself with sufficient clarity and completeness.)]

7. ('39) 26 AIR 1939 Mad 397 (398), *Chendrayya v. Seethanna*. (Reversed on another point in ('40) 27 AIR 1940 Mad 689, *Chandrayya v. Seethanna*.)

[See ('14) 1 AIR 1914 Nag 77 (78), *Nemasa v. Ramkrishna*.]

there will be no reason for refusing such amendment on the ground of the defendant being deprived of such defence. It depends on the circumstances of each case whether the proposed amendment alters the substantial character of the suit⁸ or whether a fresh suit would have been barred by limitation when the amendment is sought.

The above principles will also apply to the amendment of memoranda of appeals⁹ and applications.¹⁰

See also the A. I. R. Commentaries on the Civil Procedure Code, 5th (1950) Edn., Notes under O. 6 R. 17, O. 21 R. 17 and O. 41 R. 3.

33a. Conversion of proceedings. — Where a proceeding of one character is converted into one of a different character, the date of institution of the latter proceedings is, on the principles stated in Note 33 above, the date on which the former proceeding was instituted. But, the questions as to what is the period of limitation applicable to the proceeding and when it begins to run must be determined with reference to the proceeding *as converted*. Hence, although the proceeding as originally instituted may have been within time at the date of its institution, if at such date the proceeding as converted would have been barred by limitation, the latter must be held to be barred. Thus, suppose a suit is converted into an application for execution under S. 47, Civil Procedure Code. If at the date of the institution of the *suit* the application would have been barred by limitation, the application must be held to be barred although the *suit* may be within time at such date.

Where a Court has a discretion to convert a proceeding of one character into a different kind of proceeding and where the proceeding as converted would be barred by limitation on the above principles the Court will refuse to convert the proceeding.¹

34. Withdrawal of suit and institution of fresh suit.—

Where a suit is withdrawn with the permission of the Court to bring a fresh suit, it is clear that the period of limitation with reference to the latter suit must be calculated with regard to the date on which such suit is instituted, and the date on which the previous suit

8. ('26) 13 AIR 1926 Sind 264 (266, 267), *Gordhandas v. Gokal Khatao*. (Court must look to substantial nature of the claim introduced.)

9. ('31) 18 AIR 1931 Rang 314 (315), *Maung Ba v. Maung Tha Yin*. (Court under mistaken impression that leave to file additional ground is obtained — It can be assumed that permission to argue it is impliedly given.)

('21) 8 AIR 1921 Lah 228 (229), *Jiwan v. Fateh Bibi*.

10. ('37) 24 AIR 1937 Lah 895 (896), *Sodhi Lal v. Firm Lala Behari Lal Lakshari Mal*. (Application for adjudication in time — Amendment to correct misdescription of property allowed beyond time — Amendment takes effect *nunc pro tunc*.)

('01) 5 Cal W N 816 (817) (DB), *Shama Prosad v. Taki Mullik*. (Application for re-hearing of appeal — Amendment of.)

Section 3 — Note 33a

1. ('17) 4 AIR 1917 Mad 453 (453) (DB), *Gopiseti v. Kunaparaju*.

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Notes 34-37

was instituted is immaterial for this purpose. This rule is specifically embodied in O. 23 R. 2, Civil Procedure Code.¹ See also Note 9.

35. Rejection of plaint.—Order 7, Rule 11, Civil Procedure Code, requires that a plaint should be rejected if from the allegations in the plaint the suit appears to be barred by any law. Hence, where from the statements in the plaint the suit appears to have been instituted after the prescribed period of limitation, it is the duty of the Court to *reject* the plaint.¹ But, under this section, the duty of the Court is to *dismiss* the suit if it has been instituted after the period of limitation. Combining the two provisions, the result would be that where the conclusion of the Court that the suit has been instituted after the period of limitation is based on the allegations in the plaint itself, the proper procedure is to *reject* the plaint and that where such conclusion is based on other matters, the Court should *dismiss* the suit.

36. Summary rejection of appeal. — An appeal cannot be rejected summarily without fixing a day for the appearance of the appellant and hearing him (see O. 41 R. 11, C.P.C.) even though it may be barred by limitation.¹

37. Effect of non-compliance with section. — The effect of the section is not to deprive a Court of its *jurisdiction* to try a suit or other proceeding which has been instituted after the prescribed period of limitation. Hence, the decision of a Court decreeing or allowing a suit or other proceeding which is barred by limitation is not vitiated by want of jurisdiction.¹

See also Notes 1 and 43.

Section 3 — Note 34

1. ('25) 12 AIR 1925 Cal 845 (851) (FB), *Becharam v. Purna Chandra*. (Suit withdrawn is one as if never brought.)

See also A. I. R. Commentary on the Civil Procedure Code, 5th (1950) Edn., Order 23, Rules 1 and 2.

Section 3 — Note 35

1. ('32) 19 AIR 1932 Cal 146 (146) (DB), *Secretary of State v. Golabrai*. (1863) 2 Mad H C R 51 (53) (DB), *Chetti Gaundan v. Sundaram*. (Court can reject it even though it is registered.)

('69) 6 Bom H C R 125 (127) (DB), *Pandurang v. Balakrishna*.

('28) 15 AIR 1928 Oudh 495 (498) (DB), *Maqsood Ali v. Deputy Commissioner, Bara Banki*. (Suit not barred on face of it — Plaint cannot be rejected but suit must be dismissed.)

Section 3 — Note 36

1. ('25) 12 AIR 1925 Oudh 643 (643, 644), *Sripat v. Hubdar*.

('09) 2 Ind Cas 359 (360) : 5 Low Bur Rul 15, *Abdulla v. Palaneappa*.

[But see ('35) 22 AIR 1935 Nag 109 (110), *Balwant Rao v. Balmukund*, (Notice to appellant not necessary.)]

Section 3 — Note 37

1. ('32) 19 AIR 1932 All 273 (281) (FB), *Gobardhandas v. Dau Dayal* (Limitation is question of procedure and not of jurisdiction.)

('04) 26 All 522 (527) (DB), *Nathu Ram v. Kalian Das*. (Such decree is perfectly good decree until reversed in some manner provided by law.)

('03) 2 Low Bur Rul 237 (238), *Kyin Bwa v. Maung Lon*. (Do.)

('20) 7 AIR 1920 Bom 264 (264) (DB), *Dasiappa v. Dundappa*. (Execution application.)

38. Onus of proof. — It is a general principle that the *onus* of proving that a suit has been instituted within the period of limitation is on the plaintiff.¹ Thus, where a suit is *prima facie* barred by limitation, the *onus* of proving the circumstances which save the suit from such bar is on the plaintiff.² These principles are the basis of

- (’82) 8 Cal 51 (60) (PC), *Mungul Pershad v. Grija Kant*. (Do.)
 (’27) 14 AIR 1927 Pat 261 (262) (DB), *Lachuman v. Dukhi Sahu*. (Do.)
 (’85) 11 Cal 287 (292) (DB), *Mohamed Hossain v. Purandar Mahto*. (Do.)
 (’78) 1878 Pun Re No. 59, *Mehtab Rai v. Nanakchand*.
 (’98) 25 Cal 789 (794) (DB), *Gunessar v. Gonesh*. (Case under Bengal Act, VII of 1880.)
 (’18) 5 AIR 1918 Pat 492 (493), *Bhaiga Parida v. Gannath Khandai*. (Suit will not lie to set aside a decree absolute for sale merely upon the ground that application for such decree was barred by limitation.)
 [But see (’12) 14 Ind Cas 711 (712) (DB) (Oudh), *Debi Bakhsh v. Habib*.
 (’14) 1 AIR 1914 Cal 46 (47, 48), *Radhe Shyam v. Dinabandhu*.
 (’66) 6 Suth W R Misc. 50 (51), *Mahomed Mudsar v. Ram Lal*. (Decision under Limitation Act of 1859.)]

Section 3 — Note 38

1. (’50) 37 AIR 1950 East Punj. 157 (Pr. 4), *Bharat v. Des Raj*. (Redemption suit instituted in 1947 — Plaintiff merely showing that mortgage was in existence in 1879 — Burden held rested in first instance on plaintiff to show that suit was not barred and not liable to be dismissed under S. 3 : AIR 1948 P C 36 (P C), *Akbarkhan v. Mt. Motai*, Applied.)
 (’48) 35 AIR 1948 P C 36 (38) (P C), *Mohd. Akbar v. Motai*. (In a suit for redemption where there is no evidence that the mortgage was for any fixed term, the plaintiff has to show that the mortgage was effected within 60 years of the date of suit. Mere proof by him that it was in existence within that period is not sufficient to shift to the defendant the burden of showing that the suit was not filed within time.)
 (’48) 1948 All W R (Rev.) 165 (165), *Mihi Lal v. Sardar Ali*.
 (’42) 1942 Oudh W N (B R) 454 (455), *Amar Bahadur v. Sheonath*.
 (’41) 1941 Rev. Dec. 672 (673), *Lachman v. Sia Ram*.
 (’40) 27 AIR 1940 Mad 639 (640), *Sankara Menon v. Kuttani*. (There is no presumption that a mortgage was executed on a particular day of the month in which it is proved to have been executed — Plaintiff suing for redemption must give positive proof of the execution of the mortgage on a day within limitation — Mere probability of its having been so executed is not enough.)
 (’29) 16 AIR 1929 All 209 (209), *Mihi Lal v. Soni Ram*.
 (’99) 22 Mad 250n (DB), *Paramasiva v. Kandappa*.
 (’23) 10 AIR 1923 Bom 155 (163) (DB), *Bank of Bombay v. Fazulbhoy Ebrahim*.
 (’34) 21 AIR 1934 All 11 (12) (DB), *Lugdi v. Har Prasad*.
 (’19) 6 AIR 1919 Lah 109 (109), *Mewa Singh v. Narain Singh*.
 (’30) 17 AIR 1930 Mad 742 (744), *Subbarayulu v. Vengama*.
 (’69) 12 Moo Ind App 289 (337) (P C), *Rajah Saheb Perhlad Sein v. Run Bahadoor Singh*.
 (’68) 9 Suth W R 131 (132) (DB), *Nobokishore v. Ramkishen*.
 (’76) 1876 Bom P J 279 (DB), *Bhikaji v. Chimaji*.
 (’17) 4 AIR 1917 Mad 930 (935) (DB), *Ramanathan v. Murugappa*. (Per Seshagiri Aiyar J.)
 (’27) 14 AIR 1927 Lah 373 (374) (DB), *Muni Lal v. Kishore Chand*.
 (’12) 13 Ind Cas 661 (662) (Lah), *Ganda Singh v. Nathu Ram*.
 (’26) 13 AIR 1926 P C 9 (12) (P C), *Lal Chand v. Ramrup*.
 (’86) 11 Bom 216 (219) (DB), *Ramchandra v. Narayan* (Case under Art. 127.)
 (’80) 5 Cal 36 (37) (DB), *Mahomed v. Morrison*.
 (’69) 6 Bom H C R (A C) 125 (128), *Pandurang v. Balkishna*.
2. (’47) AIR 1947 Lah 322 (323), *Pakhar v. Labhu Ram*.
 (’26) 13 AIR 1926 P C 9 (12) (P C), *Lalchand v. Ramrup*.

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the rules in the Civil Procedure Code which require the plaintiff to state in his plaint the date of the cause of action and, where from the allegations in the plaint the suit appears to be barred by limitation, the ground on which he claims exemption from limitation. But where the defendant *admits*, by his pleadings or otherwise, the allegations of the plaintiff, the latter need not *prove* them. The admission of the defendant may be express or implied. Thus, in the absence of a specific denial in the written statement of an allegation made in the plaint, the defendant may be held to have admitted the truth of the allegation in the plaint.³ Further, where the plaintiff has given *prima facie* proof in support of his allegations, the *onus* will shift to the defendant and it will be for him to demolish the case made out by the plaintiff.⁴

It has been held that where time does not begin to run unless and until the plaintiff has knowledge or notice of certain facts (*e. g.*, Arts. 32, 48, 48A, 48B, 90 to 92, 94 to 96, 113, 114, 118, 127, 134 and 134A), the *onus* of proving knowledge of facts at a date earlier than that admitted by the plaintiff lies on the defendant.⁵

39. Plea of limitation, if technical.—The word “technical” means, according to the dictionary, “*specially appropriate to any art, science or business or the like.*”¹ Hence, a technical plea may be

(27) 14 AIR 1927 Rang 255 (256) (DB), *N. K. Ahmeisa v. Mg. San Nyien*.

(13) 20 I. C. 538 (539) (Oudh), *Kashi Ram v. Pragi*. (17 Bom 341 distinguished.)

(09) 2 Ind Cas 844 (845) (DB) (Cal), *Purna Chandra v. Anukul Biswas*.

(22) 9 AIR 1922 All 37 (41) (DB), *Collector of Jaunpur v. Jamna Prasad*.

(26) 13 AIR 1926 All 329 (329, 330), *Bandhu Singh v. Kayastha Trading and Banking Corporation, Gorakhpur*.

(28) 15 AIR 1928 Lah 763 (764), *Jagadish Ram v. Mukandlal*.

(11) 12 Ind Cas 453 (454, 455) (DB), *Mansa Ram v. Behari*. (Plaintiff must on his own allegations prove that suit is within time — He cannot for this purpose adopt any of defendant's allegations.)

(22) 9 AIR 1922 Cal 157 (158) (DB), *Biman Chandra v. Promotho Nath*.

(84) 4 C P L R 57 (58), *Anant Ram v. Takat Singh*.

(23) 10 AIR 1923 Oudh 254 (264) (DB), *Mirza Yaqub v. Mirza Rasul*.

(69) 12 Moo Ind App 292 (337) (PC), *Rajah Sahib Prahalad v. Maharajah Rajendra Kishore Singh*.

(13) 18 Ind Cas 391 (392) (Cal) (DB), *Panchu Mandal v. Sheikh Isaf*.

[But see (93) 17 Bom 341 (347) (PC), *Rahimbhoy v. Charles Agnew Turner*.

(The fraud was of such nature that party injured was necessarily kept in ignorance of it and there was clear finding that he took action within time as soon as he came to know of fraud.)]

See also Section 18 Note 7 and Article 91 Note 19.

3. (16) 3 AIR 1916 Bom 103 (103, 104) (DB), *Laxminarayan v. Chimni Ram*

(16) 3 AIR 1916 Pat 39 (41) (DB), *Baluk Chand v. Nathuni*. (Pleading of limitation is not denial *per se* of alleged payment or acknowledgment.)

(23) 10 AIR 1923 Cal 578 (578) (DB), *Sarifun Mandalin v. Feradoul Khatun*.

[See also (96) 19 Mad 391 (393), *Chinnattambi v. Chinnana*.]

4. (85) 7 All 677 (680, 681) (DB), *Radha Prasad v. Bhajan*.

(29) 16 AIR 1929 All 908 (910) (DB), *Ramadhar v. Raj Narain*. (Per Bennet J.)

(17) 4 AIR 1917 Pat 443 (445) (DB), *Ram Pratap v. Kesho Prasad*.

[See (14) 1 AIR 1914 All 512 (513) (DB), *Frank Hay v. Rafiuddin*.]

5. (06) 2 Nag L R 98 (100), *Tanto v. Gajadhar*.

Section 3 — Note 39

1. Webster's Dictionary, 1914.

understood to be a plea which is *purely* based on a *positive* provision of law as contradistinguished from *natural justice*.² Thus, if a plea though founded on *positive law* is also consistent with *natural justice*, it will not be a technical plea.³ The question whether a plea of limitation is a technical plea therefore depends on the circumstances of each case. If the effect of the plea in the particular case is to *frustrate* natural justice, it is a technical plea, whereas if its effect is to *promote* natural justice, it cannot be regarded as a technical plea although in both cases the plea is only based on positive law.

The question whether a plea of limitation is a technical one will be material with reference to matters which are within the discretion of the Court. Thus, where a defendant has no merits on his side and succeeds purely on a technical plea of limitation, the Court will take this fact into consideration while passing orders as to the costs of the suit.⁴ Similarly, where an application for the amendment of a plaint is opposed on the ground that the defendant would thereby be deprived of a defence of limitation which would otherwise be open to him, the Court would generally allow the amendment if it considers that the plea raised by the defendant tends to defeat natural justice and therefore is a technical one.⁵

But, the provisions of the Act must be given effect to, although in the particular case the effect may be inconsistent with natural justice.⁶

40. Delay in filing suit. — In the absence of acquiescence on the part of the plaintiff, mere delay by him in the institution of proceedings where the prescribed period of limitation has not actually expired will not defeat his rights except in cases in which it is within the *discretion* of the Court to grant him the relief asked for.¹ But, at

2. For the distinction between 'positive' and 'natural justice,' see Salmond's Jurisprudence, 8th Edition, page 26.

3. See ('21) 8 AIR 1921 P C 50 (51) (PC), *Charan Das v. Amir Khan*. (Where right sought is one involving the dispossession of a perfectly lawful purchaser of property, it is not quite accurate to say that a plea that such a suit has not been brought within the proper period of time limited by the Act is a technical plea, if by a technical plea is meant a plea which asserts rights which have no merits for their support.)

4. ('96) 20 Bom 109 (116), *Kankuchand v. Rustomji*.

5. ('21) 8 AIR 1921 P C 50 (51) (PC), *Charan Das v. Amir Khan*. See also Note 33.

6 ('51) 38 AIR 1951 Mad 491 (Para 2), *Lakshminarasamma v. Seshayya*. (It is against all law and equity to overlook limitation, and rob the vested rights of parties, in the absence of fraud, or at least fraud in equity, though it is a technical right and may grate against the ordinary layman's sense of fair play. Limitation is as valid and binding as any other plea in law, when it is fully proved.)

('29) 16 AIR 1929 Cal 641 (641), *Tea Financing Syndicate Ltd. v. Chandra Kamal*. (The Judge has not to determine whether the defence is handsome or conscientious but whether it is good in law.)

('24) 11 AIR 1924 Sind 47 (48) (DB), *Messrs. Manghumal Jethanand v. Messrs Aratmal Satramdas*.

Section 3—Note 40

1. ('06) 29 Mad 509n (DB), *Sankaralingan v. Stephen* cited in ('06) 29 Mad 497 at p. 500 (DB). *Ulagappan v. Chidambaram*. (Suit for mandatory injunction to

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the same time, undue delay on the part of the plaintiff in bringing his suit will be a circumstance that the Court will take into consideration in judging the truth of the allegations put forward by him.²

41. Concurrent remedies, limitation for.—Where the law allows two or more remedies to obtain the same relief, each such remedy will be governed by its own period of limitation. Thus, where an *ex parte* decree is passed against a person, the following remedies are open to him :

1. An application under O. 9, R. 13, Civil Procedure Code.
2. An appeal under S. 96, Civil Procedure Code.
3. An application for review.
4. A suit to set aside the decree (in case the decree has been obtained by fraud).

Each one of these remedies will be governed by its own period of limitation.¹

But, where a suit has been dismissed for default, or an *ex parte* decree has been passed, an application for review cannot be granted *merely* on the ground that an application for restoring the suit or for setting aside the *ex parte* decree would be barred by limitation if made at that time.²

pull down building constructed by defendant at the cost of lakh of rupees—Plaintiff having knowledge of construction and waiting till construction was over—No injunction can be granted.)

('75) 24 Suth W R 97 (98), *Ramphul v. Misree Lall*. (Held, Courts in India have no discretion to refuse relief merely because of long delay in bringing forward the claim.)

[See ('48) 1948 All W R (Rev) 149 (149), *Bhagwati v. Tabaruk*. (If a suit is filed on the last date of limitation it is perfectly all right and no Court will be justified to say that it should have been filed "more punctually" and that it was therefore barred.)

('14) 1 AIR 1914 PC 164 (165) (PC), *Manokarani Devi v. Haripada*. (Suit for possession by reversioner—Delay in filing—Delay explained—No prejudice to suit.)]

2. ('22) 9 AIR 1922 P C 378 (382) (PC), *Dataram v. Basant Kunwar*, (Pro-note repudiated by defendant—Suit filed on last day of limitation—Plaintiff though alleging to be businessman not producing account book—Inference drawn against plaintiff.)

('30) 17 AIR 1930 All 322 (322, 323) (SB), *Mrs. M. B. Hartley v. Jack Fleming Hartley*.

('23) 10 AIR 1923 Lah 669 (670), *Daljit Singh v. Hari Chand*.

('29) 16 AIR 1929 All 561 (565) (DB), *Brij Raj Saran v. Basant Singh*. (Plaintiff's delay prejudicing defendant—Court should draw adverse inference unless good cause is shown.)

Section 3—Note 41

1. ('20) 7 AIR 1920 Mad 633 (634) (DB), *Chokkalingam v. Lakshmanan*.

('29) 16 AIR 1929 Sind 38 (39) (DB), *Khasomal v. Bacho*. (('99) 26 Cal 598 (DB), *Raj Narain v. Ananga Mohan*, relied on.)

See also AIR Commentary on the Civil Procedure Code, 5th (1950) Edn. S. 96 Note 12, O. 9 R. 13 Note 9 and O. 47 R. 1 Note 24.

2. ('33) 20 AIR 1933 Pat 557 (558), *Decruze v. Pitts*.

[See also ('25) 12 AIR 1925 Lah 517 (518), *Abdul Razak v. Muhammad Sharif*. (Application for restoration of suit under O. 9, R. 9, C. P. C., dismissed as time-barred—Subsequent application for review cannot be entertained.)]

42. High Court, if can make rules inconsistent with provisions of the Act.—See the A.I.R. Commentaries on the Civil Procedure Code, 5th (1950) Edition, S. 122 Note 3.

43. Revision, if lies on question of limitation.

Revision under S. 115 of the Civil Procedure Code :

The power of the High Court to revise the proceedings of the lower Court under the above section arises in the following three cases —

- (a) Where the lower Court has exercised a jurisdiction not vested in it by law ;
- (b) Where the lower Court has failed to exercise a jurisdiction vested in it by law ;
- (c) Where the lower Court has acted with illegality or material irregularity in the exercise of its jurisdiction.

As seen in Note 37, this section does not affect any question of jurisdiction and hence the failure to dismiss a proceeding although time-barred does not amount to the exercise of a jurisdiction not vested in the Court by law within the first clause of S. 115.¹ Similarly, the erroneous dismissal of a proceeding as barred by limitation, although it is not so barred, does not amount to a failure to exercise a jurisdiction which is vested in the Court by law so as to attract the provisions of the second clause of S. 115.² The act of the Court in erroneously dismissing such a proceeding is an *exercise* of jurisdiction and not a *failure to exercise* jurisdiction. As regards the third clause of S. 115, it only applies to the *manner* of the exercise of jurisdiction and not to an erroneous decision on any question. Hence, erroneous decision even on a question of law in connexion with limitation will not, by itself, make revision competent.³ But, where the decision of the Court on the point of

Section 3—Note 43

1. ('50) 37 AIR 1950 Nag 228 (Pr 3), *Shambhoo v. Firm Dindayal*. (Manifestly erroneous decision on question of limitation—Decision one which no Judge acting judicially could reasonably reach—Revision lies.)

('27) 14 AIR 1927 All 358 (359), *Baburam v. Munna Lal*.

('78) 1878 Pun Re No. 59, *Mehtab Rai v. Nanak Chand*.

The following decisions to the contrary are not correct :

('96) 1 Cal W N 67 (70) (DB), *Kailash Chandra Halder v. Bissonath Parmanic*.

('12) 14 Ind Cas 711 (712) (Oudh) (DB), *Debi Baksh Singh v. Habib Shah*.

('26) 13 AIR 1926 Lah 344 (345), *Wiru Ram v. Amar Chand*.

('26) 13 AIR 1926 Lah 379 (381), *Piroj Shah v. Qarib Shah*.

('18) 5 AIR 1918 Low Bur 140 (142), *Kaliyaparama v. V.C.U.A.R. Chetty Firm*.

2. ('38) 25 AIR 1938 Bom 209 (210), *Veerappa v. Iratappa*.

('87) 11 Bom 488 (492) (DB), *Amritarav v. Balakrishna*. (Question was about *res judicata*.)

('69) 12 Suth W R 129 (130) (DB), *Kalee Prasad v. Ram Soondur*.

[See ('13) 18 Ind Cas 391 (392) (Cal), *Panchu Mandal v. Sheikh Isaf*.]

The following decisions to the contrary are not correct :

('16) 3 AIR 1916 Mad 927 (927), *Ratnam v. Ramasamy*.

('23) 10 AIR 1923 Mad 435 (436) (DB), *The British India Steam Navigation Co. v. H. M. Sharafally*.

3. ('24) 11 AIR 1924 Cal 493 (493, 494), *East Indian Railway Co. v. Kanai Lal*. (Section 115, C. P. C., is not directed against conclusions of law or fact in which question of jurisdiction is not involved.)

('20) 7 AIR 1920 All 181 (181, 182), *Hashmat Ali v. Mohan*.

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Note 43

limitation is affected with any irregularity or illegality as to the manner in which such decision has been arrived at, revision will be competent.⁴ Similarly, the failure to decide a material issue will amount to an irregularity in the manner of the exercise of jurisdiction and may be a ground for revision.⁵ Hence, the refusal or failure of the Court to decide a material question of limitation which arises in the case may be a ground for interference in revision.⁶

(26) 13 AIR 1926 Lah 355 (355, 356), *Hardwari Mal v. Chironji Lal*.

(24) 11 AIR 1924 Lah 666 (667), *Surjit Singh v. Lieut Capt. C. J. Torrie*. (Mere error of law is not necessarily an illegality.)

(15) 2 AIR 1915 All 54 (55) (DB), *Mahabir Sahu v. Bhirgurai*.

(30) 17 AIR 1930 Lah 112 (113), *Nur Ahmad v. Hamid Khan*.

(29) 16 AIR 1929 Lah 26 (27), *Beli Ram v. Padam Sain*.

(15) 2 AIR 1915 Mad 907 (907), *Thomas v. Muthuraman*.

(17) 4 AIR 1917 Mad 76 (76) (DB), *Kuppuswamy v. Narayana*. (Erroneous decision on point of limitation by Presidency Small Cause Court—High Court will not interfere in revision when no question of jurisdiction is involved.)

(17) 4 AIR 1917 Cal 572 (572) (DB), *Rampat v. Ram Ghulam*. (Proceeding under S. 105, Bengal Tenancy Act, 1885.)

(16) 3 AIR 1916 Cal 907 (908) (DB), *Mohini Chunder Choudhry v. Mirza Ahmad Ali* (But revision lies if decision is without considering point of limitation.)

(28) 15 AIR 1928 Cal 189 (190), *Satish Chandra v. Rakhal Chandra*.

(28) 15 AIR 1928 Cal 202 (204) (DB), *Tamirannessa v. Kachhiman*.

(36) 23 AIR 1936 Nag 157 (159), *Devidas v. Nilakanth*, (Test for applicability of cl. (c) of S. 115, C. P. C., laid down.)

(34) 21 AIR 1934 Pesh 103 (105), *Quadir Bakhsh v. Ujagir Singh*.

(30) 17 AIR 1930 Nag 88 (88), *Rahmatbi v. Badridas*.

(27) 14 AIR 1927 Oudh 615 (615), *Sheopal v. Chitoria*.

(27) 14 AIR 1927 Nag 389 (389), *Madhorao v. Govind*.

(24) 11 AIR 1924 Pat 37 (38) (DB), *Zainabi v. Paras Nath*.

(25) 12 AIR 1925 Oudh 373 (373), *Bankey Lal v. Ram Lal*.

(25) 12 AIR 1925 Oudh 148 (148), *Bharat v. Basant*.

(85) 1885 All W N 32 (32) (FB), *Ali Mazhar v. Sheo Baksh*.

(32) 19 AIR 1932 All 543 (544) (DB), *Bhajja v. Muhammad Said*.

(08) 4 Nag L R 184 (185), *Duri v. Mohanlal*.

(97) 20 All 78 (79) (DB), *Sunder Singh v. Doru Shankar*.

(12) 15 Ind Cas 679 (681) (DB) (Cal), *Renode Behari v. Ram Sarup*. ('85) 17 All 345 (DB), *Har Prasad v. Jafar Ali*, dissented from.)

(12) 14 Ind Cas 52 (53) (All) (DB), *Besesar Dayal v. Har Govind*.

(10) 6 Ind Cas 745 (746) (Mad), *Karnam Sama Rao v. Roddam Vencoba Rao*.

(12) 15 Ind Cas 547 (548), *Ramagopal v. Joharmall*.

(80) 5 Cal 807 (810, 811) (DB), *Ram Sahai v. Maniram*.

[See also ('11) 11 Ind Cas 60 (61) (Lah), *Jalu v. Samand*. (Revision under S. 70 (1) (a), Punjab Courts Act, XVIII of 1884.)

('11) 10 Ind Cas 293 (294) (Lah), *Hukum Singh v. Sham Singh*. (Court of revision can review finding upon a question of limitation.)]

[But see ('35) 22 AIR 1935 Pesh 186 (189), *Zainab v. Behari Lal*. (Article 181 applicable—Court erroneously applying Art. 163—Held, that this constitutes material irregularity.)]

4. ('29) 16 AIR 1929 All 593 (595) (DB), *Dipchand v. Sheo Prasad*.

('87) 12 Bom 617 (620) (DB), *Venkubai v. Lakshman*.

(15) 2 A I R 1915 All 161 (162), *Shanar Singh v. Rekha*. (Case under S. 25, Provincial Small Cause Courts Act, IX of 1887.)

[See ('34) 21 AIR 1934 Pat 50 (52), *Akhauri Herambo Narain v. Jamuna*.)]

5. See A. I. R. Commentary on the Civil Procedure Code (5th (1950) Edition), S. 115 Note 12.

6. ('38) 25 A I R 1938 Bom 209 (210), *Veerappa v. Iratappa*. (Judge ignoring provisions of S. 4, Limitation Act, and dismissing suit.)

Even where otherwise revision is competent, the High Court will refuse to interfere except where it is necessary in the interests of justice to do so.⁷

Revision under S. 25, Provincial Small Cause Courts Act, 1887 :

The powers of the High Court under the above section are not confined to the three classes of cases specified in S. 115, Civil Procedure Code, and hence, even a mere error in the decision on a question of limitation may be a ground for revising the decision of a Provincial Small Cause Court, provided that such decision has caused substantial injustice to any of the parties.⁸

('38) 25 AIR 1938 Rang 87 (87) (DB), *Chattal Trading Co. Ltd. v. Babu Mahim Chandra*.

('19) 6 AIR 1919 Lah 422 (422), *Asa Nand v. Jhangli Ram*.

('23) 10 AIR 1923 Mad 503 (504), *Gopalaswamy v. Ramachandra*. (Lower Court excusing delay without evidence.)

('27) 14 A I R 1927 Mad 436 (437), *Sanjivappa v. Venkatanaranappa*. (Lower Court not referring to proper Article as amended.)

('26) 13 A I R 1926 Cal 444 (445) (D B), *Hem Kanta v. Manoj Prova*. (Order setting aside abatement without considering limitation for such application.)

('15) 2 AIR 1915 All 240 (241) (DB), *Janki Prasad v. Parameshwar Din*. (Court granting time-barred application for setting aside *ex parte* decree on ground that defendant being in jail had not fair chance of defending suit.)

('25) 12 AIR 1925 Rang 381 (382), *Ma Shwe U v. Ma Shin*. (Lower Court overlooking S. 6 (1), Limitation Act, and dismissing application to sue in *forma pauperis*.)

('33) 20 A I R 1933 Pat 132 (134), *Kakraul Co-operative Society v. Durganand*. (Lower Court allowing time-barred application under inherent power)

('13) 18 Ind Cas 392 (392) (Cal) (DB), *Jagbandhu Biswas v. Srinath*.

('29) 16 AIR 1929 Rang 304 (306), *Maung San v. Ma Shin*.

('24) 11 AIR 1924 Pat 36 (36) (DB), *Mode Narain Singh v. Bikram Singh*.

('13) 18 Ind Cas 391 (392) (Cal) (DB), *Panchu Mandal v. Isaf*.

('13) 19 Ind Cas 425 (426), *Habibullah v. Karanje*. (Lower Court instead of inquiring into question of limitation holding that it had no jurisdiction to go into the question.)

[See ('18) 5 A I R 1918 Mad 1173 (1173), *British India Steam Navigation Co. v. Hussain*. (Appellate Court cannot be said to have acted with material irregularity in not adjudicating on plea of limitation which had not been raised before it.)]

[See also ('85) 7 All 345 (347) (DB), *Har Prasad v. Jafar Ali*. (Lower Court admitting time-barred application in contravention of law of limitation.)]

[But see ('17) 4 A I R 1917 Mad 667 (667), *Duraisamy Udayan v. Kadirsa Rowthen*. (Mere fact that the judgment of an Appellate Court does not deal with a point of limitation arising in the case does not amount to a material irregularity.)]

('27) 14 A I R 1927 Mad 660 (661), *Mangamma v. Pedda Ammanna*. (Where application to set aside award was dismissed as barred by limitation without considering provisions of S. 12, Limitation Act, held, there was no question of jurisdiction and revision was not competent.)]

7. ('25) 12 AIR 1925 All 164 (165), *Mohammad Naqi v. Hargu Lal*.

('11) 11 Ind Cas 445 (446) (Lah), *Ghasita v. Sultan*. (Revision under S. 25 of Act IX of 1887.)

8. ('15) 2 A I R 1915 All 449 (450), *Singar Manufacturing Co. v. E. Felyun*.

('35) 22 A I R 1935 Lah 137 (138), *Charan Das v. Ram Rattan*. (No substantial injustice – High Court refused to interfere.)

('12) 17 Ind Cas 470 (471), *Rajah Raghuraj v. Sahib Din*. (Do.)

('11) 11 Ind Cas 445 (446) (Lah), *Ghasita v. Sultan*. (Do.)

Section 3
Note 44

44. Review, if lies on question of limitation.— A review lies in regard to a question of limitation under the conditions specified in O. 47 R. 1, Civil Procedure Code. Thus, where the bar of limitation is clear on the facts found by the Court, and the Court has failed to notice such bar, the decision is vitiated by an error apparent on the face of the record and can be set aside in review.¹ But the mere fact that the judgment does not state that certain aspects of the question of limitation were considered is not a sufficient ground for review.²

Section 4

4.* Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens.

*Acts of 1877 and 1871.

First paragraph of Section 5 of the Act of 1877 and Section 5 (a) of the Act of 1871 were the same.

Act of 1859.

Contained no corresponding provision.

- (25) 12 AIR 1925 Oudh 34 (34) (DB), *Mohnya v. Panna Lal*.
 (13) 19 Ind Cas 782 (782) (All), *Sheoram v. Badri Das*.
 (13) 20 Ind Cas 175 (176) (All) (DB), *Sheo Pershad v. Sheo Pershad*.
 (26) 95 Ind Cas 4 (5) (Lah), *Thakar Das v. Bhola Shah*.
 (36) 161 Ind Cas 423 (423, 424) (Oudh), *Lal Jagendra Bakhsh Singh v. Andrews A. Ferns*. (Powers under S. 25 of Act IX of 1887 are discretionary to be exercised only when substantial injustice is done.)
 (03) 1903 Pun L R No. 138, p. 589 (D B), *Mir Shah v. Atar Singh*.
 (18) 5 AIR 1918 Oudh 329 (330, 331), *Madho Singh v. Badil Singh*. (Powers of High Court under S. 25 of Act IX of 1887 are not to be measured by language of S. 115, C. P. C.)
 (09) 3 Ind Cas 817 (818) (All), *Jamna Das v. Bishnath Singh*.
 (36) 23 A I R 1936 Oudh 247 (248) (DB), *C. P. Clarke v. Aga Aziz*. (No substantial injustice—High Court refused to interfere.)
 (28) 15 A I R 1928 Lah 274 (275), *Mohamed Shafi v. Delhi House of Mullan*. (Powers of revision under S. 25 of Act IX of 1887 are wider than those under S. 115, C. P. C.)
 (27) 14 AIR 1927 Lah 396 (397), *Dil Mohamed v. Sain Das*. (Wrong decision on point of limitation—Substantial justice done—No revision.)
 (35) 22 AIR 1935 All 716 (717), *Gajadhar Prasad v. Dharma Nand*.
 (15) 2 AIR 1915 Lah 209 (210), *Sher Khan v. Gokal Chand*.
 (28) 15 A I R 1928 Lah 51 (52), *Karam Chand v. Daya Nand*. (Wrong decision on point of limitation not *per se* ground for revision.)
 [See also (10) 9 Ind Cas 467 (468) (Low Bur), *Maung Ba Kyaw v. Me Saw*. (No revision against interlocutory orders.)]

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1. (28) 15 AIR 1928 Lah 919 (919, 920) (DB), *Debi Sahai v. Basheshar Lal*.
 (29) 16 A I R 1929 Nag 185 (190) (DB), *Kawdu v. Berar Ginning Co. Ltd., Akot*. ("Aggrieved person" need not be a party to original proceedings.)
2. (29) 16 AIR 1929 Nag 89 (90), *Trimbak v. Krishna Rao*.

Synopsis

Section 4
Note 1

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| <ol style="list-style-type: none"> 1. History of the section. 2. Principle of the section. 3. Applicability to act for which limitation is prescribed by S. 48 or by O. 45, R. 7 of the Civil Procedure Code. 4. Applicability to payments under O. 21, Rule 89 of the Civil Procedure Code. 5. Applicability to acts directed to be done by decree or order of Court. 6. Applicability to payments to be made under private agreement between parties. 6a. Section, if affects court-fee payable on application for review under Schedule I, Articles 4 and 5 of the Court-fees Act. 6b. Applicability to proceedings under special or local laws. 7. Expiry of period 'prescribed.' | <ol style="list-style-type: none"> 8. Acknowledgment or payment of interest during vacation. 8a. Assignment of interest during vacation. 9. Section 4 and Sections 6 to 8 of the Act. 10. Section 4 and S. 12 of the Act. 11. Section 4 and S. 31 (repealed) of the Act. 12. "When the Court is closed." 13. "Court" means the "proper Court." 13a. "Suit"—Meaning of. 14. "Suit, appeal or application may be instituted, preferred or made." 15. "Day that the Court re-opens." 16. Fact of the Court having been closed, whether should be mentioned in the pleading. 17. Adjudication of debtor as insolvent on re-opening day—Effect. |
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TOPIC INDICATOR

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|---|---|
| <p>Applicability to periods prescribed by special or local laws. See S. 29.</p> <p>Further holidays after vacation. See Note 12.</p> <p>Judge holding Court on Gazetted holiday. See Note 12.</p> | <p>No extension of period by S. 4. See Notes 2 and 7.</p> <p>Office of Court open during holidays. See Note 12.</p> <p>Section 4 and Section 14—Distinction. See Notes 2 and 7.</p> <p>Unauthorized holiday. See Note 12.</p> |
|---|---|

1. History of the section. — There was no provision corresponding to this section in the Act of 1859, but there was a provision (corresponding to S. 3 of the present Act) to the effect that no *suit* should be maintained in any Court unless the same was instituted within the prescribed period, any law or regulation to the contrary notwithstanding. In view of that provision it was held that a *suit* instituted on the re-opening day when the period prescribed expired on a day on which the Court was closed was barred by limitation.¹ As

Section 4 — Note 1

1. (1864) 2 Mad H C R 268 (269) (DB), *K. J. S. Nani Varu v. U. Venkataraya*.
- ('71) 16 Suth W R 230 (231) (DB), *Ununto Ram v. Protab Chunder*. (A plaint may be received and admitted by a Munsif on Sunday or other holiday on which the time for bringing an action was to expire.)
- ('73) 1873 Pun Re No. 56, *Bhaggat Singh v. Mt. Rupan*. (Before the 1st April 1873 when S. 5 of Act IX of 1871 came into force, the fact that the Courts were closed was held not to extend the period of limitation.)
- (1865) 3 Suth W R S C C Ref 5 (6): Beng L R Sup Vol. 360 (FB), *Rajkisto Roy v. Denobundhoo Surmah*.
- (1865) 3 Suth W R 209 (210) (DB), *Messrs. Collis & Grant v. Tarinee Churn*.
- ('66) 6 Suth W R 39 (40) (DB), *Holee Ram v. Mihee Ram Gogooee*.
- ('73) 20 Suth W R 167 (168) (DB), *Kudomes Suree Dassee v. Enamali Mookh-tear*.
- ('69) 11 Suth W R 259 (259) (DB), *Dewan Ali v. Munsoor Ali*.

Section 4
Notes 1-2

regards *appeals* and *applications* and acts directed to be performed by a decree of the Court, to which the said provision did not apply, it was held that the presentation thereof on the re-opening day was a valid presentation.²

Section 5 (a) of the Limitation Act of 1871 introduced a provision corresponding to this section, and the same has been re-enacted in the subsequent Acts.³

2. Principle of the section. — This section is based on the general principle of law enunciated by the maxims "*Lex non cogit ad impossibilia*" — the law does not compel a man to do that which he cannot possibly perform,¹ and "*Actus curiae neminem gravabit*" — an act of the Court shall prejudice no man.² In *Dharamsi Morarji*

[See also ('71) 16 Suth W R (O C) 1 (3) : 8 Beng L R 24 (DB), *Tarachand Ghose v. Munshi Abdul Ali*. (Quaere.)]

2. ('70) 13 Suth W R 105 (106) : 5 Beng L R App 57n (DB), *Girijabhusan Haldar v. Akhay Nikari*. (Notice of application for new trial.)

('66) 6 Suth W R Misc 106 (106) (DB), *Gopeenath Roy v. Gopinath Chatterjee*.

('67) 8 Suth W R 73 (74, 75) (DB), *Raja Bishen Perakash Narain Singh v. Babooa Misser*. (If last day for preferring an appeal falls on an unexpected and unauthorised closed day, the appellant will not be barred by limitation if he can prove that he was prepared to file the appeal on that day, and if he did file it on the first open day thereafter.)

(1865) 1865 Beng L R Sup Vol. 361n, *Govind Chunder v. Sreenath Mookerjee*.

(1864) 1864 Suth W R (Gap) Misc 40 (40, 41) (DB), *Mosuruf Ali v. Janokenath*.

('69) 6 Bom H C R A C 50 (50) (DB), *Ex parte Krishna Padhe*.

('69) 12 Suth W R 21 (24) : 4 Beng L R 32 (FB), *Narayan Mandal v. Beni Madhab Sirkar*. (Application for review.)

('69) 12 Suth W R 293 (294), *Luchman Chunder Gir. v. Kali Churn Singh*.

('67) 8 Suth W R 223 (224, 225, 226) (DB), *Dabee Rawoot v. Heeramun*. (Act directed to be done under a decree.)

[But see ('70) 13 Suth W R 122 (123) : 4 Beng L R A C 131 (DB), *Khodie Lall v. Mt. Biswasu Kunwar*. (Application for execution.)]

('67) 1 Beng L R O C 39 (40), *Tamvaco v. Skinner*. (Time expired during vacation — Petition of appeal presented on the re-opening day — But there was a vacation Judge for the transaction of any business of a pressing nature — Held that the petition was too late.)]

3. ('76) 1 All 263 (265) (DB), *Bishan Chand v. Ahmad Khan*. (Period for suit expired during vacation — It was instituted on the re-opening day — Held that it was in time.)

('09) 3 Ind Cas 400 (401) (Cal) (DB), *Venkata Ramaniam v. Kherode Mull*. (Application for leave to appeal to Privy Council filed after limitation expiring during vacation.)

Section 4 — Note 2

1. ('49) 36 AIR 1949 Nag 141 (144) : ILR (1948) Nag 612 (DB), *Premchand v. Ramdeo*.

('12) 14 Ind Cas 173 (174) (Cal) (DB), *Ahad Baksh Molla v. Babar Ali*.

('23) 10 AIR 1923 Nag 246 (247) : 19 Nag L R 116 : 72 Ind Cas 388, *Dhanu Singh v. Kesheoprasad*.

('23) 12 Ind Cas 810 (811) : 7 Nag L R 176, *Balakrishna v. Tima*.

2. ('42) 29 AIR 1942 All 429 (437) : ILR (1943) All 84 : 204 Ind Cas 1 (FB), *Raja Pande v. Sheopujan Pande*.

('38) 25 AIR 1938 Nag 454 (455) : ILR (1939) Nag 377 : 178 Ind Cas 479, *Balkisan Seth v. Bhanu Prasad*.

('26) 13 AIR 1926 Nag 331 (331) : 96 Ind Cas 376, *Raotmal v. Amar Singh*.

'03) 6 Oudh Cas 68 (71, 72), *Ram Nath v. Murlidhar*.

Chemical Co., Ltd. v. Occhavlal Hargovandas Shah,³ their Lordships of the Bombay High Court observed as follows :

Section 4
Note 2

"When a party has to do something before a certain day and if upon that day or before that day he cannot do that thing by reason of the act of the Court, then he is entitled to an extension of time over that period during which he is delayed by the Court's action."

And this principle has been followed in numerous cases.⁴

This section is, however, limited in its applicability to the institution, preferring, or making of *suits, appeals or applications* where a *period of limitation had been prescribed* therefor. It does not, for instance, apply to *other acts* allowed to be done by law on a certain day or within a prescribed period. Such cases are governed by S. 10 of the General Clauses Act, 1897, which is also based on the same general principle⁵ and which runs as follows :

"Where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court

3. ('27) 14 AIR 1927 Bom 480 (481) : 51 Bom 848 : 103 Ind Cas 540 (DB).
4. ('31) 18 AIR 1931 Cal 785 (786, 787) : 58 Cal 1148 : 134 I C 1132, *Anisaddin Ahmed v. Kalipada Ray*.
(1868) L R 3 Q B 173 (176) : 9 B & S 23 : 37 L J Q B 65 : 17 L T 468 : 16 W R 358 (DB), *Waterton v. Baker*.
(71) 6 Beng L R 292 (294), *Munshi Abdul Ali v. Tarachand Ghose*.
(06) 3 Cal L Jour 339 (342, 343) : 10 Cal WN 535 (DB), *Surendra Narain Mustafi v. Souravini Dasi*.
(11) 9 Ind Cas 181 (183) Cal), *Lachmi Narain Marwari v. Sukhraj Rai*.
(12) 14 Ind Cas 173 (174) (Cal) (DB) (L. P. A.), *Ahad Baksh Molla v. Babar Ali*.
(25) 12 AIR 1925 Mad 743 (744) : 87 Ind Cas 560, *Saukaran Unni v. Raman*.
(27) 14 AIR 1927 Mad 1196 (1196, 1197) : 106 Ind Cas 502 (DB), *Chinna Nadan v. Arumugam Chetty*.
(21) 8 AIR 1921 Lah 6 (8, 9) : 67 Ind Cas 772 (FB), *Himmun v. Fauja*.
(31) 18 AIR 1931 Lah 386 (387) : 133 Ind Cas 434 (DB), *Fateh Khan v. Chhajju*.
(23) 10 AIR 1923 Nag 246 (247) : 19 Nag L R 116 : 72 Ind Cas 388, *Dhanu Singh v. Kesheoprasad*.
(26) 13 AIR 1926 Nag 331 (331) : 96 Ind Cas 376, *Raotmal v. Amar Singh*.
(11) 12 Ind Cas 810 (811) : 7 Nag L R 176, *Balakrishna v. Tima*.
(03) 6 Oudh Cas 68 (71, 72), *Ram Nath v. Murlidhar*.
(27) 14 AIR 1927 All 608 (508) : 102 I. C. 523, *Ram Sarup v. Khaderan Kohar*.
(Act required to be done by rule of High Court—Last day a holiday—Act may be done next day.)
(91) 18 Cal 231 (234) (DB), *Shooshee Bhusan v. Gobind Chunder Roy*.
(91) 18 Cal 631 (634) (DB), *Peary Mohun v. Anunda Charan*.
(98) 21 Mad 385 (387) (DB), *Aravamudu Ayyangar v. Samiyappa Nadan*.
(99) 22 Mad 179 (182) : 8 M L J 265 (DB), *Sambasiva Chari v. Ramaswami Reddi*.
(24) 11 AIR 1924 All 218 (219, 220) : 46 All 328 : 78 Ind Cas 1014 (FB), *Muham-mad Jan v. Shiam Lal*.
(80) 5 Cal 314 (317), *Golap Chand v. Krishto Chunder*.
5. ('42) 29 AIR 1942 All 429 (432, 437) : ILR (1943) All 84 : 204 Ind Cas 1 (FB), *Raja Pande v. Sheopujan Pande*. (Per Full Bench:—S. 10, General Clauses Act, applies to petition of insolvency under S. 9, Provincial Insolvency Act. Per Dar J.—S. 4, Limitation Act also applies.)
(06) 3 Cal L Jour 339 (342, 343) : 10 Cal W N 535 (DB), *Surendra Narain Mustafi v. Souravini Dasi*.
(10) 5 Ind Cas 416 (418) (Cal), *Ahad Baksh Molla v. Babur Ali*.

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Notes 2-3

or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time, if it is done or taken on the next day afterwards on which the Court or office is open.

Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies."

Section 10, General Clauses Act, is also limited in its scope and applies only to acts and proceedings allowed by any Central Act or Regulation, to be done on a certain day or within a prescribed period. It will not apply, for instance, to cases where the act is to be done under a decree or order of a Court within a particular period and the period expires on a holiday. In such cases, however, the general principle stated above will apply.⁶ See Note 5.

The language of the section indicates that it has nothing to do with computing the prescribed period of limitation. In *Maqbul Ahmad v. Onkar Pratap Narain Singh*,⁷ their Lordships of the Privy Council observed as follows :

"What the section provides is that, where the period prescribed expires on a day when the Court is closed, notwithstanding that fact, the application may be made on the day that the Court re-opens; so that there is nothing in the section which alters the length of the prescribed period; whereas in S. 14, and other sections of a similar nature in the Act, the direction begins with the words 'In computing the period of limitation prescribed for any application,' certain periods shall be excluded."

3. Applicability to act for which limitation is prescribed by Section 48 or by Order 45, Rule 7 of the Civil Procedure Code. — In *Peary Mohun Aich v. Ananda Charan*,¹

6. ('11) 9 Ind Cas 181 (183) (Cal), *Lachmi Narain Marwari v. Sukhraj Rai*.
 ('12) 14 Ind Cas 173 (174) (Cal) (DB) (L.P.A.), *Ahad Baksh Molla v. Babar Ali*.
 ('25) 12 AIR 1925 Mad 743 (744) : 67 Ind Cas 560, *Sankaran Unni v. Raman*.
 ('27) 14 AIR 1927 Mad 1196 (1196, 1197) : 106 Ind Cas 502 (DB), *Chinna Nandan v. Arumugam Chetty*.
 ('21) 8 AIR 1921 Lah 6 (9) : 67 Ind Cas 772 (FB), *Himmun v. Fauja*.
 ('31) 18 AIR 1931 Lah 386 (387) : 183 I. C. 434 (DB), *Fateh Khan v. Chhajju*.
 ('23) 10 AIR 1923 Nag 246 (247) : 19 Nag L R 116 : 72 Ind Cas 388, *Dhanu Singh v. Kesheoprasad*.
 ('26) 13 AIR 1926 Nag 331 (331) : 96 Ind Cas 376, *Raotmal v. Amar Singh*.
 ('02) 6 Oudh Cas 68 (71, 72), *Ram Nath v. Murlidhar*.
 ('30) 5 Cal 906 (909, 910) : 6 Cal L R 239 (DB), *Hossein Ally v. Donzelle*.
 ('91) 18 Cal 231 (234) (DB), *Shooshee Bhushan Rudro v. Gobind Chunder Roy*.
 (1900) 1900 Pun L R No. 9, p. 24 (24) (DB), *Muhammad Yusuf v. Karim Baksh*.
 ('82) 4 All 430 (434) : 1882 All W N 71 (DB), *Baghelin v. Mathura Prasad*.
 ('35) 22 AIR 1935 Lah 369 (370) : 158 Ind Cas 352, *Amolak Ram Dwarka Das v. Roda Mal Ramsaran Das*.
 ('24) 11 AIR 1924 All 218 (219, 220) : 46 All 328 : 78 Ind Cas 1014 (FB), *Muhammad Jan v. Shiam Lal*.
 [But see ('18) 5 AIR 1918 Sind 50 (51) : 11 Sind L R 106 : 45 Ind Cas 168, *Moosaji Ahmad and Co. v. The Asiatic Steam Navigation Co.* (Time prescribed by Karachi Port Trusts Act — Section 4 of Limitation Act and S. 10 of General Clauses Act not applying — General principle also not held to apply as it was not impossible to file the suit before the holiday — Submitted wrong.)]
 7. ('35) 22 AIR 1935 P C 85 (87) : 155 Ind Cas 205 : 62 Ind App 80 : 57 All 242 (PC).

Section 4 — Note 3

1. ('91) 18 Cal 631 (634) (DB).

which was decided before the General Clauses Act, 1897, was passed, an application for execution, which would become barred by the twelve years' rule of limitation under the Civil Procedure Code, 1882, was filed on the re-opening day of the Court, the last day of the said period having expired when the Court was closed. It was held by the Calcutta High Court that on *general principles* of law, the application was within time. In the undermentioned cases,² where the period prescribed by Act VI of 1874 (now O. 45, R. 7, Civil Procedure Code) for deposit of costs in a Privy Council appeal expired on a day on which the Court was closed, it was held that it would be a reasonable exercise of discretion to allow the deposit to be made on the day that the Court re-opened. The cases would, it is submitted, now be governed by S. 10 of the General Clauses Act, 1897.³

4. Applicability to payments under Order 21, Rule 89 of the Civil Procedure Code.—An *application* to set aside a sale under O. 21, R. 89 of the Civil Procedure Code is one for which a limitation period of thirty days has been prescribed by Art. 166 of the Limitation Act. Where on the day on which the period expires the Court is closed, the application may, by virtue of this section be made on the day that the Court re-opens.¹

But under O. 21, R. 89, the party can apply only *on his depositing* the amounts referred to in that rule. It has been held in the under-mentioned case² that the tender of such amount must also be considered

2. ('77) 2 Cal 272 (273) (DB), *In the matter of the petition of Soorj mukhi Koer* [See also ('77) 2 Cal 128 (129) : 1 Ind Jur 374, *In the matter of the petition of Lalla Gopee Chand*. (Deposit not made on the re-opening day but much later—Delay was not excused.)]

3. See ('39) 26 AIR 1939 Pat 667 (677) : 19 Pat 123 : 185 I. C. 353 (FB), *Lachmeshwar Prasad v. Girdhari Lal*. (Per Agarwala, J. —The furnishing of security or the deposit of costs is not an application within the meaning of S. 4, Limitation Act — An appellant to the Federal Court who deposits the printing charges as required by O. 45, R. 7 (1), C. P. C., as applied to Federal Court appeals, does not move the Court to do anything — Section 4, Limitation Act, does not apply to such cases—Matter is governed by S. 10, General Clauses Act.)

Section 4 — Note 4

1. ('50) 37 AIR 1950 All 367 (Pr 5), *Hirania v. Ram Piari*.

('48) 35 AIR 1948 Nag 63 (64) : ILR (1947) Nag 494, *Umedsingh v. Shankerlal*. (Court away on casual leave when period expired — It is imperative on the applicant to file his application and make the necessary deposit on the very next day on which the Court is open.)

('38) 25 AIR 1938 Bom 209 (209) : 175 Ind Cas 221, *Veerappa Chinnappa v. Iratappa Malagi*. (Decree transferred to Collector for execution — Limitation for application under O. 21, R. 89 for setting aside sale expiring on day when Civil Court was closed but Collector's Court was open—Application made to Civil Court after it opened is in time as O. 21, R. 91A (Bombay Amendment) does not compel the applicant to apply to the Collector.)

('22) 9 AIR 1922 All 195 (196) : 67 Ind Cas 321, *Durga Prasad v. Babulal*.

('12) 17 Ind Cas 783 (784) : 35 All 65 (DB), *Munshi Lal v. Ram Narain*. (No section referred to.)

See also Article 166 Note 17.

2. ('22) 9 AIR 1922 All 195 (196) : 67 Ind Cas 321, *Durga Prasad v. Babulal*.

Section 4
Notes 4-5

as an *application* governed by s. 4 of the Act. According to the cases cited below,³ the tender is governed by s. 10 of the General Clauses Act, 1897, as being an act allowed by a Central Act, to be done within a particular period. Where a tender of deposit under O. 21, R. 89 was made on the last day, and the Court though not closed, was unable to receive the deposit, it was held by the late Judicial Commissioner's Court of Nagpur, that it could be received the next day on the general principle that the act of the Court shall prejudice no party.⁴ See also Article 166 Note 7.

5. Applicability to acts directed to be done by decree or order of Court. — Where money is payable under a direction in a decree, it may, under the provisions of Order 21, Rule 1 of the Civil Procedure Code, be paid either into Court or out of Court to the decree-holder. The person bound to pay under the decree is entitled to choose the method of payment.¹ Suppose he chooses the alternative of depositing the amount in Court and finds that the last day on which the amount is to be deposited falls on a holiday on which the Court is closed. Can he deposit it on the next day on which the Court re-opens? As has been seen in Note 2, neither section 4 of this Act, nor section 10 of the General Clauses Act, 1897, applies to such a case. It has been held, however, generally that the *general principle of law* referred to in Note 2 will apply in such cases.² It has also been held that a valid

3. ('06) 9 Oudh Cas 214 (216) (DB), *Radhe Lal v. Sheo Prasad*.

('97) 19 All 140 (140) : 1897 All W N 7 (DB), *Bashir-ud-din v. Jhori Singh*. (Case governed by cls. (1) and (2) of S. 7, General Clauses Act of 1887.)

('03) 13 Mad L Jour 271 (272) (DB), *In re Ari Chetty*. (Auction-purchaser — Balance of purchase money—Court closed for vacation — Fifteen days expiring during recess — Payment on re-opening day.)

4. ('26) 13 AIR 1926 Nag 331 (331) : 96 Ind Cas 376, *Raot Mal v. Amar Singh*. [See ('11) 10 Ind Cas 51 (53) (DB) (Cal), *Mahomed Akbar Jaman Khan v. Sukhdeo Panday*.]

See also Article 166 Note 7.

Section 4 — Note 5

1. ('10) 7 Ind Cas 992 (992) : 35 Bom 35 (DB), *Waman Ravji v. Natu Murha*.

('25) 12 AIR 1925 Mad 743 (744) : 87 Ind Cas 560, *Sankaran Unni v. Raman*.

('21) 8 AIR 1921 All 44 (44) : 60 Ind Cas 894 (DB), *Reoti Ram v. Sita Ram*.

('23) 10 AIR 1923 Nag 246 (247) : 72 Ind Cas 388 : 19 Nag L R 116, *Dhanu Singh v. Kesheoprasad*.

('25) 12 AIR 1925 All 687 (687) : 87 Ind Cas 620 (DB), *Mahomed Hashim v. Radha Krishun*.

2. ('49) 36 AIR 1949 Nag 141 (144) : 1 L R (1948) Nag 612 (DB), *Premchand v. Ramdeo Sukdoo*. (Instalment compromise decree.)

('06) 3 Cal L Jour 339 (342) : 10 Cal W N 595 (DB), *Surendra Narain Mustafi v. Souravini Dasi*. (Compromise decree.)

('70) 2 N W P H C R 112 (112) (DB), *Mt. Muchul Kooer v. Laljee*. (Pre-emption decree.)

('84) 7 All 107 (108) : 1884 W N 224 (DB), *Ram Sahai v. Gaya*. (Do.)

('77) 1877 Pun Re No. 31, *Shams-ud-din v. Pir Baksh*. (Do.)

('31) 18 AIR 1931 Lah 386 (387) : 133 Ind Cas 434 (DB), *Fateh Khan v. Chajju*. (Do—AIR 1924 All 218 followed; Dissenting from AIR 1918 All 13 (DB), *Hirdey Narain v. Alam Singh* which was approved in AIR 1921 Lah 6.)

('08) 11 Oudh Cas 144 (146), *Ganga Dhar v. Anrudh Singh*. (Pre-emption decree.)

('23) 10 AIR 1923 All 516 (517) : 45 All 456:74 Ind Cas 745 (DB), *Girdhari Singh v. Bhupal Singh*. (Do.)

tender of money to Court on the re-opening day will be equivalent to actual deposit and that if the Court is unable, for no fault of the party, to accept the deposit on that day, the deposit on the next day will be accepted as proper on the principle that the act of the Court shall prejudice no man.³

In *Wana Ravji v. Natu Murha*,⁴ however, it was held that S. 10 of the General Clauses Act, 1897, applied to such cases. It is submitted that this view is not correct.

It has also been held in the undermentioned case⁵ that where for some time after decree directing payment is passed, the Court is open, but is closed on the date on which the period allowed for payment expires, the judgment-debtor cannot wait till the re-opening of the Court to deposit the amount, and is bound to have paid the amount either direct to the decree-holder or to have deposited it before the Court closed for the vacation. It is submitted that this view also is not correct and is against the trend of judicial opinion.

6. Applicability to payments to be made under private agreement between parties.—Section 4 of this Act has been held not to apply to payments to be made under a *private agreement* between the parties.¹ It is submitted that neither S. 10 of the General Clauses Act, 1897, nor the general principle of law will be applicable to such cases.

6a. Section, if affects court-fee payable on application for review under Schedule I, Articles 4 and 5 of the Court-fees Act.—The court-fee leviable on an application for review of judgment is that leviable on the plaint or memorandum of appeal, if such application is presented *on or after* the ninetieth day from the date of the decree, but is only half of that fee if such application is presented before the ninetieth day. Suppose now that the eighty-ninth day expires on a day on which the Court is closed and the application is consequently presented on the day on which the Court re-opens. What is the court-fee payable? It has been held that the full court-fee must be paid, the reason being that this section excuses the delay only for purposes of *limitation* and does not affect the payment of court-fee.¹

(24) 11 AIR 1924 All 218 (219) : 40 All 328 : 78 Ind Cas 1014 (FB), *Muhammad Jan v. Shiam Lal*. (Do — Overruling AIR 1918 All 13 and AIR 1922 All 278, *Fateh Muhammad v. Sita*.)

(98) 21 Mad 385 (387) (DB), *Aravamudu Ayyangar v. Samiappa Nandan*.

(21) 8 AIR 1921 Lah 6 (8, 9) : 67 Ind Cas 772 (FB), *Himmun v. Fauja*.

3. (08) 11 Oudh Cas 144 (146), *Ganga Dhar v. Anrudh Singh*.

(11) 10 Ind Cas 51 (53) (Cal) (DB), *Md. Akbar Jaman Khan v. Sukhdeo Panday*.

4. (10) 7 Ind Cas 992 (992):35 Bom 35 (DB).

[See (06) 9 Oudh Cas 214 (216) (DB), *Radhe Lal v. Sheo Prasad*.]

5. (29) 16 AIR 1929 All 207 (208) : 115 Ind Cas 796 : 51 All 527 (DB), *Kunj Behari Singh v. Bindeshri Prasad Singh*.

Section 4 — Note 6

1. (20) 7 AIR 1920 Pat 122 (123) : 56 IC 495 (DB), *Adya Singh v. Nasib Singh*.
(34) 21 AIR 1934 Oudh 303 (305) : 149 Ind Cas 258 : 9 Luck 475, *Salamat Ali v. Nur Muhammad Khan*.

Section 4 — Note 6a

1. (86) 9 Mad 134 (136) : 9 Ind Jur 423 (DB), *In re Kota*.

Section 4
Notes 6b-7

6b. Applicability to proceedings under special or local laws.— The section has been held to be applicable to the following proceedings under special or local laws :

- (1) Application under S. 23 of the Press (Emergency Powers) Act, 1931.¹
- (2) Application under S. 19 of the Madras Agriculturists' Relief Act, 1938.²
- (3) Application under S. 54 of the Provincial Insolvency Act.³
- (4) Application under S. 12 (2) of the Oudh Courts Act.⁴
- (5) Appeals from Revenue Courts to the District Judge under the Oudh Rent Act.⁵

The section has been held to be not applicable to a petition of insolvency under S. 9 of the Provincial Insolvency Act, 1920.⁶

See also section 29 Note 3.

7. Expiry of period "prescribed." — It is important to remember that this section *does not alter or modify* the length of the "prescribed" period. It assumes that the period prescribed *expires* on a day on which the Court is closed and it says that *notwithstanding such expiry* the proceeding may be taken on the day the Court re-opens.¹

(10) 15 Ind Cas 455 (456) (Cal) (DB), *Sayera Bibi v. Bhutnath Haldar*.

(99) 2 Oudh Cas 302 (303), *Jagatpal Singh v. Jageshwar Baksh Singh*.

(93) 7 C P L R 111 (112), *Hiralal Ramdhan v. Mt. Gangabai*. (Application filed after the 90th day from the date of the decree though it was within time in view of S. 12 of the Limitation Act — Held that it must bear full stamp because the Court-fees Act and the Limitation Act are not *in pari materia*.)

(79) 1879 Pun Re No. 39, *Ruldu Mal v. Sobha*.

Section 4 — Note 6b

1. ('39) 26 AIR 1939 Pesh 6 (7):180 Ind Cas 252 (DB), *In re Sant Singh Sardar Rattan Singh*.
2. ('39) 26 AIR 1939 Mad 613 (614) : I L R (1239) Mad 886 : 186 Ind Cas 379 (DB), *Kumaraswami Pillai v. Thiruvengadatha Ayyangar*.
3. ('38) 25 AIR 1938 Nag 454 (455):ILR (1939) Nag 377 : 178 I C 479, *Balkisan Seth v. Bhanu Prasad*.
4. ('38) 25 AIR 1938 Oudh 186 (188) : 14 Luck 138 : 177 Ind Cas 48 (DB), *Ram Dass v. Chhedi Lal*.
5. ('14) 1 AIR 1914 Oudh 255 (255) : 17 Oudh Cas 254 : 25 Ind Cas 703, *Binda Parshad v. Ram Bhajan*.
6. ('42) 29 AIR 1942 All 429 (432, 434, 436, 437):ILR (1943) All 84: 204 Ind Cas 1 (FB), *Raja Pande v. Sheopujan Pande*. (Per Full Bench; Per Das J. — S. 4, Limitation Act also applies.)

Section 4 — Note 7

1. ('48) 35 AIR 1948 Nag 63 (64):ILR (1947) Nag 494, *Umedsingh v. Shankerlal*, (Section 4 unlike S. 14 does not entitle a person to add the days on which the Court is closed to the statutory period.)
- (47) 34 AIR 1947 Lah 168 (169) : ILR (1946) Lah 107 : 230 Ind Cas 73 (DB), *Bhiwani Cloth Mills v. Parmeshari Doss*.
- (47) 34 AIR 1947 Oudh 3 (4) : 21 Luck 447 : 225 Ind Cas 497, *Ram Manorath v. Ram Bhulawan*. (Section 4 neither prescribes nor extends the period given in the schedule.)
- (42) 29 AIR 1942 All 429 (437) : ILR (1943) All 84 : 204 Ind Cas 1 (FB), *Raja Pande v. Sheopujan Pande*.

In *Maqbul Ahmad v. Onkar Pratap Narain Singh*,² their Lordships of the Privy Council observed as follows :

"The language employed in S. 4 indicates that it has nothing to do with computing the prescribed period. What the section provides is that, where the period prescribed expires on a day when the Court is closed, notwithstanding that fact, the application may be made on the day that the Court re-opens; so that there is nothing in the section which alters the length of the prescribed period."

There are, however, other sections in the Act which extend or modify the periods prescribed by the first schedule in particular cases. Thus, ss. 6 to 8 of the Act *extend* the period prescribed by the first schedule, where the person entitled to institute a suit or make an application is a minor, or insane or an idiot. (See Note 9.) Sections 12 to 24 prescribe the method by which the periods prescribed in the first schedule in particular cases are to be computed or reckoned. In *Maqbul Ahmed's case*,² referred to above, where one of the questions was when the period of limitation expired in a case to which S. 14 of the Act applied, their Lordships observed as follows :

('42) 29 AIR 1942 Cal 566 (567) : ILR (1942) 2 Cal 160:203 Ind Cas 426, *Johuri-mull v. Kashiprosad*. (Limitation for application to set aside award expiring on Sunday — Such application made on following day — Judgment pronounced on award earlier on same day is not invalid as the limitation period for making the application is not extended by S. 4.)

('42) 29 AIR 1942 Mad 604 (606) : ILR (1942) Mad 868 : 203 Ind Cas 5, *Kamaraju v. Saramma*.

('40) 27 AIR 1940 Mad 908 (909) : 194 Ind Cas 401, *Thimmanna Bhat v. Adyanthaya*. (The observations in this case seem to suggest that the words "period prescribed" refer to the period prescribed by the first schedule (which is the expression used in S. 3) — But the words are really general and refer to the period prescribed by the first schedule as modified by the provisions in the body of the Act.)

('40) 27 AIR 1940 Nag 401 (402) : 188 Ind Cas 585, *Laxman Krishnaji v. Yadao Raghoba*. (Section 4 does not extend the prescribed period in S. 20.)

('38) 25 AIR 1938 All 606 (608) : I L R (1938) All 861 : 178 Ind Cas 668 (DB), *Puran Chand v. Abdullah*. (Do.)

('38) 25 AIR 1938 Lah 234 (236) : ILR (1938) Lah 193 : 174 Ind Cas 277 (FB), *Shanti Parkash v. Harnam Das*. (AIR 1937 Lah 642 reversed on another point.)

('37) 24 AIR 1937 Lah 642 (643) : 174 Ind Cas 258, *Shanti Parkash v. Harnam Das*. (Reversed in AIR 1938 Lah 234 (FB) on another point.)

('32) 19 AIR 1932 Mad 287 (289) : 55 Mad 630 : 136 Ind Cas 822 (FB), *Fatma Bi v. Nagoor Khan*.

('35) 22 AIR 1935 P C 85 (87) : 57 All 242 : 155 Ind Cas 205:62 Ind App 80 (PC), *Maqbul Ahmad v. Onkar Pratap Narain Singh*.

('83) 13 Cal L R 153 (156), *Deb Narain Singh v. Ishan Chunder Malo*. (Where the last day is not a holiday, time will not be extended because the *next* day is a holiday.)

('16) 3 AIR 1916 Mad 734 (734) : 30 Ind Cas 832 (DB), *Chennama Shettithi v. Krishnaya Setti*. (Do.)

('13) 18 Ind Cas 574 (575) : 1912 Upp Bur Rul 140, *Nga Po Yin v. Mi Shan Nu*. (Where a suit on a promissory note executed on the 7th May 1907 was instituted on the 9th May 1910, the 8th being a Sunday, *held* the suit was barred.)

2. ('35) 22 AIR 1935 P C 85 (87):57 All 242:155 Ind Cas 205:62 Ind App 80 (PC). [See also ('49) 36 AIR 1949 All 764 (766):ILR (1950) All 701, *Chheda v. Baldeo*. (The period prescribed by Sch. I of the Limitation Act lapses not on the expiry of the definite number of years prescribed therein but on the expiry of that number of years together with the period of time which is excluded from the calculation.)]

Section 4 Note 7-8

"In S. 14 and other sections of a similar nature in the Act, the direction begins with the words: 'in computing the period of limitation prescribed for any application,' certain periods shall be excluded. It therefore seems to their Lordships that, where there is ground for excluding certain periods under S. 14, in order to ascertain what is the date of the *expiration of the prescribed period*, the days excluded from operating by way of limitation have to be added to what is primarily the prescribed period; that is to say, if the prescribed period is three years, and twenty days ought to be excluded in order to determine when the prescribed period expires, twenty days have to be added to the three years, and the date of the expiration of the prescribed period is thus ascertained."

If on the date of the expiration of the prescribed period as ascertained in the above manner, the Court is closed, then, under this section, the proceeding may be taken on the day that the Court re-opens.³

8. Acknowledgment or payment of interest during vacation. — Suppose the period prescribed by the first schedule for a particular suit expires on a day during the vacation of the Court, and an acknowledgment or a payment of interest is made after that date but before the Court re-opens, can it be said that such acknowledgment or payment is made "before the expiration of the period prescribed for the suit" within the meaning of ss. 19 and 20 of the Act so as to save limitation? It is clear from what has been stated in Note 7 that this section does not alter or extend the period of limitation but merely allows a suit to be filed on the re-opening day, *notwithstanding that the period has expired*. It follows that the acknowledgment or payment, as the case may be, made under the above circumstances cannot be said to be made "before the expiration of the prescribed period" and cannot give a fresh period of limitation under ss. 19 and 20.¹ A contrary view has been held in the under-

3. ('48) 35 AIR 1948 Nag 15 (16) : ILR (1947) Nag 375 : 231 Ind Cas 134 (DB), *Chudaman v. Ramkuwar*. (Section 4 which by itself excludes no time can be tacked on to S. 14.)
- ('47) 34 AIR 1947 Lah 168 (171) : ILR (1946) Lah 107 : 230 Ind Cas 73 (DB), *Bhiwani Cloth Mills v. Parmeshari Doss*.
- ('29) 16 AIR 1929 Cal 315 (318) : 123 Ind Cas 246 (DB), *Bejoy Kumar Sen v. Kusum Kumari Debi*.
- ('21) 8 AIR 1921 Lah 124 (125) : 60 Ind Cas 259, *Kanshi Ram v. Karam Narain*.
[See ('37) 24 AIR 1937 Cal 454 (455) : ILR (1937) 2 Cal 612 : 174 Ind Cas 1009 (DB), *Khirode Chandra Das v. Ramani Mohan Dhan*.]

Section 4 — Note 8

1. ('47) 34 AIR 1947 Oudh 3 (4) : 21 Luck 447 : 225 Ind Cas 497, *Ram Manorath v. Ram Bhulawan*. (AIR 1927 All 577 : 49 All 726, *Adul Ghani v. Chiranji Lal* and AIR 1937 Lah 162, *Kishan Singh v. Sardar Ali*, Dissent.)
- ('41) 28 AIR 1941 Nag 100 (101) : I L R (1941) Nag 144 (D B), *Shivjiram Dhanlal v. Gulabchand Kaloor*. (Courts closed for summer vacation when the previous acknowledgment was due to expire — Fresh acknowledgment during vacation but after three years from previous acknowledgment — Suit on late acknowledgment is barred. A I R 1928 Nag 192 overruled.)
- ('40) 27 AIR 1940 Nag 401 (402) : 188 Ind Cas 585, *Laxman Krishnaji v. Yadao Raghoba*. (Period prescribed in S. 20 (1) does not mean period prescribed by the schedule as modified by S. 4. A I R 1928 Nag 192 held no longer good law.)
- ('39) 26 AIR 1939 All 252 (252) : 181 Ind Cas 899 (D B), *Mt. Shayam Peare v. Ram Autar Singh*. (Section 4 cannot be used to extend period prescribed under S. 20. A I R 1927 All 577 not followed.)

mentioned cases,² which in view of the decision of the Privy Council in *Maqbul Ahmad v. Onkar Pratap Narain Singh*³ can be considered to be no longer good law. See also S. 19 Note 12 and S. 20 Note 10.

See also the undermentioned case.⁴

8a. Assignment of interest during vacation. — Where on the last day of limitation for filing a suit on a pro-note the Courts were closed for the summer vacation and on the re-opening day the payee under the promissory note assigned his rights and the assignee filed a suit on the same day, it was held that the suit was within time in view of this section.¹

9. Section 4 and Sections 6 to 8 of the Act. — A is under a legal disability on 1st January 1920 when he becomes entitled to sue for the recovery of a loan. The disability ceases on 1st January 1925. Under ss. 6 and 8 of the Act he can institute the suit within three years from that date, i. e., before the 1st January 1928. The Court is closed on that date and re-opens only on the 5th January 1928. Can A validly institute the suit on the 5th January 1928? The answer to the

('38) 25 AIR 1938 All 606 (609) : I L R (1938) All 861 : 178 Ind Cas 668 (D B), *Puran Chand v. Abdullah*. (Section 4 does not extend the prescribed period in Section 20.)

('38) 25 A I R 1938 Lah 234 (236, 237) : I L R (1938) Lah 193 : 174 Ind Cas 277 (FB), *Shanti Parkash v. Harnam Das*.

('31) 18 A I R 1931 Cal 785 (786) : 58 Cal 1148 : 134 Ind Cas 1132, *Anisuddin Ahmad v. Kalipada Roy*. (Section 4 does not apply to acknowledgments.)

('02) 26 Bom 782 (784) : 4 Bom L R 608 (D B), *Bai Hemkore v. Masamali*. (Acknowledgment.)

('29) 16 A I R 1929 Cal 68 (68) : 55 Cal 1210 : 114 Ind Cas 483, *Debendra Nath Roy v. Kartic Prasad Das*. (Payment of interest.)¹

('37) 24 AIR 1937 Lah 642 (643, 644) : 174 Ind Cas 258, *Shanti Prakash v. Harnam Das*. (Section 4 does not apply to acknowledgment. Reversed in A I R 1938 Lah 234 (FB) on another point.)

('37) 24 A I R 1937 Mad 367 (368) : 169 Ind Cas 653, *Chidambaran Chettiar v. Venkatasubba Naik*.

2. ('37) 24 A I R 1937 Lah 162 (164) : 164 Ind Cas 650, *Kishan Singh v. Sardar Ali*. (Period prescribed means period prescribed in schedule read with S. 4.)

('27) 14 AIR 1927 All 577 (577, 578) : 49 All 726 : 102 Ind Cas 111, *Abdul Ghani v. Chiranji Lal*. ('Period prescribed' does not mean 'period prescribed' by the schedule alone but by entire Limitation Act.)

('13) 19 Ind Cas 820 (821) (Bom), *Visram v. Tabaji*. (Obiter.)

3. ('35) 22 AIR 1935 P C 85 (87) : 57 All 242 : 155 Ind Cas 205 : 62 Ind App 80 (PC).

4. ('45) 32 A I R 1945 Mad 137 (138) : I L R (1945) Mad 634 (DB), *Subbareddi v. Venkatramayya*. (Joint Hindu family — Pronote by manager — Limitation for suit on, expiring during vacation of Court in which suit could be instituted — Renewal of pronote by manager before re-opening date when suit could be filed by reason of S. 4 is not revival of barred debt and is binding on other members.)

Section 4 — Note 8a

1. ('40) 27 A I R 1940 Mad 908 (909), *Thimmanna Bhat v. Adyanthayya*. (Limitation bars remedy but does not extinguish right—So notwithstanding the expiry of limitation there is an assignable right and suit is saved from bar of limitation by this section.)

('40) 27 AIR 1940 Cal 443 (445) : I L R (1940) 1 Cal 323 : 191 Ind Cas 52, *Srilal Singhania v. Anantlal*.

Section 4 Notes 9-10

question depends upon the answer to another question, namely "Does the period of limitation prescribed for the suit *expire on a day on which Court is closed?*" It would clearly follow from what has been stated in Note 7 that in order to ascertain the expiration of the period prescribed for the suit, the days excluded under Ss. 6 to 8 from operating by way of limitation have to be added to what is primarily the prescribed period. In the illustrative case above, the period so calculated will expire on the 1st January 1928 when the Court is closed. The suit is therefore validly instituted on the 5th January 1928 by virtue of this section.¹

10. Section 4 and Section 12 of the Act. — It follows from what has been stated in Note 7 that in a case to which S. 12 applies, the date of the expiration of the period prescribed must be ascertained by adding the days excluded to what is primarily the prescribed period. If on such date the Court is closed, the appellant or the applicant as the case may be can, under this section, prefer the appeal or make the application on the date when the Court re-opens.¹

Illustrations.

1. A decree is passed in a suit on 1-1-1935. The period of limitation prescribed for an appeal from such judgment is thirty days from the date of the decree. Application for copies is made on 20-1-1935 and copies are got on 13-2-1935. In order to ascertain when the period of limitation prescribed for the appeal expires, the period excluded, namely twenty-five days (from the 20th January to 13th February both inclusive) must be added to the prescribed period of thirty days and so adding it, the period will expire on the fifty-fifth day from 1-1-1935 (excluding 1st January under S. 12, sub-s. (1)) which will be 25-2-1935. If on that day the Court is closed, the appeal can be presented on the re-opening day.²

2. A decree is passed in a suit on 1-1-1935. The period of limitation prescribed for an appeal from such judgment is thirty days from that date. The Court is

Section 4 — Note 9

1. ('32) 19 AIR 1932 Mad 139 (141) : 135 Ind Cas 587 : 55 Mad 286 (D B), *Naganna v. Krishnamurthy*. (The phrase "the period of limitation prescribed for any suit", etc., in S. 4 of the Limitation Act is wide enough to include a period of time contained in the first schedule of the Limitation Act but computed with the aid of one or more of the Ss. 12 to 16 of the Limitation Act or starting from the date of attaining majority under S. 6 of the Act.)

('28) 15 A I R 1928 Mad 1255 (1258) : 115 Ind Cas 500, *Narasayya v. Krishnamurthy*. (Period of *limitation prescribed* means period of limitation prescribed by Schedule 1 as qualified by Ss. 6 and 8.)

('24) 11 AIR 1924 Oudh 385 (387) : 81 Ind Cas 484 (DB), *Bans Bahadur Singh v. Sakalraj Kuar*. ("Prescribed" means prescribed by the Act, i.e., by the first schedule and by the provisions of Ss. 4 to 25.)

[See ('43) 30 AIR 1943 Nag 284 (285) : I L R (1943) Nag 331 : 207 Ind Cas 338, *Dadarao Krishnaji v. Jatanbai*. (Obiter.—In order to ascertain the date of the expiration of the prescribed period, any extension permissible on the ground of minority would be included.)]

See also Section 6 Note 41.

Section 4 — Note 10

1. ('47) 34 AIR 1947 Lah 168 (171) : I L R (1946) Lah 107 : 230 Ind Cas 73 (DB), *Shiwani Cloth Mills, Ltd. v. Parmeshari Doss*.

('35) 22 AIR 1935 P C 85 (87, 88) : 57 All 242 : 155 Ind Cas 205 : 62 Ind App 80 (PC), *Maqbul Ahmad v. Onkar Pratap*.

2. ('34) 21 AIR 1934 Pat 367 (368) : 13 Pat 632 : 151 Ind Cas 380 (D B), *Dhanna Mistry v. Bengal Nagpur Railway Co., Ltd.*

closed from 25-1-1935 to 25-2-1935. Application for copies is made on 26-2-1935 which is the day on which the Court re-opens and copies are got on 30-3-1935. In order to ascertain when the period of limitation for the appeal expires, the period excluded under S. 12, namely thirty-three days (from 26-2-1935 to 30-3-1935 both inclusive), should be added to the prescribed period of thirty days and so adding it, the period will expire on the sixty-third day from 1-1-1935 which will be 5-3-1935. An appeal presented on the 31st March after the copies are obtained will be barred.³ It is assumed here that the application for copies made on the re-opening day is effective for the purpose of giving the appellant the benefit of the provisions of S. 12, even though the period of limitation for the appeal has expired during the vacation. This view is not correct.^{3a} See also S. 12 N. 24 Pt. 13. It has, however, been held in the undermentioned cases⁴ that the appeal is in

3. ('05) 28 Mad 452 (453) : 15 Mad L Jour 109 (D B), *Venkataram v. Venkatachalam Chetty*.
- ('16) 3 A I R 1916 Lah 407 (407) : 35 Ind Cas 233 : 1916 Pun Re No. 79, *Guran Rakha v. Bindraban*.
- ('34) 21 AIR 1934 Pat 367 (368) : 13 Pat 632 : 151 I C 380 (D B), *Dhanna Mistry v. Bengal Nagpur Railway Co., Ltd.* (A I R 1931 Pat 60 (DB) *Ramchandra v. Sri Thakurjee Mandil Darkadhis*, held not correct law.)
- ('20) 7 AIR 1920 Mad 1025 (1025) : 63 Ind Cas 922 (DB), *Masilamani v. Arumuga*. (Following 11 Ind Cas 339 (D B), *Tanjore Palace Estate v. Andi Ramiah* and A I R 1920 Mad 359 (DB), *Subramanyan v. Narsimham*.)
- ('79) 1879 Pun Re No. 82, *Jiwan Singh v. Nagina Singh*.
- 3a. ('42) 29 A I R 1942 Mad 604 (606) : I L R (1942) Mad 868 : 203 Ind Cas 5, *Kamaraju v. Saramma*. (Section 12 assumes that the time requisite for obtaining the copy of decree must begin before the prescribed period is over. Under S. 4, the right to present a suit or appeal or application on the day on which a Court re-opens is a special right which cannot extend the period of limitation prescribed in the Act. The section pre-supposes that that period has already expired. Therefore, under S. 4, the only privilege which is granted to the suitor or appellant, is that he may file his suit or appeal on that particular day and that particular day alone. If he delays in making his application for a copy until that day, then he is applying for a copy when the period of limitation has already expired and the extension which is granted to him by the application of S. 4 cannot be combined with the extension which he seeks under S. 12.)
4. ('38) 25 AIR 1938 Lah 317 (318) : 177 Ind Cas 672, *Asa Singh v. Hira Singh*. (Limitation for appeal expiring on 30-5-1936 which was a holiday — Application for copies on 1-6-1936, the opening day — Copies obtained on 2-6-1936 — 3rd June being again a holiday, appeal preferred on 4-6-1936 — Held appeal was within time.)
- ('97) 19 All 342 (347) : 1897 All W N 76 (DB), *Siyadat-un-nissa v. Md. Mahmud*.
- (1900) 2 Bom L R 221 (223) (DB), *Sitaram v. Ramji*.
- ('26) 13 AIR 1926 All 111 (112) : 89 I C 956, *Megh Baran Singh v. Rama Das*.
- ('14) 1 AIR 1914 All 303 (304) : 23 Ind Cas 874, *Budhu v. Sultan*.
- ('01) 25 Bom 584 (586) : 3 Bom L R 143 (DB), *Tukaram v. Pandurang*.
- ('01) 25 Rom 586 (588) : 3 Bom L R 244 (DB), *Pandharinath v. Shankar*.
- ('26) 13 AIR 1926 Lah 121 (122) : 89 Ind Cas 437, *Naman v. Gurditta*.
- ('30) 17 A I R 1930 Lah 116 (216, 217) : 11 Lah 111 : 120 Ind Cas 169 (D B), *Mt. Attari v. Ram Kishan*.
- ('29) 16 AIR 1929 Rang 96 (96) : 6 Rang 743 : 115 Ind Cas 667 (D B), *Ma Dan v. Tan Chong San*.
- ('20) 7 AIR 1920 Pat 818 (819) : 60 Ind Cas 493, *Farzand Ali v. Abdul*.
- ('15) 2 A I R 1915 Nag 117 (118) : 11 Nag L R 104 : 29 Ind Cas 833, *Kashibai v. Kannoo*.
- [See also ('38) 25 AIR 1938 Lah 707 (708, 709) : 182 I C 108, *Mahomed Zaman v. Hans Raj Shah*. (In this case, on the day on which the application for copy of decree was made the period of limitation for the appeal had expired but owing to the intervention of holidays, the appeal could have been filed on that

Section 4 Notes 10-11

time, on the ground that the right of appeal subsisted on the re-opening day by virtue of S. 4, and that, therefore, the period of the closing of the Court must be excluded in addition to the period that can be excluded under S. 12. In other words this view proceeds on the ground that S. 4 itself *extends* the period of limitation up to the re-opening of the Court. As has been seen in Note 7 this view is not correct, as explained by the Privy Council in *Maqbul Ahmad v. Onkar Pratap Narain Singh*,⁵ and consequently the said decisions can no longer be considered to be good law.

3. A decree is passed on 1-1-1935 and immediately the Court closes for the vacation and re-opens on 1-3-1935. Copies are applied for on the same date and obtained on 5-3-1935 and an appeal is preferred on the same date. Is the appeal in time? On the principle and method of calculation referred to in illustration 2 above, the appeal would be barred if the "time requisite" for obtaining the copies is taken to be the period from 1-3-1935 to 5-3-1935 both inclusive. There is, however, a difference of opinion as to whether in a case such as the above, where it is impossible for the party to apply for copies before the re-opening day, the "time requisite" should not be taken to include the whole vacation also. See Note 24 to section 12.

11. Section 4 and Section 31 (repealed) of the Act. — There was a conflict of opinions as to whether the period allowed by S. 31 (now repealed) was a "prescribed" period within the meaning of S. 4; in other words, whether if the period allowed by S. 31 for a proceeding expired on a day on which the Court was closed, such proceeding could be taken on the re-opening day. It was held in the undermentioned cases¹ that the word "prescribed" in S. 4 meant only the periods prescribed by the first schedule to the Act, that the period allowed by S. 31 was therefore not a "prescribed period" and that S. 4 could not be applied so as to validate the proceeding taken on the re-opening day. A contrary view was taken in the cases cited below,² namely

day under this section — It was contended that under these circumstances the time taken to get copy of the decree could not be excluded but it was held that as the appeal could have been preferred under this section on the day on which the application for copy was made, such application was in time and the appellant was entitled to deduct the time taken for getting copy of the decree — It is submitted that there is no period of limitation for an application for copy of decree as was assumed in this case and such application is not also required under S. 12 to be made within the period of limitation for the appeal.)]

5. ('35) 22 AIR 1935 PC 85 (87) : 155 I C 205 : 62 Ind App 80 : 57 All 242 (P C).

Section 4 — Note 11

1. ('12) 15 Ind Cas 439 (440) (Oudh) (DB), *Rahmatul Fatime v. Ashraf Ali*. (Section 10, General Clauses Act, was however held to apply.)
- ('11) 12 Ind Cas 811 (813) (Bom) (D B), *Sheodas Doulatram v. Nayaryan Asaji*. (Section 10, General Clauses Act, also will not apply.)
- ('30) 17 AIR 1930 Lah 127 (128, 129) : 10 Lah 681: 122 Ind Cas 86 (DB), *Jai Dev Singh v. Abdul Rahman*. (Section 5, Punjab Loans Limitation Act, corresponded to Section 31 of this Act — Section 4 of this Act assumed not to apply, but S. 8, Punjab General Clauses Act, I of 1898, corresponding to S. 10, Indian General Clauses Act, was applied.)
- ('11) 12 Ind Cas 810 (811) : 7 Nag L R 176, *Balkrishna v. Tima*.
2. ('24) 11 AIR 1924 Oudh 385 (387) : 81 Ind Cas 484 (DB), *Bans Bahadur Singh v. Sakalraj Kuar*. ('Prescribed' means prescribed by the Act, and not merely by the first schedule.)
- ('28) 15 A I R 1928 Mad 1255 (1258) : 115 Ind Cas 509, *Narasayya v. Krishnamurthy*. ('Period of limitation prescribed' means prescribed by the first schedule but calculated in the manner provided by the sections of the Act.)

that the word "prescribed" meant prescribed by the Act, i.e., prescribed primarily by the first schedule but computed, altered or substituted by the sections of the Act, that consequently the period allowed by S. 31 was a "prescribed" period within the meaning of S. 4 and that if such period expired on a day on which the Court was closed, the proceeding might be taken on the day on which the Court re-opened. In view of the repeal of S. 31 of the Act, this conflict would no longer be of any importance and even otherwise would now be taken to have been set at rest by the decision of the Privy Council in *Maqbul Ahmad v. Onkar Pratap Narain Singh*³ to the effect that the date of the expiration of the prescribed period must be ascertained by considering the sections along with the period primarily prescribed by the first schedule. See also Notes 7 to 10.

12. "When the Court is closed." — The question whether in any particular case the Court is closed is one of fact which must depend upon the practice which prevails in the particular Court.¹ There may be a vacation; yet the Court may be open for certain classes of business, such as admission of complaints, filing of written statements and hearing of short cases.² A Court cannot be deemed to be closed within the meaning of this section during a vacation, if for the purpose of the particular business in question the office of the Court is open.³ According to the prevailing practice in the Bombay High Court, suits on the Original Side can be filed in the summer vacation and therefore

('14) 1 A I R 1914 Mad 663 (663) : 21 Ind Cas 770 (D B), *Murugesu Mudali v. Ramasamy Chettiar*. (Section 31 prescribed a period of limitation—'Prescribed' means prescribed whether as a matter of grace or otherwise.)

('12) 14 Ind Cas 154 (155) : 34 All 375 (DB), *Hira Singh v. Amarti*.

('92) 19 AIR 1932 Mad 139 (141) : 135 Ind Cas 587 : 55 Mad 286 (DB), *Naganna v. Krishnamurthy*. (Words 'the period of limitation prescribed for any suit' etc. in S. 4 are wide enough to include a period of time contained in Schedule I, Limitation Act, but computed with the aid of one or more of the sections of the Act.)

3. ('35) 22 AIR 1935 P C 85 (87, 88) : 155 Ind Cas 205 : 62 Ind App 80 : 57 All 242 (PC).

Section 4 — Note 12

1. ('51) 55 Cal W N 127 (129) (DB), *Gur Bux v. Sohanlal*.

('27) 14 AIR 1927 Bom 480 (482) : 103 Ind Cas 540 : 51 Bom 848 (DB), *Dharamsi Morarji Chemical Co. Ltd. v. Occhavlal Hargovindas*.

2. ('24) 11 AIR 1924 Bom 144 (147) : 89 Ind Cas 529, *Tata Industrial Bank v. Abdul Hussein*.

3. ('41) 28 AIR 1941 Nag 216 (217) : I L R (1941) Nag 563 : 197 Ind Cas 415 (DB), *Kisanlal v. Tansukhrail*. (High Court notification providing that Court will remain closed for summer vacation except for certain business including filing of Letters Patent Appeals—Office to remain open during vacation—Court cannot be said to be closed for purpose of filing Letters Patent Appeals.)

('27) 14 AIR 1927 Bom 480 (481) : 103 Ind Cas 540 : 51 Bom 848 (DB), *Dharamsi Morarji Chemical Co. Ltd. v. Occhavlal Hargovandas*.

('83) 1883 All W N 254 (254) (DB), *Hijab Banu v. Muhammad Shafi*.

[See also ('21) 61 Ind Cas 714 (715) (Cal), *Soma Sheikh v. Naib Ali*. (Limitation for criminal appeal expiring during Court's civil vacation—Vacation Judge sitting but appeal not filed in time due to want of notice of time and place where vacation Judge was to hold his sittings—Appeal filed on re-opening day should be admitted.)]

Section 4
Note 12

the Bombay High Court Original Side is not closed in the vacation within the meaning of S. 4.⁴

When a Court was adjourned for the recess, and during the recess the office was open twice a week for the purpose of receiving papers under the rules framed by the High Court in that behalf, an appeal, the time for which had expired during the recess, was held to be time-barred, when presented on the day the Court re-opened after the recess.⁵ But when the day on which the period of limitation expired for an appeal is a *gazetted holiday*, and the District Judge holds Court on that day, a presentation of papers on the next following day is not barred.⁶ The reason is that a Court is deemed closed for purposes of this section on a gazetted holiday, in spite of the fact that the Judge holds Court on that day.⁷

A Court is not closed within the meaning of this section, if the officer authorised to receive plaints is absent from headquarters and is in camp.⁸

Where the Court was in vacation, but there was a notification in the Gazette providing that "plaints, execution applications and other papers will be received only on the days on which the Judge sits," and further providing for the sitting of a vacation Judge on Wednesdays and Thursdays, it was held that the Court was not closed.⁹

Where a notification relating to the disposal of work during summer vacation provided that the High Court would be closed except for certain business including filing of Letters Patent appeals and the office of the Court was to remain open as usual it was held that the High Court could not be said to be closed for the purpose of filing Letters Patent appeals.^{9a}

Where the period of limitation prescribed for a suit expired when the Court was closed for vacation and the Court did not sit on the re-opening day, but sat on a later day, it was held that the suit was within time, if it was filed on the day that the Court actually re-opened.¹⁰

Where the Court was open, but so far as the act, namely, depositing purchase money, which a party desired to carry out through the

4. ('27) 14 AIR 1927 Bom 480 (482) : 103 Ind Cas 540 : 51 Bom 848 (DB), *Dharamsi Morarji Chemical Co., Ltd. v. Occhavilal Hargovandas*.

5. ('82) 5 Mad 189 (193) (FB), *Nachiyappa v. Ayyasami*.

6. ('97) 20 Mad 469 (469) (DB), *Boyamma v. Balaji Rau*.

7. ('03) 13 Mad L Jour 316 (317) (DB), *Ghulam Ghouse v. Venkatachalam Pillai*.

8. ('16) 3 AIR 1916 Mad 3 (4) : 38 Mad 295 : 29 Ind Cas 449 (FB), *Receiver of Nidadavole & Medur Estate v. Suraparazu*.

9. ('23) 10 AIR 1923 Mad 435 (436) : 46 Mad 938 : 70 Ind Cas 888 (DB), *British India Steam Navigation Co. v. Sharafally*.

9a. ('41) 28 AIR 1941 Nag 216 (217) : I L R (1941) Nag 563 : 197 Ind Cas 415 (DB), *Kisanlal v. Tansukhrail*.

10. ('75) 1 All 263 (265) (DB), *Bishan Chand v. Ahmad Khan*.

[But see ('48) 35 AIR 1948 Mad 521 (522) (DB), *In re Thokkudubivyanu Immaniyelu*. (Limitation expiring during recess — Court re-opening on Saturday 5th July but no judicial work done — Review petition presented on 7th July barred by limitation.)]

Court, was concerned, he was refused facilities so as not to enable him to carry it out on the day in question, it was held that the Court must be considered to have been closed.¹¹

In an earlier case, where the Chief Court of the Punjab was in vacation but by an arrangement of the Court it was kept open for reception of petitions by the Deputy Registrar of the Court, an application, the period of limitation for which expired during vacation, was held to be validly presented on the re-opening of the Court.¹² But the trend of later decisions is to the contrary effect. Where the Court was in vacation, but the Court office was open, to which appeals could be presented during the vacation, it was held that the Court was not closed.¹³

The Subordinate Judge of S used to sit for a week every month at L. During his absence from S, the plaintiff presented his plaint at S, which was accepted by the Naib-Sheriff of the Court, who was not authorised to receive plaints and no other arrangement existed for reception of plaints at S. It was placed before the Subordinate Judge on his return from L, who dismissed it as time-barred. It was held that the Court at S should be deemed to have been closed during the time that the Subordinate Judge was absent from S.¹⁴

13. "Court" means the proper Court. — There was a conflict of opinion as to whether the words "the Court" mean the *proper Court* (that is, the Court in which the suit ought to have been instituted), or the Court in which the suit happens to be filed, whether it is the proper Court or a wrong Court. According to the High Courts of Allahabad, Calcutta, Madras and Lahore, the words "the Court" meant only the *proper Court*. Where therefore on the date of the expiry of the period of limitation for a suit, the proper Court was open and another Court was closed and the suit was filed in the latter Court on its re-opening day, the period between the expiry of the period of limitation and the re-opening of the wrong Court could not, according to the said High Courts, be saved under this section, in

11. ('26) 13 AIR 1926 Nag 331 (331) : 96 Ind Cas 376, *Raotmal v. Amarsingh*. (Extension of period under S. 151, C. P. C.)

12. ('91) 1891 Pun Re No. 29, *Ganpat Rai v. Hira Singh*.

13. ('21) 8 AIR 1921 Lah 237 (238) : 60 Ind Cas 737 (DB), *Fatteh Muhammad v. Chothu Ram*. (Appeal under Letters Patent, Lahore, cl. 10.)

[See also ('33) 20 AIR 1933 Lah 239 (239) : 142 Ind Cas 307, *Hira Lal v. Sojan Chand*. (Mere absence of presiding officer of Court on leave is not tantamount to Court being closed where the office of the Court is open and the establishment of the Court is present.)]

[See however ('39) 26 AIR 1939 Pat 667 (677) : 19 Pat 123 : 185 Ind Cas 353 (FB), *Lachmeshwar Prasad v. Girdhari Lal*. (The office of the Court is merely the hand with which the Court performs some of its functions—The fact that the office of a Court remains open while the Court itself is closed for judicial business will not deprive a litigant of the extended time for doing an act to which S. 10, General Clauses Act, applies—Per Agarwala, J.)].

14. ('34) 21 AIR 1934 Lah 622 (622) : 15 Lah 308 : 152 Ind Cas 618, *Nur Muhammad v. Ghulaman*.

Section 4
Note 13

addition to the period which may be deducted under S. 14 of the Act.¹ The High Court of Bombay,² on the other hand, held that such period should also be deducted on the ground that, otherwise, the result would be inequitable. The conflict has now been set at rest by the decision of the Privy Council in *Maqbul Ahmad v. Onkar Pratap Narain Singh*,³ in which their Lordships observed as follows :

"The language of S. 4 is such that it seems to their Lordships to be impossible to apply it to a case like the present. What it provides is that, where the period of limitation prescribed expires on a day when the Court is closed, the application may be made on the day when the Court re-opens. In their Lordships' view that means the proper Court in which the application ought to have been made."

As has been seen in Note 2 the principle on which this section is based is that the law does not compel a man to do that which he cannot possibly perform. It cannot be said that he cannot possibly file the suit in the proper Court when that Court is open, just because he is under a mistake as to the Court in which the suit is to be filed. See also the cases cited below.⁴

Section 4 — Note 13

1. ('16) 3 AIR 1916 All 222 (223) : 35 Ind Cas 292 (DB), *Makund Ram v. Ramraj*. (Limitation expiring on holiday—Plaint filed in wrong Court on next day—Plaint returned—Plaintiff is not entitled to exclusion of extra day on ground that it was a holiday.)
- ('75) 24 Suth W R 26 (27, 28) (DB), *Abhoya Churn Chuckerbutty v. Gour Mohun*.
- ('13) 18 Ind Cas 121 (122) (Cal) (DB), *Hari Das Roy v. Sarat Chandra Dey*.
- ('11) 12 Ind Cas 58 (60) : 36 Mad 131 (DB), *Mira Mohideen v. Nallaperumal Pillai*. (Although the word 'Court' in S. 4 is not qualified by the adjective 'proper' as it is in other parts of the Act, it would be unreasonable to take account of the closing and re-opening of any other Court than that in which the suit was rightly instituted.)
- ('19) 6 AIR 1919 Mad 845 (845, 846) : 47 Ind Cas 624 (DB), *Ramalingamiyer v. Subbaier*. (Section 4 can be availed of only if the suit etc., is filed in the proper Court when the time for doing so has expired on a holiday.)
- ('21) 8 AIR 1921 Mad 654 (655) : 44 Mad 817 : 63 Ind Cas 924 (DB), *Ummathu v. Pathumma*. (Court closed on the last day of limitation — Plaintiff presented in wrong Court on re-opening day — Plaintiff presented in proper Court subsequently — Suit time-barred.)
- ('23) 10 AIR 1923 Mad 114 (115, 116) : 69 I. C. 724 (DB), *Govindasami Padayachi v. Sami Padayachi*. (Liberal construction of S. 4 cannot be taken, when to do so, would involve disregard of the words of the statute.)
- ('12) 14 I. C. 157 (158) : 36 Mad 482 (DB), *Seshagiri Rao v. Vajra Velayudam Pillai*.
- ('29) 16 AIR 1929 Lah 425 (426) : 116 Ind Cas 314 : 11 Lah 12 (DB), *Dharman Ram Ladha Ram v. Ganga Ram*.
- ('20) 7 AIR 1920 Lah 346 (347) : 55 Ind Cas 55, *Banomal v. Banomal*.
2. ('21) 8 AIR 1921 Bom 379 (380) : 45 Bom 443 : 59 Ind Cas 743 (DB), *Basavanappa v. Krishnadas Goverdhandas*. (Plaint returned for presentation to proper Court — The plaintiff is entitled to take advantage of those days during which the first Court was closed for the vacation, and the calculation should be made in the same way as if the second Court had been closed for the vacation. 12 Ind Cas 58 (DB) (Mad), *Mira v. Nallaperumal*, Dissented from.)
3. ('35) 22 AIR 1935 P C 85 (88) : 155 Ind Cas 205 : 62 Ind App 80 : 57 All 242 (PC).
4. ('44) 48 Cal W N 187 (189), *Munsuf v. Abdul*. (Suit filed on re-opening day in Court having no pecuniary jurisdiction — Plaintiff returned to be filed in proper Court — Plaintiff has no right to deduct period of vacation.)
- ('36) 41 Cal W N 956 (957) (DB), *Anil Prokash Chatterjee v. Dhirendranath*.

Where a party is entitled to file a suit or make an application in two Courts of concurrent jurisdiction and one of the Courts in which he wishes to file his suit or make an application is closed on the last day of limitation, the party is entitled to the benefit of this section notwithstanding that the other Court is open at that time.⁵

Where the plaintiff has united several causes of action under O. 2, R. 3, Civil P. C. against the same defendant before a Court competent to try not necessarily those causes of action separately but the suit as a whole, the question of limitation under this section should be regarded with special reference to the jurisdiction of that Court to try the *suit* and not to the jurisdiction of the other Courts which might have been able to try those causes of action when split up had they been brought before them.

Illustration.

A brings one suit under O. 2, R. 3, Civil P. C. in respect of two contracts in the Sub Judge's Court, which is competent to try the suit as a whole, on the reopening day of that Court by taking advantage of the provisions of this section. A's suit in respect of the first contract could have been filed within limitation in the District Munsif's Court which had reopened earlier after the vacation. It was held that the whole suit was within limitation even though the claim in respect of the first contract would have been barred if the plaintiff had brought his suit in the District Munsif's Court on such date.⁶

13a. "Suit" meaning of.—See S. 3 N. 4. Where a suit includes several causes of action, the "Court" in which the suit is to be filed must be determined with the reference to the suit as a *whole* and not with reference to the individual causes of action—See Note 13.

('37) 24 AIR 1937 Lah 464 (465) : 173 Ind Cas 740. *Firm Bujamal Govindamal v. Mukta Parshad*. (What is necessary in view of the wording of S. 4, Limitation Act, is that the plaint must have been presented to the proper Court — Where, therefore, a plaintiff presents a plaint to a wrong Court of first instance, he is not entitled to any deduction on account of holidays under S. 4.)

('37) 24 AIR 1937 Nag 215 (216) : 170 Ind Cas 798 : 1 L R (1937) Nag 217, *Waman Rao v. Umrao*. (Period of limitation expiring during summer vacation — Suit instituted on opening day in Court of Sub-Judge, First Class — Plaint returned for presentation to proper Court — Suit instituted in the Court of Sub-Judge, Second Class, next day — Section 4 has no application as suit is not filed in proper Court on opening day — Suit held barred by time.)

5. ('40) 27 AIR 1940 Mad 495 (496) : 1 L R (1940) Mad 684, *Subba Rao v. Kandregula Narsiah*. (District Munsif's Court closed during vacation—Person having right to sue in that Court is entitled to benefit of S. 4 — Fact that Village Munsif's Court under Madras Village Courts Act has concurrent jurisdiction and is open during vacation does not deprive plaintiff of benefit of S. 4.)

('40) 27 AIR 1940 Cal 443 (444) : 1 L R (1940) 1 Cal 323 : 191 Ind Cas 52, *Srilal Singhania v. Anant Lal*. (Pronote executed at A but payable at B—On last date of limitation Court at A open but at B closed for vacation — Suit instituted at B on re-opening day—Suit held within time.)

('38) 25 AIR 1938 Bom 209 (209) : 175 Ind Cas 221, *Veerappa Channappa v. Iratappa Malagi*. (Decree transferred to Collector for execution—Limitation for application to set aside execution sale expiring on day when Civil Court was closed but Collector's Court was open — Application made to Civil Court after it opened is in time — Order 21, R. 91A, C. P. C. (Bombay Amendment) does not compel him to apply to the Collector.)

6. ('41) 28 AIR 1941 Mad 786 (788), *Latchayya v. Seshayya*.

Section 4
Note 14

14. "Suit, appeal or application may be instituted, preferred or made."—Order 4, R. 1, sub-rule (1) of the Civil Procedure Code provides: "Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf." Order 41, Rule 1 sub-rule (1) of the same Code provides: "Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and *presented to the Court or to such officer* as it appoints in this behalf....." As regards proceedings other than suits and appeals, S. 141 of the same Code provides: "The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction." The explanation to section 3 of this Act also provides that a suit is instituted, in ordinary cases, when the plaint is presented to the proper officer.

It follows from the above that a suit, appeal or application is instituted, preferred or made when it is presented to the proper officer.¹ A proceeding presented to a wrong Court² or to an officer who is not authorised to receive plaints³ is not a valid institution of such proceeding. But where according to the practice of the Court petitions are used to be thrown in a box kept for that purpose, the act of throwing an application into such box is a valid presentation.⁴

A proceeding presented on an insufficient stamp is not validly presented. But if the Court grants time to make good the deficiency and the deficiency is made good within that time, then under S. 149 of the Civil Procedure Code, it shall have the same effect as if the full stamp had been paid in the first instance.⁵

A memorandum of appeal must, under O. 41, R. 1, sub-rule (1) of the Civil Procedure Code be accompanied by a copy of the decree appealed from and (unless the appellate Court dispenses therewith) of the judgment on which it is founded. A memorandum of appeal not so accompanied is not a valid appeal. (See Note 6 to S. 3.)

An appeal otherwise properly presented will not be too late, simply because it was presented after the hour fixed by the Judge for the reception of papers; for, a Judge is not empowered to assign by rule certain hours of the working day to certain kinds of business, so as to deprive a suitor of any portion of the period within which he is entitled by law to do a particular act.⁶

Section 4 — Note 14

1. ('27) 14 AIR 1927 Bom 480 (481) : 103 Ind Cas 540 : 51 Bom 848 (DB), *Dharamsi Morarji Chemical Co., Ltd.*, v. *Occhavlal Hargovandas*.
2. ('21) 8 AIR 1921 Mad 654 (655) : 44 Mad 817: 63 Ind Cas 924 (DB), *Ummathu v. Pathumma*.
3. ('69) 6 Bom H CR A C J 254 (256), *Nandvallabh v. Alibhai*. (Plaint was presented to a karkun left in charge of a Court during vacation.)
- ('23) 10 AIR 1923 Pat 150(151): 71 Ind Cas 426: 2 Pat 264, *Anand Ram Branchans v. Ramgulam Sahu*. (Appeal presented to officer not authorized to receive papers.)
4. (1900) 1900 Pun L R No. 133, *Kaim Din v. Nihal Singh*.
5. ('10) 4 Ind Cas 503 (505, 506) : 32 Mad 305 (FB), *Gavaranga Sahu v. Boto Krishna Patro*. (Insufficiently stamped plaint is not void ab initio.)
6. ('84) 1884 Pun Re No. 140, *Shivdial v. Aladia*.

15. "Day that the Court re-opens." — "Day" here means the day on which the Court *actually* re-opens. Where the period of limitation prescribed for an application expired during the vacation and the Court re-opened on the 18th November 1903, but the application was made on the 19th November 1903, for that was, according to the rules of practice, the day for motions, it was held that the re-opening day was the day on which the Court *actually* re-opened, and not the first day after re-opening on which the Court in the ordinary course took motions.¹ Where, however, the period of limitation prescribed for filing an application for the substitution of the heirs of a deceased appellant expired during Easter holidays and the office of the Court re-opened on 3rd April 1937 but the application was made on the 5th April 1937 which was the first date on which the Registrar was sitting, it was held that the application was within time as it had to be moved before the Registrar.²

16. Fact of the Court having been closed, whether should be mentioned in the pleading. — Where the period of limitation for a suit expired on a Gazetted holiday and the plaint was presented on the day the Court re-opened, it was held that it was not necessary for the plaint to state explicitly under O. 7, R. 6 of the Civil Procedure Code, that on the day on which the period of limitation expired, the Court was closed.¹

17. Adjudication of debtor as insolvent on re-opening day — Effect. — Where limitation for a debt expires on a day on which the Court is closed and the debtor is adjudicated insolvent on the day on which the Court re-opens, the debt is one to which the debtor is "subject" at the time of his adjudication, within the meaning of S. 46 (3) of the Presidency Towns Insolvency Act and is provable in the Insolvency Court. The reason is that the creditor could have sued for the debt on the re-opening day under this section.¹

See also section 3 Note 30.

Section 4 — Note 15

1. ('04) 31 Cal 150 (153) : 8 Cal W N 97, *Hinga Bibee v. Munna Bibee*.
[See also ('48) 35 AIR 1948 Mad 521 (522) (DB), *In re Thokkudubivyanu Immaniyelu*. (Limitation expiring during vacation— Court re-opening on 5th July but no judicial work done— Review petition filed on 7th July on which judicial work is taken is barred.)]
2. ('37) 24 AIR 1937 Cal 454 (455) : I L R (1937) 2 Cal 612 : 174 Ind Cas 1009 (DB), *Khirode Chandra v. Ramani Mohan*. (('37) 41 C W N 492, *Re. K. P. Sinha v. Jatindra Nath*, followed.)

Section 4 — Note 16

1. ('20) 7 AIR 1920 Nag 200 (202) : 16 Nag L R 198 : 56 Ind Cas 926, *Tek Chand v. Mt. Patto*. (Under S. 57 (9), Evidence Act, the Court is bound to take judicial notice of public holidays notified in the Official Gazette.)
- ('37) 24 AIR 1937 Pesh 41 (41) : 168 Ind Cas 384, *Ghulam Hussain v. Ghulam Sarwar*. (Do.)

Section 4 — Note 17

1. ('32) 19 AIR 1932 Mad 287 (287) : 55 Mad 630 : 136 Ind Cas 822 (FB), *Fatma Bi v. Nagoor Khan*.

Section 5

5.* Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable ^a[by or under any enactment] for the time being in force may be admitted after the period limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation.— The fact that the appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section.

a. *Substituted* by the Indian Limitation (Amendment) Act, 1922 (10 [X] of 1922), S. 2, for 'by any enactment or rule.'

Synopsis

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| 1. History of the section. | 8. Reasonable diligence in prosecution of proceeding. |
| 2. Scope of the section. | 9. Existence of circumstances contemplated by section 14. |
| 3. Section applies to appeals and certain specified applications. | 10. Negligence of party. |
| 4. Section applies only to matters for which limitation is prescribed by this Act. | 11. Negligence of party's agent. |
| 5. Applicability to cases arising under Court-fees Act. | 12. Mistake of fact of party or his agent. |
| 6. "Sufficient cause." | 13. Mistake of law of party or his agent. |
| 7. Exercise of discretion, when sufficient cause shown — General principles. | 14. Amendment of decree. |
| | 15. Illness of party. |
| | 16. Minority, if sufficient cause. |

*Act of 1877 : S. 5, para. 2, and S. 5A.

(2) Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.

5A. Whenever it is shown to the satisfaction of the Court that an appeal or an application for a review of judgment was presented after the expiration of the period of limitation prescribed for such appeal or application owing to the appellant or applicant having been misled by an order, or practice, or judgment of the High Court of the Presidency, Province or District, such appeal or application, if otherwise in accordance with law, shall for all purposes be deemed by all Courts to have been presented within the period of limitation prescribed therefor.

Act of 1871 : S. 5 (b).

(b) Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.

Act of 1859.

No corresponding provision.

Section 5
Note 1

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| <p>17. Fraud.</p> <p>18. Poverty or want of funds.</p> <p>19. Subsequent decisions altering law.</p> <p>20. Imprisonment of party.</p> <p>21. Non-availability of court-fee stamps.</p> <p>22. Mistake of Court or its officers — Explanation.</p> <p>23. Discovery of fresh evidence.</p> <p>24. Party misled by declaration as to holidays.</p> <p>25. Party being a woman or a pardanashin lady.</p> <p>26. Party being Government or body corporate.</p> <p>27. Importance of matter.</p> <p>27a. Public interests involved.</p> <p>28. Being engaged in important litigation.</p> <p>29. Application for leave to appeal in forma pauperis.</p> <p>30. Application in revision treated as appeal.</p> <p>30a. Appeal treated as revision.</p> <p>31. Two appeals against same decree — One decree copy filed.</p> <p>32. Failure of Court of Wards to file proceeding, if sufficient cause.</p> | <p>33. Delay in filing copy of first Court's judgment in second appeal, or the copy of the judgment in review.</p> <p>34. Unforeseen circumstances causing delay.</p> <p>35. Other cases of delay.</p> <p>36. Admission ex parte — Right of other person to re-open it.</p> <p>37. Burden of proof.</p> <p>38. Exercise of discretion, when binding on appeal.</p> <p>39. Order under section 5, if open to revision.</p> <p>40. Question of exercising discretion, when arises.</p> <p>41. Order under section 5 must give reasons.</p> <p>42. Valuation of application under section 5.</p> <p>43. Formal application, if necessary.</p> <p>44. Order under section 5, if "judgment" within the meaning of the Letters Patent.</p> <p>45. Order under section 5, whether one "passed on appeal."</p> <p>46. Section 5 and Madras High Court Original Side Rules, Rule 356.</p> <p>47. Appeal on behalf of or against dead person.</p> |
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TOPIC INDICATOR

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| <p>Applicability to applications under Provincial Insolvency Act. See Note 4.</p> <p>Applicability to cases under Companies Act, See Note 4.</p> <p>Applicability to criminal appeals. See Note 3.</p> <p>Applicability to special or local laws. See Note 4.</p> <p>Defective vakalatnama. See Note 12.</p> <p>Duty of appellant. See Notes 7, 8 and 37.</p> <p>Duty of Court. See Note 7.</p> <p>Judgment not pronounced in open Court and notice of judgment not given. See Note 22.</p> | <p>Mistake or negligence of counsel or his clerk. See Notes 11, 12 and 13.</p> <p>Only admission — Not granting or allowing application or appeal. See Note 2.</p> <p>Proceedings in wrong Court through <i>bona fide</i> mistake. See Note 9.</p> <p>Reasonable diligence antecedent to cause for delay — Whether party bound to show. See Note 8.</p> <p>Sudden accident. See Notes 8, 15 and 34.</p> <p>Sufficient cause — Question of law or fact. See Notes 6 and 38.</p> <p>Unsuccessful proceedings. See Note 9.</p> <p>Wrong proceedings in good faith and not in good faith. See Note 9.</p> |
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1. History of the section.

Before the Act of 1859 —

There was a provision in Bengal Regulation, XXVI of 1814, that a petition for review should be presented within three calendar months, provided that if the parties preferring the same should be able to show just and reasonable cause for not having preferred it within the time limited, such review should be allowed.¹

Section 5 — Note 1

1. See (1857-59) 7 Moo Ind App 283 (305) : 3 Suth W R 45 : 1 Suther 325 : 1 Sar 645 (PC), *Maharaja Moheshur Singh v. The Bengal Government*.

Section 5.
Note 1

Act of 1859 —

The Limitation Act of 1859 provided limitation only for suits and not for appeals or applications for review. But under the Code of Civil Procedure (Act VIII of 1859) limitation was provided for such proceedings with a proviso that the Court may extend the period under certain circumstances. Section 333 of the Code provided as follows :

"Appeals shall be made in the form of a memorandum which shall be presented to the appellate Court within the period hereinafter specified, unless the appellant shall show sufficient cause to the satisfaction of the appellate Court for not having presented it within such limited period."

And section 377 provided as follows :

"An application for review of judgment shall be made within ninety days from the date of the decree, unless the party preferring the same shall be able to show just and reasonable cause to the satisfaction of the Court for not having preferred such application within the limited period."²

Acts of 1871 and 1877 —

The provisions for limitation as to appeals and applications for review which occurred in the Code of Civil Procedure, 1859, were incorporated in these Acts, and S. 5 thereof corresponding to this section ran as follows :

"Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period."

The section did not refer to applications for leave to appeal, and it was held that such applications could not be treated as "appeals" within the meaning of that section.³ The section did not also contain any provision corresponding to the explanation in the present section. But in the year 1892 by the Amending Act VI of that year a new S. 5A was inserted, which corresponded to the present explanation.

Act of 1908 —

The section was enlarged so as to include within its scope, applications for leave to appeal, and also any other application to which it may be made applicable "by any enactment or rule for the time being in force." The section was amended by Act X of 1922 by substituting the words "by or under any enactment" for the words "by any enactment or rule."

2. See ('66) 2 Bom H C R 270 (274), *Edalji Shapurji v. Tulsidas Sundardas*.

3. ('79) 2 Mad 230 (231); 3 Ind Jur 452 (DB), *Lakshmi v. Ananta Shanbaga*. (In the Act it was intended to draw clear distinction between *applications* and *appeals*.)

('03) 30 Cal 790 (793); 8 Cal W N 906, *Sarat Chandra Dey v. Brojeshwari Dassi*.

('89) 12 All 79 (83); 1890 All W N 25 (FB), *Parbati v. Bhola*.

('81) 1881 All W N 130 (130) (DB), *Ganga Gir v. Balvant Gir*.

('98) 1398 All W N 80 (80) (DB), *In the matter of Anthoney Derridon*.

[See also ('90) 12 All 461 (487); 1890 All W N 149 (FB), *Bechi v. Ahsanullah*.

('92) 15 All 14 (19); 1892 All W N 152 (DB), *In re Sita Ram Kesho*. (Leave to appeal to Privy Council.)

('06) 28 All 391 (393); 1906 All W N 55; 3 All L Jour 165 (DB), *Shib Singh v. Gandarp Singh*. (Do.)

('95) 19 Bom 301 (302) (DB), *Moroba Ramchandra v. Ghanasham Nilkant*. (Do.)]

2. Scope of the section.—The general rule is that every suit instituted, appeal preferred or application made after the period prescribed therefor by the first schedule *shall* be dismissed (S. 3). This section is one of the provisions to which the general rule is subject, and provides for the extension of time in the case of appeals and certain specified applications under the circumstances referred to in it, namely, that the appellant or applicant, as the case may be, satisfies the Court that he had “sufficient cause” for not filing the proceeding within the period prescribed.

But mere proof of the existence of sufficient cause for not filing the proceeding within the prescribed period does not, under the section *ipso facto* compel the Court to extend the time. The Court has a *discretion* to admit or refuse to admit the proceeding, even if sufficient cause is shown, as is made clear by the words “may be admitted.” In *Brij Indar Singh v. Kanshi Ram*,¹ their Lordships of the Privy Council quoted with approval the observations of Plowden, J., in *Karm Baksh v. Daulat Ram*² to the following effect :

“All that the section requires in express terms as a condition for the exercise of the discretionary power of admission of an appeal presented after time is sufficient cause for not presenting the appeal within the prescribed period. If such can be shown, the Court may in its discretion, which is, of course, a judicial and not an arbitrary discretion, admit the appeal.”

The existence of sufficient cause for not filing the proceeding in time is thus a *condition* that must be satisfied before the Court can exercise its power of granting or refusing to grant the extension of time.³ If the condition is not satisfied, there is no room for the applicability of the power to excuse delay. Thus, where no cause has, at all, been shown, that is where no explanation has been given for filing the proceeding out of time, there arises no opportunity of considering the sufficiency or otherwise of the reasons for that fact, and there can not be any room for the exercise of the discretion given by the section.⁴ If the condition is satisfied, then the Court gets a discre-

Section 5 — Note 2

1. ('17) 4 AIR 1917 P C 156 (158) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC).
2. ('88) 1888 Pun Re No. 183 (FB).
3. ('51) 38 AIR 1951 Simla 170 (Prs 5, 6), *Karora Singh v. Kartar Singh*. (Delay not excused if appellant was negligent even if for one day in not filing appeal within limitation.)
- ('17) 4 AIR 1917 P C 156 (158) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC), *Brij Indar Singh v. Kanshi Ram*.
4. ('48) 1 Sau L R 19 (22), *Garasia Sartanji Manubhai v. Shah Leherchand Hanubhai*. (Delay can be excused only for valid reasons however short delay might be (2 days.))
- ('14) 1 AIR 1914 All 521 (523) : 25 Ind Cas 30, *Dewan v. Buddhu*.
- ('20) 7 AIR 1920 Cal 207 (208) : 56 Ind Cas 551 (DB), *Abdul Sheikh v. Md. Ayab*.
- ('19) 6 AIR 1919 Cal 958 (959) : 47 Ind Cas 677 (DB), *Prosunno Kumar Baidya v. Ram Chandra De*.
- ('11) 10 Ind Cas 210 (210) : 5 Sind L R 47 (DB), *Topandas v. The Manager, Encumbered Estates*.
- ('25) 12 AIR 1925 Oudh 371 (372) : 28 Oudh Cas 378 : 86 Ind Cas 270, *Mumtaz Ali v. Ugraj Singh*.

Section 5

Note 2

tionary power to grant or refuse the prayer for extension of time.⁵ It may in its discretion *refuse* to extend the time even though there may be sufficient cause for the delay.⁶ The extension of time is thus a matter of *concession or indulgence* to the applicant and cannot be claimed by him as a *matter of absolute right*.⁷ The principles guiding

- (‘33) 20 AIR 1933 Pat 134 (135) : 142 Ind Cas 599, *Munshi v. Bansropan*.
 (‘30) 17 AIR 1930 Cal 422 (424) : 57 Cal 148 : 124 Ind Cas 817 (DB), *Janakinath Singh v. Nirodbaran Ray*.
 (‘25) 12 AIR 1925 Cal 735 (736) : 52 Cal 342 : 89 Ind Cas 277 (DB), *Kamruddin Hyder v. M. N. Mitter*.
 (‘69) 11 Suth W R 22 (22) : 5 Beng L R A C 318 (Note) (DB), *Mahomed Gaze Chowdhury v. Doollub Bebee*. (9 Suth W R 181 (FB), *Shama Churn v. Bindabun Chunder*, followed.)
 (‘77) 1877 Bom P J 188 (188), *Damodharav v. Krishnarav*. (2 Ind App 58 followed.)
 (‘74) 2 Ind App 58 (68, 69) : 14 Beng L R 373 : 3 Sar 437 (PC), *Luchmun Singh v. Shunshere Singh*. (8 Suth W R 184 (SB), *Gunganarain v. Gonomoonee*, approved.)
 (1864) 1864 Suth W R (Gap) 287 (287) (DB), *Gossie Doss v. Narain Das*.
 (1864) 1864 Suth W R (Gap) 91 (92) (DB), *Kasheenath Roy v. Luckeenarain*.
 (‘75) 24 Suth W R 294 (294) (DB), *Gour Pershad v. Anjub Ali*.
 (‘72) 18 Suth W R 286 (286) (DB), *Sreenath Choudhry v. Kritato Moyee*.
 (‘72) 17 Suth W R 230 (231) (DB), *Jhubhoo Sahoo v. Mt. Jusoda Kooer*.
 (‘70) 13 Suth W R 33 (33) (DB), *Assur Ali v. Woolfutoonissa*.
 (‘12) 17 Ind Cas 99 (100) (Cal) (DB), *Hem Chandra Bakshi v. Jadub Chandra*.
 (‘69) 12 Suth W R 94 (95) (DB), *Kristo Gobind Joardar v. Jugobundhoo Sircar*.
 (Admission without reference to sufficient cause for delay is without jurisdiction.)
 (‘84) 1884 All W N 330 (331) (DB), *Kuber Singh v. Fa’eh Singh*.
 (‘76) 1876 Pun Re No. 114, *Hyat v. Rahim-ud-din*.
 (‘76) 1876 Pun Re No. 101 (FB), *Mt. Fatto v. Lashkar Khan*.
 [See also (‘69) 11 Suth W R 130 (131) : 2 Beng App 35 (DB), *Omra Nushyo v. Gugun Sootur*.]
 (‘25) 12 AIR 1925 Mad 709 (709) : 88 Ind Cas 278 (DB), *Janakiramayya v. Brahmayya*.
 (‘31) 18 AIR 1931 Nag 101 (101, 102) : 122 Ind Cas 257, *Mahadya v. Emperor*.
 (No cause for delay was even alleged.)
 (‘17) 4 AIR 1917 Lah 436 (437) : 41 Ind Cas 918 : 1917 Pun Re No. 67, *Dhanpat Mal. v. Mela Mal*. (Copy of judgment filed after expiry of limitation.)
 5. (‘42) 29 AIR 1942 Oudh 339 (340) : 199 Ind Cas 801 (DB), *Lakshmi Narain v. Satgurnath*. (Where the order appealed against was passed several years ago, the Court should be reluctant to grant the necessary extension except on very strong grounds.)
 (‘38) 25 AIR 1938 Bom 408 (409) : ILR (1938) Bom 704 : 177 Ind Cas 734 (DB), *Maria F. Almeida v. Ramchandra Santuram*.
 (‘38) 25 AIR 1938 Pat 413 (421) : 17 Pat 507 : 177 Ind Cas 564 (DB), *Nrisingha Charan Nandy v. Trigunand*.
 (‘24) 11 AIR 1924 Bom 399 (404) : 48 Bom 442 : 80 Ind Cas 862 (SB), *Nagindas Motilal v. Nilaji Moroba*.
 (‘17) 4 AIR 1917 Low Bur 74 (76) : 8 Low Bur Rul 566 : 37 Ind Cas 815 (DB), *Ma Mai Gale v. Maung Tun Win*.
 [See (‘15) 2 AIR 1915 Low Bur 145 (146) : 8 Low Bur Rul 146 : 27 Ind Cas 829 (DB), *Mg. Tun U. v. Palaniappa Chetty*.]
 6. (‘35) 22 AIR 1935 All 620 (624) : 57 All 983 : 157 Ind Cas 347 (FB). *Mt. Shamzadi Begum v. Alakh Nath*.
 [See also (‘17) 4 AIR 1917 P C 156 (158) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC), *Brij Indar Singh v. Lala Kanshi Ram*.]
 7. (‘35) 22 AIR 1935 All 620 (624) : 57 All 983 : 157 I. C. 347 (FB), *Mt. Shamzadi Begum v. Alakh Nath*.

the exercise of this indulgence or discretion are discussed in the subsequent Notes.

Section 5 Notes 2-3

The section deals only with the *admission* of appeals and applications after time. But to *admit* an appeal or application is not to *grant* or allow the appeal or application in favour of the appellant or applicant.⁸ To admit the proceeding is merely to entertain it and not dismiss it has barred by limitation. It has been held by the Lahore High Court that this section only applies to the original institution of an appeal and not to the addition of parties to an appeal already instituted and that when a person is sought to be added as a party to an appeal after the period of limitation for an appeal against him has expired, this section cannot be made use of to excuse the delay.⁹

The Allahabad High Court has held that the Court has jurisdiction under this section to grant permission to the appellant to make the necessary amendments for correcting the valuation of appeal and to make good the deficiency in court-fee even after the time for filing an appeal against the decree has expired.¹⁰

3. Section applies to appeals and certain specified applications. — The section applies only to —

1. Appeals,
2. Application for review of judgment,
3. Application for leave to appeal,
4. Any other application to which this section is made applicable by or under any enactment for the time being in force.

An application not falling within the above classes cannot be entertained after the period prescribed therefor. See the cases cited below.¹

(19) 6 AIR 1919 Cal 958 (959): 47 I. C. 677, *Prosunno Kumar v. Ram Chandra*.

8. (1857-59) 7 Moo Ind App 283 (305, 306): 9 Suth W R 45: 1 Suther 325: 1 Sar 645 (PC), *Maharajah Moheshur Singh v. The Bengal Government*.

9. (44) 31 AIR 1944 Lah 76 (86): ILR (1945) Lah 18: 213 Ind Cas 278 (FB), *Labhu Ram v. Ram Partab*. (Court moved to add respondent under C. P. C., O. 41, R. 20. This does not amount to preferring an appeal—S. 5 does not apply—AIR 1941 Lah 402: ILR (1942) Lah 603, *Shanti Lal v. Hira Lal*, Overruled.)

(40) 27 AIR 1940 Lah 314 (315): 190 Ind Cas 332, *Shangara Singh v. Imam Din*. (Following A I R 1938 Lah 35 (DB), *Hayai v. Mutalli*.)

10. (50) ILR (1950) All 86 (90) (DB), *Gajadhar Misra v. Ram Bux*.

Section 5 — Note 3

1. Does not apply to — Suits.

(25) 12 AIR 1925 Oudh 369 (369): 87 Ind Cas 17, *Ram Pher v. Ajudhia*. (Pre-emption suit.)

(34) 21 AIR 1934 Nag 145 (146): 30 Nag L R 294: 149 Ind Cas 956, *Model Mills, Nagpur Ltd. v. Hiralal Ramgopal*. (Suit for damages for breach of contract — Time between return of plaint and its presentation to proper Court prayed to be excluded — Held section inapplicable.)

(19) 6 AIR 1919 Lah 25 (26): 52 Ind Cas 587: 1919 Pun Re No. 86 (DB), *Mt. Hussain Bibi v. Hakim*. (Pre-emption suit—One of several vendees dying before

Section 5

Note 3

institution of suit — Legal representative brought on record after limitation — Section held inapplicable.)

Application under Order 9, Rule 4, C. P. C.

('29) 16 AIR 1929 All 127 (128) : 51 All 487 : 113 Ind Cas 767, *Kali Prasad Tewari v. Parmeshwar Prasad Marwari*.

('28) 15 AIR 1928 Mad 556 (557) : 110 Ind Cos 47, *Veerayya v. Sreesalam*.

('33) 20 AIR 1933 Pat 557 (558) : 147 Ind Cas 179, *E. C. D'Cruz v. Mrs. L. T. Pitts*.

Application under O. 9, R. 9, C. P. C., (except in Bombay).

('50) 37 AIR 1950 Cal 217 (Pr 33), *Debendra Nath v. Satyabala Dasi*. (AIR 1931 Cal 319, *Madhoram v. Tapoo Rubhani*, Rel. on.)

('48) 35 AIR 1948 Mad 480 (490), *Chinnappa v. Deenadayalu*. (Court has no inherent power to extend time in such cases.)

('47) 34 AIR 1947 Mad 153 (154) (DB), *Samankatha v. James*.

('31) 18 AIR 1931 Cal 319 (320) : 129 Ind Cas 778, *Madha Ram v. Mt. Tupoo Rubhani*.

('02) 1902 Pun Re No. 83, *Sahib Ditta v. Roda*.

[See ('79) 1879 Pun Re No. 141, *Mahi v. Jiwan*]

Application under Order 9, Rule 13, C. P. C.

('43) 1943 All L W 517, *Sidh Nath v. Ganga Prasad*.

('20) 7 AIR 1920 Lah 261 (261) : 57 Ind Cas 15, *Mt. Lal Devi v. Amar Nath*.

('27) 14 AIR 1927 Lah 342 (343) : 100 Ind Cas 936, *Pal Singh v. Harnam Singh*.

('22) 9 AIR 1922 Lah 266 (266) : 66 Ind Cas 270, *Khairati v. Umar Din*.

('23) 10 AIR 1923 All 319 (320) : 45 All 332 : 84 Ind Cas 538, *S. T. Gadre v. Brijnandan Saran*.

('16) 3 AIR 1916 Cal 651 (652) : 29 Ind Cas 476 (DB), *Tara Sankar v. Nasaruddi*.

('33) 20 AIR 1933 Rang 110 (111) : 144 Ind Cas 980, *Ramanathan Chettiar v. Baldeo Singh*.

('10) 6 Ind Cas 901 (902) (Bom), *Abdool Hoosein v. Esmailji Abdool Hossein*.

('10) 8 Ind Cas 616 (918) (Bom), *Shavaksha Rattonji v. Hugh Hogarth*.

('25) 12 AIR 1925 Rang 187 (188) : 2 Rang 655 : 85 Ind Cas 324, *Ma Naw v. Somasundaram*.

('35) 22 AIR 1935 Rang 466 (471) : 13 Rang 595 : 159 Ind Cas 945 (DB), *K. P. L. S. S. Chettiar v. Official Receiver, Ramnad*.

('25) 12 AIR 1925 Oudh 446 (446) : 89 Ind Cas 482, *Mt. Sitaba v. Mata Din*.

See also Article 164 Note 9.

Application for execution.

('41) 28 AIR 1941 Rang 56 (57) : 1940 Rang L R 725 : 193 Ind Cas 318 (DB), *Subramanian Chettiar v. L. N. Chettiar Firm*.

('32) 19 AIR 1932 All 601 (602) : 138 Ind Cas 692 (DB), *Sukhnandan Singh v. Mt. Ramdeyi Kunwar*.

('26) 13 AIR 1926 All 345 (345) : 93 I. C. 292, *Ram Raj Dassundhi v. Umraji*.

('18) 5 AIR 1918 All 401 (402) : 45 Ind Cas 531, *Sundar Lal v. Banarasi Das*.

('14) 1 AIR 1914 Cal 691 (691) : 23 Ind Cas 240 (DB), *Shekambari v. Ram Kumar*.

('17) 4 AIR 1917 Pat 132 (132, 133) : 44 Ind Cas 570 (DB), *Midnapore Zamindari Co. v. Deputy Commissioner of Manbhum*.

Application to set aside execution sale.

('39) 26 AIR 1939 Cal 310 (311) : ILR (1939) 1 Cal 452 : 184 Ind Cas 453, *Amal Chandra v. Ram Swarup*.

('19) 6 AIR 1919 Lah 422 (422) : 50 Ind Cas 610, *Asa Nand v. Jhangi Ram*.

('19) 6 AIR 1919 Lah 152 (154) : 51 I. C. 447, *Bashi Ram v. Hassan Muhammad*.

('34) 21 AIR 1934 All 314 (314) : 151 Ind Cas 244 (DB), *Narotam Das v. Bhagwan*.

('25) 12 AIR 1925 Oudh 411 (412) : 87 Ind Cas 722, *Ram Autar v. Sheo Piary Lal*.

('34) 21 AIR 1934 Pesh 25 (26) : 148 I. C. 1082, *Bhag Chand v. Mt. Najab Sultan*.

('26) 92 Ind Cas 839 (839) (Lah), *Umrao Singh v. Beni Pershad Mehr Chand*.

Application under O. 21, R. 2, C. P. C.

('39) 26 AIR 1939 Mad 163 (164) : 180 Ind Cas 437, *Kailasa Padayachi v. Denappa Kachirayar*.

Application for leave to appeal :

The words "leave to appeal" are wide enough to include leave to appeal as a pauper.² The contrary view³ is, it is submitted, not

Section 5
Note 3*Application under O. 21, R. 95, C. P. C.*

('82) 19 AIR 1932 Cal 75 (76) : 134 Ind Cas 1188 (DB), *Anarjan Bibi v. Chandramani Shaha*. (Reversed on another point in *Chandramani v. Anarjan Bibi*, AIR 1934 P C 134 (PC).)

See also Article 180, Note 5.

Application to bring legal representative on record.

('22) 9 AIR 1922 Lah 131 (131) : 65 Ind Cas 121 (DB), *Shah Muhammad v. Choudhri Karam Ilahi*.

('14) 1 AIR 1914 All 94 (95) : 36 All 243 : 25 Ind Cas 48 (DB), *Secretary of State v. Jawahir Lal*.

See also Article 177, Note 7.

Application under O. 41, R. 20, C. P. C.

('38) 25 AIR 1938 Lah 35 (37) : I L R (1937) Lah 746 : 175 Ind Cas 819 (DB), *Hayat v. Mutalli*.

Application under O. 41, R. 21, C. P. C.

('44) 31 AIR 1944 Mad 571 (572):218 Ind Cas 451 (DB), *Sitaramiah v. Sarvayya*. (Court has no inherent power to excuse delay in such cases.)

Application for final decree.

('46) 33 AIR 1946 Mad 381 (382) : I L R (1946) Mad 889 : 226 Ind Cas 153 (DB), *Ramakotayya v. Sitharamaswami*. (Application for final decree under O. 34, R. 5, Civil P. C.)

('35) 22 AIR 1935 P C 85 (88) : 155 Ind Cas 205 : 62 Ind App 80 : 57 All 242 (PC), *Maqbul Ahmad v. Onkar Pratab Narain Singh*. (Execution of preliminary decree in mortgage suit dismissed—Subsequent application for final decree for sale—Execution period cannot be excluded.)

Application for leave to defend summary suit.

(1900) 5 Cal W N 259 (262), *Quazie Mahumdar Rohman v. Sarat Chandra Dutt*.
Application governed by Article 168, Limitation Act.

('50) 37 AIR 1950 East Punj 255 (Pr 3) (DB), *Arjan Singh v. Md. Husain*. (Section does not govern applications under O. 41, R. 19, Civil P. C.)

('43) 30 AIR 1943 Sind 132 (133, 134) : ILR (1943) Kar 409 : 209 Ind Cas 326 (DB), *Md. Shah v. Abdul Jabbar*. (Section 5 does not apply to application under O. 41, R. 19, C. P. C. — Court has no inherent power in the matter.)

('33) 20 AIR 1933 Rang 96 (98):142 I. C. 185 (DB), *Ma Sein v. S. T. R. M. Firms*
(25) 91 Ind Cas 168 (169) (Lah) (DB), *Devi Das v. Anant Ram*. (Court cannot exercise its inherent powers as that would be tantamount to overriding express statutory provisions.)

('89) 1889 All W N 151 (151) (DB), *Bhundar Tewari v. Thakur Tewari*.

Application to set aside award.

('14) 1 AIR 1914 Cal 723 (724) : 17 Ind Cas 7 (DB), *Surya Narain v. Banwari*.

('27) 14 AIR 1927 Lah 273 (273) : 8 Lah 274 : 100 Ind Cas 955, *Devi Ditta v. Babu Ram*.

Application under Schedule II, Paragraph 20, C. P. C.

('15) 2 AIR 1915 All 369 (371) : 38 All 85 : 31 Ind Cas 899 (DB), *Ram Ugrah Pande v. Achraj Nath Pande*.

2. ('51) 38 AIR 1951 Sau 12 (Pr 3) : 3 Sau L R 220, *Ahmed Arabi v. Osman Isa*.
(42) 29 AIR 1942 Oudh 240 (242) : 17 Luck 628 : 199 Ind Cas 614, *Ram Dulari v. Alian Bibi*. (A I R 1928 All 499, Foll.)

('28) 15 AIR 1928 All 499 (499):111 Ind Cas 655 (DB), *Ram Charan v. Banshidar*.
(A I R 1915 All 310 (DB), *Gati v. Rachla Kunwar*, distinguished.)

3. ('40) 186 Ind Cas 161 (161) : 15 Luck 390 (DB), *Ram Pheran v. Sri Ram*.

('27) 14 AIR 1927 Nag 197 (198) : 101 I. C. 320, *Sabuddin v. Pundlik*. (Following ('03) 30 Cal 790, *Sarat Chandra v. Brojeshwari*, which was decided under the old Act. } In view of amended section this decision cannot be supported.)

Section 5 Note 3

correct as it seems to unduly curtail the meaning of the words "leave to appeal." (See also Note 29). The section applies to an application for leave to appeal under S. 449 (c) of the Criminal Procedure Code.⁴

"Any other application to which in force":

The following are examples of applications to which this section has been made applicable by other enactments:

1. Application under O. 9 R. 4, Civil Procedure Code, in Bombay.
2. Application under O. 9 R. 13, Civil Procedure Code, in Bombay, Madras⁵ and Nagpur.
3. Application under O. 9 R. 9, Civil Procedure Code, in Bombay.⁶
4. Application under O. 22 R. 9, Civil Procedure Code.⁷ (See O. 22, R. 9, sub-r. (3).)
5. Application under S. 10 (1), Indian Soldiers (Litigation) Act, 1925, by virtue of S. 10 (2) of that Act.
6. Application under S. 7 (1), Merchant Seamen (Litigation) Act, 1946, by virtue of S. 7 (2) of that Act.

4. ('27) 14 AIR 1927 Cal 307 (309) : 54 Cal 52 : 101 Ind Cas 657 (DB), *Gallagher v. Emperor*.

5. ('17) 4 AIR 1917 Mad 957 (957) : 32 Ind Cas 975, *Sennimalai Goundan v. Palani Goundan*.

('25) 12 AIR 1925 Mad 14 (17) : 80 Ind Cas 877 : 47 Mad 824 (FB), *Krishnamachariar v. Sri Rengammal*.

('22) 9 AIR 1922 Mad 186 (187) : 45 Mad 628 : 66 Ind Cas 104 (DB), *Sudalai-muthu Kudumban v. Andi Reddiar*. (Full amount of decree not paid within time—Court can excuse delay.)

See also Article 164 Note 9.

6. ('29) 16 AIR 1929 Bom 262 (263, 264) : 53 Bom 453 : 122 Ind Cas 76 (DB). *Pandarinath Kikalal v. Thakoredas Shankardas*.

7. ('40) 1940 All W R (CC) 120 (120), *Bhagwan Din v. Muru*.

('39) 26 AIR 1939 All 717 (718, 719) : ILR (1939) All 892 : 185 Ind Cas 402 (DB), *Gokaran Singh v. Brij Bhukan Singh*.

('39) 26 AIR 1939 Cal 310 (311) : I L R (1939) 1 Cal 452 : 184 Ind Cas 453, *Amal Chandra v. Ram Swarup*.

('20) 7 AIR 1920 All 284 (285) : 42 All 540 : 59 Ind Cas 903, *Lachmi Narain v. Muhammad Yusuf*. (C. P. Code, V of 1908, O. 22, R. 9 (3) — Scope of sub-r. (3) is wider than this section.)

('32) 19 AIR 1932 All 459 (460) : 54 All 280 : 135 Ind Cas 159 (DB), *Lakshmi Chand v. Behari Lal*. (Ignorance of death of the party in absence of negligence is sufficient cause.)

('32) 19 AIR 1932 All 698 (699) : 143 Ind Cas 35 (DB), *Badri Nath v. Raja Ram*.

('28) 15 AIR 1928 Mad 404 (406) : 108 Ind Cas 288, *Ramachandran v. Sabapathy Mudaliar*. (Abatement of suit by minor through next friend, his mother — Suit conducted by aged father of next friend — Ignorance of law pleaded as excuse — Delay was excused.)

('22) 9 AIR 1922 Cal 335 (336) : 49 Cal 62 : 67 Ind Cas 917 (DB), *Sarat Chandra Sarkar v. Maihar Stone & Lime Co. Ltd.*

('35) 22 AIR 1935 Lah 443 (444), *Budhu Ram v. Ali Shah*.

('21) 8 AIR 1921 Mad 650 (651) : 62 I. C. 795 (DB), *Vaithinatha Iyer v. Govindaswamy Odayar*. (Pleader's mistake may be sufficient cause to excuse delay.)

('25) 91 Ind Cas 560 (561) (Oudh), *Muhammad Mohsin v. Muhammad Abid*.

('38) 25 AIR 1938 Bom 6 (9) : I L R (1938) Bom 64 : 172 Ind Cas 919, *Khodada Mundegar v. Bai Jerbai*.

4. Section applies only to matters for which limitation is prescribed by this Act. — Section 29 shows that this section does not apply to periods of limitation prescribed by any special or local law different from that prescribed by this Act. Thus, it has been held that this section cannot be applied for the purpose of extending time for applications under S. 18 of the Rangoon Rent Act,¹ or under the Registration Act,² or under S. 17 of the Press Act of 1910,³ or under S. 108 of the Oudh Rent Act,⁴ or under the Burma Courts Act,⁵ or under the Martial Law Ordinance, I of 1922.⁶ Similarly, the period of limitation prescribed by the rules of the High Court for Letters Patent appeals cannot be extended by applying the provisions of this section if there is no power under the said rules to extend it.⁷ See also the undermentioned cases.⁸

Section 5 — Note 4

1. ('24) 11 AIR 1924 Rang 377 (377) : 84 I. C. 284 (DB), *F. Mires v. R. R. Khan*. (Application to Small Cause Court under S. 18 of Rangoon Rent Act is not appeal.)
2. ('38) 42 C W N 1174 (1177), *Mafizur Rahman v. Jamila Khatun*, ('06) 5 Cal L Jour 188 (191), *Baban Sahai v. Udit Narain*.
3. ('14) 1 AIR 1914 Lah 8 (9) : 1914 Pun Re Cr No. 16 : 22 Ind Cas 1006 (SB), *Abdul Haq v. Emperor*. (Even if Court holds that sufficient cause for delay is established.)
4. ('01) 4 Oudh Cas 182 (188) (DB), *Raghubar Dayal v. Sheo Charan*.
5. ('72-92) 1872-92 Low Bur Rul 338 (340), *M. Ramasamy Pillai v. E. Manuel*.
6. ('23) 10 AIR 1923 Mad 95 (95):71 I. C. 217 (DB), *In re Mittoor Moideen Hajee*.
7. ('49) 36 AIR 1949 East Punj 299 (300, 301), *Harbans Singh v. Karam Chand*. (Letters Patent appeal under Cl. 10, Letters Patent (Lah) filed beyond limitation — Relevant provision for extending limitation is R. 4 of East Punjab High Court Rules and Orders Vol. V, Chap. 1-A — Section 5, Limitation Act, cannot be invoked.)
- ('28) 15 AIR 1928 All 708 (708):50 All 865:110 Ind Cas 719, *Baijnath v. Doolarey Hajjam*.
[See also ('17) 4 AIR 1917 Cal 494 (495): 34 Ind Cas 584 (DB), *Adwaitya Charan Chowdhuri v. Sorajranjan Choudhury*. (The High Court extended the time having regard to the unusual circumstances of the case.)]
8. ('50) 18 ITR 72 (74) (All) (DB), *Haji Mahboob v. Commissioner of Income-tax, U. P.* (Section does not apply to application under S. 66 (1), Income-tax Act.)
- ('47) 1947 Pat W N 23 (23), *Udit Choudhury v. Sri Kumar*. (Section 5 has no application to cases of Revenue sales under the Bengal Land Revenue Sales Act and appeals arising therefrom.)
- ('41) 28 AIR 1941 All 207 (208) : I L R (1941) All 356 : 194 Ind Cas 404 (DB), *Chheda Lal v. Officer Commanding Station Meerut Cantonment*. (Section 5 does not apply to appeal under S. 29, Cantonments (House Accommodation) Act, 1923.)
- ('18) 5 AIR 1918 Mad 213 (216, 218) : 41 Mad 169:44 Ind Cas 805 (FB), *Lingayya v. Chinnarayana*. (The general provisions of the Limitation Act including S. 5 are not applicable to petitions under the Provincial Insolvency Act of 1907.)
- ('27) 14 AIR 1927 Pat 333 (334) : 103 Ind Cas 295, *Kristo Singh Sardar v. Secretary of State*. (Not applicable to proceedings under Land Acquisition Act.)
- ('33) 20 AIR 1933 Cal 132 (133) : 60 Cal 618 : 142 I. C. 280 (DB), *Manmathanath v. Emperor*. (Does not apply to Bengal Emergency Powers Ordinance of 1931.)
- ('36) 23 AIR 1936 Cal 388 (388) : 166 Ind Cas 493, *Gajendra Nath Mandal v. Kunja Behari Mistri*. (Does not apply to application under Bengal Tenancy Act VIII of 1885, S. 26F.)
- ('36) 23 AIR 1936 Cal 343 (346) : 63 Cal 1079 : 166 I. C. 641, *Gadadhar Sarkhel v. Gopal Chandra Das*. (Do — Obiter.)

Section 5 Note 4

But, though by virtue of the Limitation Act itself this section does not apply to special or local laws, such special or local laws may expressly or by necessary implication make this section applicable to applications under those laws. Thus, s. 5 has been made applicable to appeals and applications under s. 78 of the Provincial Insolvency Act.⁹ It may be noted that an insolvency *petition* is not an "application" for the purpose of extending time under s. 5 as provided by s. 78.¹⁰ Section 5 has been held to apply by implication to cases arising under the Indian Companies Act.¹¹

This section has been held to apply to an appeal filed under s. 25A, Madras Agriculturists' Relief Act, 1938,¹² or to an appeal under s. 3, Calcutta Improvement (Appeals) Act, 1911.¹³

- ('33) 20 AIR 1933 Cal 124 (125, 126) : 60 Cal 571 : 143 Ind Cas 802 (DB), *Nil Ratan Ganguli v. Emperor*. (Does not apply to Ordinance II of 1932.)
- ('26) 13 AIR 1926 Mad 657 (658) : 49 Mad 419 : 93 I. C. 341 (DB), *Ahmed Koya v. Aisamma*. (The Limitation Act does not apply to periods prescribed by the Laccadive Islands and Minicoy Regulation I of 1912.)
- ('37) 24 AIR 1937 Lah 876 (876) : I L R (1938) Lah 229 : 176 Ind Cas 171 (DB), *Merchants Mohini Flour Mills Ltd. v. Commissioner of Income-tax*. (Does not apply to applications under s. 66, Income-tax Act.)
9. ('39) 26 AIR 1939 Cal 310 (311) : I L R (1939) 1 Cal 452 : 184 I. C. 453, *Amal Chandra v. Ram Swarup*.
- ('34) 21 AIR 1934 Lah 33 (34) : 149 I. C. 935, *Mangat Rai v. Lala Mohan Lal*.
- ('24) 11 AIR 1924 Mad 400 (400) : 80 I. C. 376, *Karuthian Chettiar v. Raman Chetty*.
- ('24) 11 AIR 1924 Mad 345 (346) : 47 Mad 673 : 79 Ind Cas 395 (DB), *Ananthanarayana Iyer v. Ramasubba Iyer*.
- ('37) 24 AIR 1937 Rang 283 (283, 284) : 172 Ind Cas 253 (DB), *U Tha Yun v. Messrs. Sobhraj & Sons*.
- [See ('46) 1946 Rang L R 270 (276) (DB), *A. R. O. V. R. Chettyar v. Thenammai Achi*. (Application under s. 68, Burma Insolvency Act (V of 1920) — Section 5 applies.)]
10. ('48) 35 AIR 1948 Nag 385 (387) : I L R (1948) Nag 523, *Chintaman v. Ramgopal*. (Three months' period prescribed by s. 9 (1) (c), Provincial Insolvency Act is not period of limitation but a condition precedent to filing of insolvency petition — Delay in filing petition cannot be condoned under ss. 5 and 14, Limitation Act — Section 78 (1), Provincial Insolvency Act contemplates application — Section 9 (1) (c), Provincial Insolvency Act, contemplates "petition" and not application.)
- ('32) 19 AIR 1932 Mad 112 (114) : 135 Ind Cas 613, *Vaithinatha Aiyer v. Vaithinatha Aiyar*.
- ('28) 15 AIR 1928 Sind 177 (178) : 112 Ind Cas 646 (DB), *Bulomal Variomal v. Sumar Khan*.
- ('32) 19 AIR 1932 Mad 352 (356) : 55 Mad 766 : 137 Ind Cas 740 (DB), *Gangjee Premjee & Co. v. O. L. K. K. N. Firm, Colombo*.
- ('23) 10 AIR 1923 Mad 462 (463) : 72 Ind Cas 488 (DB), *Aiyapparaju v. Venkatakrishnayya*.
- [See also ('30) 17 AIR 1930 Lah 417 (418) : 127 I. C. 215 (DB), *Hazara Singh v. Ditta Ram*. (Doubting.)]
11. ('29) 16 AIR 1929 Nag 185 (189) : 116 Ind Cas 427 (DB), *Kawdu v. Berar Ginning Co. Ltd., Akot*.
12. ('46) 33 AIR 1946 Mad 351 (352) (DB), *Venkatramayya v. Venkata Subbayya*. (Section 29 (2), Limitation Act, does not apply to such appeal so as to exclude the provisions of this section inasmuch as the period prescribed therefor is not different from the one prescribed by Sch. 1, Limitation Act.)
13. ('50) 37 AIR 1950 Cal 356 (Pr 20) (DB), *Province of Bengal v. Amulya Dhon*.

As to the applicability of the Limitation Act to arbitration proceedings, see S. 3 Note 27.

Section 5 Notes 4-6

5. Applicability to cases arising under Court-fees Act.—

This section has no application to cases under the Court-fees Act, 1870, under which a review application presented on or after the ninetieth day of the judgment must be stamped with the full court-fee leviable on the plaint. Thus, where a review application is filed on the ninetieth day because the eightyninth day was a holiday, full stamp cannot be excused by any reference to section 5.¹

6. "Sufficient cause." — As has been seen in Note 2, the existence of sufficient cause is a condition precedent for the exercise of the discretion under this section. The expression "sufficient cause" is not defined but it has been held that it must mean a cause which is *beyond the control of the party invoking the aid of the section*.¹ A cause for delay which, by due care and attention, the party could have avoided cannot be a "sufficient cause."² The test, therefore, whether or not a cause is sufficient is to see whether it could have been avoided by the party by the exercise of due care and attention: in other words, whether it is a *bona fide* cause, inasmuch as nothing shall be deemed to be done *bona fide* or in good faith which is not done with due care and attention.³ Subject to the above test, the words "sufficient cause" should receive a liberal construction so as to advance substantial justice. The leading case on the point is *Krishna v. Chathappan*,⁴ decided by the High Court of

Section 5—Note 5

1. ('12) 15 Ind Cas 455 (456, 457) (Cal) (DB), *Sayera Bibi v. Bhutnath Haldar*. ('79) 1879 Pun Re No. 39, *Ruldu Mal v. Sobha*.

Section 5—Note 6

1. ('21) 8 AIR 1921 All 23 (26) : 43 All 660 : 63 I C 338 (DB), *Bhairon Ghulam v. Ram Autar*. (Appellant's failure to obtain and file copy of judgment—Cause beyond control, not shown—*Held*, extension could not be granted.)
2. See ('38) 25 AIR 1938 Bom 408 (410) : I L R (1938) Bom 704 : 177 Ind Cas 734 (DB), *Maria F. Almeida v. Ramchandra Santuram*. (Want of care and attention or want of due diligence negatives the existence of sufficient cause.)
3. ('40) 27 AIR 1940 Rang 14 (16) : 1939 Rang L R 639 : 186 Ind Cas 715, *Firm R. M. A. L. v. Ko Shan*. (In considering what is "sufficient cause" within the meaning of S. 5, the good faith with which a person must be shown to have acted will appropriately be taken to mean that variety which presupposes due care and attention rather than mere "honesty.")

See Section 2 sub-section (7).

[See however ('47) 34 AIR 1947 Lah 76 (77) : 225 Ind Cas 291, *Arura v. Karam Din*. (In finding a "sufficient cause," a man's good faith would have to be kept in view, but that "good faith" is more in general sense of that word as grammatically understood rather than in the sense in which it has been defined in S. 2 (7) of the Act. According to the definition of "good faith" in S. 3 (20) of the General Clauses Act, an act may be done honestly and in perfect good faith although it may have been done negligently. It cannot, however, be said that an act, however negligent—whether grossly or otherwise—should always be regarded as falling within the term "sufficient cause" if it is found to have been done honestly. It would depend upon the circumstances of each case, though courts would show indulgence to a person acting honestly.)

4. ('89) 13 Mad 269 (271) (FB). (Error in law can be sufficient cause within meaning of this section.)

Section 5
Note 6

Madras in the year 1889. Their Lordships observed that the words "sufficient cause" should receive "a liberal construction so as to advance substantial justice when no negligence, nor inaction, nor want of bona fides is imputable to the appellant." And this view has been generally followed.⁵

In *Kichilippa v. Ramanujam*,⁶ the same High Court observed :
" 'Sufficient cause' is evidently something more than 'legally sufficient' or 'sufficient according to the rules laid down in the law of limitation' ; for, if any case fell within these rules it would be governed thereby as in the case of suits, and there would be no scope for the application of S. 5. 'Sufficient cause' seems to mean not only those circumstances (such as the Courts being closed, or time being spent in obtaining copies, or the party being a minor or insane) which the law expressly recognizes as extending the time, but also such circumstances as are not expressly recognized but which may appear to the Court to be reasonable looking to all the facts of the case."

The question of the existence of 'sufficient cause' is thus one to be decided from the facts and circumstances of the particular case.⁷ The various circumstances, which may or may not amount to sufficient cause, have been discussed and illustrated in the Notes below.

5. ('42) 29 AIR 1942 Mad 170 (170) : 201 Ind Cas 84, *Kayambu Pillai v. Court of Wards*.

('39) 25 AIR 1938 Bom 408 (409) : ILR (1938) Bom 704 : 177 Ind Cas 734 (DB), *Maria F. Almeida v. Ramchandra Santuram*.

('11) 12 Ind Cas 677 (678, 679) (DB) (Cal), *Sundar Koer v. Raghunath Sahai*.

('07) 9 Bom L R 893 (894) (FB), *Emperor v. Shiva Adar*. (Delay in filing of appeal ought not to be excused unless there are special circumstances.)

('96) 11 C P L R 3 (4), *Gopal Modi v. Mt. Ganga*. (Decree — Judgment-debtor applying for permission to appeal in *forma pauperis*—Application dismissed—Fresh appeal on payment of court-fees but after period of limitation had expired, was allowed.)

('13) 19 Ind Cas 931 (932, 933) (DB) (Cal), *Rakhal Chandra Ghosh v. Ashutosh Ghosh*. (*Bona fide* mistake committed by pleader in calculating period of limitation, in consequence of which appeal is filed out of time, may constitute sufficient cause.)

('09) 1 Ind Cas 73 (76) (Mad) (DB), *Krishnaswamy Panikundar v. Ramasamy Chettiar*. (Want of funds or entrusting work to incompetent agent is not "sufficient cause.")

('01) 4 Oudh Cas 372 (373), *Jang Bahadur Singh v. Raghuraj Singh*.

('97) 19 All 348 (351) : 1897 All W N 86 (FB), *Brij Mohan Das v. Mannu Bibi*.

('15) 2 AIR 1915 All 459 (460) : 31 I C 876, *Gurprasad Singh v. Ram Samajh Singh*. (Memorandum of appeal unaccompanied by copy of decree appealed against but accompanied by a copy of decree in connected case where whole procedure of appellant was too slack—*Held*, this section did not apply.)

('18) 5 AIR 1918 All 229 (232) : 43 Ind Cas 490 : 40 All 68, *Khurshed Alam Khan v. Rahmat Ullah Khan*.

[See ('41) 28 AIR 1941 Rang 194 (194, 195) : 1941 Rang L R 213 : 195 Ind Cas 296 (DB), *Ma Hmwe Yai v. Daw Win Tha*. (The *dictum* that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors should be read together with S. 5, Lim. Act, and the expression "sufficient cause" used therein should not be construed in too narrow a sense.)

6. ('02) 25 Mad 166 (170, 171) : 11 Mad L Jour 406 (DB).

7. ('49) 36 AIR 1949 Assam 24 (24) (DB), *Sambhunath Sarma v. Gobinda Priya Debya*. ("Sufficient cause"—Erroneous advice given by pleader on question of limitation for filing appeal—Finding by lower appellate Court that mistake of pleader is not *bona fide*—No interference in second appeal.)

7. Exercise of discretion, when sufficient cause shown
—General principles.—It has been seen in Note 2 that the existence of a 'sufficient cause' for the delay is a *condition* which must exist before the power to exercise the discretion under this section comes into play, but that it is not enough merely to show the existence of "sufficient cause" in order to claim, as of right, that the time should be extended. What then are the limits of this discretion? It is, of course, a general principle of law that whenever a Court is vested with a discretionary power, such discretion must be exercised, not in any arbitrary, vague or fanciful manner, but on *judicial principles*.¹ Adverting to the danger of giving a rigid definition of these principles, Bowen, L. J., in *In re Manchester Economic Building Society*,² observed as follows :

"It seems to me that to attempt in any one case to lay down a set of iron rails on which the discretion of the Court of Appeal was always to be obliged to run, and to say that the leave of the Court would never be granted except in certain special circumstances, and in a defined way, would be very perilous. The rules leave the matter at large. Of course it is to be exercised in the way in which judicial power and the discretion ought to be exercised upon principles which are well understood, but which had better not be defined in a case except so far as may be necessary for the decision of that case, otherwise there is great danger, as it seems to me, of crystallizing into a rigid definition that judicial power and discretion which the Legislature and the rules of the Court have, for the best of all reasons, left undetermined and unfettered."

See also the undermentioned cases³ expressing the same view.

('48) 35 AIR 1948 All 213 (215) : 1 L R (1948) All 237 (DB), *Ram Baksh v. Rajeshwari*.

('33) 20 AIR 1933 Oudh 523 (525) : 9 Luck 193 : 146 Ind Cas 127 (FB), *Mithoo Lal v. Jamna Prasad*. (Erroneous advice of pleader cannot always be taken as "sufficient cause.")

('13) 19 Ind Cas 931 (933) (Cal), *Rakhal Chandra Ghosh v. Ashutosh Ghosh*.

('08) 12 Cal W N 25 (27, 28) (DB), *Bishendut Tewari v. Nandan Pershad*.

('92-96) 1892-96 Upp Bur Rul 452 (453), *Ma Hmon v. Ma Shwe Me*.

Section 5—Note 7

1. ('38) 25 AIR 1938 Bom 408 (409) : 1 L R (1938) Bom 704 : 177 Ind Cas 734 (DB), *Maria F. Almeida v. Ramchandra Santuram*.

('38) 25 AIR 1938 Pat 413 (417, 421) : 17 Pat 507 : 177 Ind Cas 564 (DB), *Nrisingha Charan Nandy v. Trigunand*.

('17) 4 AIR 1917 Low Bur 74 (76) : 8 Low Bur Rul 566 : 37 Ind Cas 815 (DB), *Ma Mai Gale v. Maung Tun Win*. (Discretion must be based on materials judicially cognizable.)

('14) 1 AIR 1914 Upp Bur 49 (50) : 27 Ind Cas 967, *Nga Po Kan v. Nga Shwe Dat*. (Discretion when applied to a Court of law means discretion guided by law.)

('26) 13 AIR 1926 Cal 677 (678) : 92 Ind Cas 1031, *Ramdhani Muchi v. Khakshardas Tati*.

('33) 20 AIR 1933 Oudh 523 (525) : 9 Luck 193 : 146 Ind Cas 127 (FB), *Mithoo Lal v. Jamna Prasad*. (Liberal construction must be with reference to judicial principles having regard to the respondent's side of the question.)

('25) 12 AIR 1925 Sind 60 (61) : 17 Sind L R 306 : 78 Ind Cas 953 (DB), *Nur Muhammad v. Hassmal*.

2. ('83-84) 32 W R (Eng) 325 (328) : 24 Ch D 488 : 49 L Tim 793.

3. ('11) 12 Ind Cas 677 (678) (Cal) (DB), *Sunder Koer v. Raghunath Sahai*.

('12) 16 Ind Cas 425 (427) (Cal) (DB), *Bonamali Gaontia v. Padma Lochan*.

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Note 7

But, without *defining* the principles there may be *general rules* of guidance laid down for the exercise of the discretion.^{3a} In *Brij Indar Singh v. Kanshi Ram*,⁴ Lord Dunedin in delivering the judgment of the Privy Council observed as follows :

"The learned Judge says that each case depends upon its own circumstances. This is true. But he seems to treat this truism as if it was destructive of the idea that there can be a general rule. There is no inconsistency in the position. There may be a general rule as to the exercise of discretion but each case must, nevertheless, be examined as to its own circumstances, to see whether they make it fall within or without the terms of the general rule."

The fundamental rule, which has been universally recognised as the true rule of guidance for the exercise of discretion under the section, is to see whether the party claiming the indulgence *has been reasonably diligent in prosecuting his appeal or application*.⁵

('13) 19 Ind Cas 931 (933) (Cal) (DB), *Rakhal Chandra Ghosh v. Ashutosh Ghosh*. (Bona fide miscalculation by pleader may constitute 'sufficient cause' having regard to all facts and circumstances of a case.)

('32) 19 AIR 1932 Cal 589 (596) : 59 Cal 781 : 140 Ind Cas 662 (DB), *Surendra Mohan Rai v. Mohendra Nath Banerjee*,

('33) 20 AIR 1933 Oudh 523 (525) : 9 Luck 193 : 146 Ind Cas 127 (FB). *Mithoo Lal v. Jamna Prasad*. (Affirming *Chhotey Lal v. Devi Brij Rani*, AIR 1930 Oudh 49 (DB).)

3a ('32) 19 AIR 1932 Cal 589 (596): 59 Cal 781: 140 Ind Cas 662 (DB), *Surendra Mohan Rai v. Mohendra Nath Banerji*.

4. ('17) 4 AIR 1917 P C 156 (159) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC).

5. ('51) 38 AIR 1951 Simla 209 (Prs 8, 11) (DB), *Raj Malik v. Susanta Sen*. (He must give an explanation for every day that he delayed in coming to Court. But this does not mean that he must conclusively establish his inability on each and every day to come to Court. It merely means that he must give some explanation of why he did not pursue his remedy. In some cases even a feeble explanation may be accepted owing to the peculiar circumstances of that particular case. In other instances the Court may refuse to accept the explanation on the ground that it is not satisfactory. View of Plowden J. in 1888 Pun Re No. 183 (FB), *Karam Bakhsh v. Daulat Ram*, Not approved.)

('46) 33 AIR 1946 F C 13 (15, 16) ; 1946 F C R 32 : ILR (1946) Kar (FC) 1 : 223 Ind Cas 626 (FC), *Bank of Commerce, Khulna v. Protap Chandra*. (Death of one of respondents before filing of appeal—Application for substitution of legal representative of deceased respondent due to ignorance of fact of death prior to appeal—Application must be treated as if appeal is filed for first time against legal representative - Delay in making application held should be excused when there is no negligence or other act of omission.)

('48) 35 AIR 1948 All 213 (215) : ILR (1948) All 237 (DB), *Ram Baksh v. Rajeshwari*. (Application for review of judgment after 8 years - Applicant throughout acting diligently and bona fide taking all steps advised by her lawyer—Delay held was rightly condoned.)

('42) 29 AIR 1942 Mad 170 (171) : 201 Ind Cas 84, *Kayambu v. The Court of Wards*. (The exercise by the Court of its discretion to excuse the delay would to a certain extent be detrimental to the respondent who has in the meanwhile acquired valuable rights, but the question has to be approached from the point of view of the applicant's conduct rather than of the advantage gained by the respondent.)

('38) 25 AIR 1938 Nag 156 (161) : ILR (1938) Nag 409 : 173 Ind Cas 369 (DB), *Krishna Rao v. Trimbak*. (Period for preferring an appeal cannot be extended simply because the appellant's case is hard and calls for sympathy, nor will the Courts extend the period of limitation merely out of benevolence.)

- (17) 4 AIR 1917 P C 156 (158, 159) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC), *Brij Indar Singh v. Lala Kanshi Ram*.
- (25) 12 AIR 1925 Cal 291 (292, 293) : 92 Ind Cas 563 (DB), *Gobind Lal Dutt v. Official Assignee of Calcutta*. (High Court decree in favour of A and against B—A not filing requisition for drawing up of decree as per High Court Rules—B, who could in such a case have filed a requisition, not doing anything—Delay caused in not drawing up the decree cannot be excused.)
- (19) 6 AIR 1919 Cal 374 (378) : 52 Ind Cas 582 (DB), *Pramatha Nath Roy v. W.A. Lee*. (Per Chitty, J.—No application or steps whatever, towards procuring copy of order appealed from—Appellant cannot be allowed after limitation expires, exclusion of time requisite for 'obtaining copy'.)
- (25) 12 AIR 1925 Oudh 371 (372) : 28 Oudh Cas 378 : 86 Ind Cas 270, *Md. Mumtaz Ali Khan v. Ugraj Singh*. (Unnecessary laches—No discretion can be exercised in applicant's favour.)
- (25) 12 AIR 1925 Sind 60 (61) : 17 Sind L R 306 : 78 Ind Cas 953 (DB), *Nur Muhammad v. Hassomal*.
- (24) 11 AIR 1924 Bom 399 (409) : 48 Bom 442 : 80 Ind Cas 862 (DB), *Nagindas Motilal v. Nilaji Moroba Naik*. (Applicant's application for leave to appeal to His Majesty in Council was out of time by about a fortnight, owing to legal adviser not knowing recent change in law—*Held* delay should be excused.)
- (29) 16 AIR 1929 All 351 (352) : 119 Ind Cas 447, *Lachmi Chand Babu Lal v. Unkar Mal Chote Lal*.
- (32) 19 AIR 1932 All 459 (460) : 54 All 280 : 135 Ind Cas 159 (DB), *Lakshmi-chand v. Behari Lal*. (Ignorance of death in absence of negligence is sufficient cause for extension.)
- (20) 7 AIR 1920 Oudh 42 (43) : 22 Oudh Cas 379 : 55 Ind Cas 837, *Hobibullah v. Banarsi Das*.
- (36) 23 AIR 1936 Oudh 9 (10, 11) : 158 Ind Cas 19, *Gaya Charan Misra v. Jagan Nath*. (Appeal filed without copy of decree—Copy not applied for till after filing of appeal—Delay pleaded due to mistake—Delay held not condonable as appellant was not diligent.)
- (13) 21 Ind Cas 306 (308) : (1913) 1 U B R 175, *Mi Ein Zi v. Mi Ni*. (Appeal filed against deceased person—Application to substitute names of his legal representatives after expiry of time for filing appeal was not allowed.)
- (12) 13 Ind Cas 714 (715) (Lah) (DB), *Lal Singh v. Pala Singh*. (Plea that appeal is strong on merits is no ground for granting indulgence of this section.)
- (32) 19 AIR 1932 Cal 534 (535) : 59 Cal 1052 : 138 Ind Cas 754 (DB), *Nandalal Ganguli v. Dasarathi Mukerjee*. (Question of *bona fides* should be taken into account in proof of "sufficient cause".)
- (30) 17 AIR 1930 Lah 216 (217) : 11 Lah 111 : 120 Ind Cas 169 (DB), *Mt. Attri v. Ramkishan*. (Copies of judgment and decree sent to lawyer for advice lost in transit—New application made on last day of limitation and copies obtained on expiration and appeal filed immediately—Extension under this section was granted.)
- (23) 10 AIR 1923 Lah 208 (209) : 79 Ind Cas 812, *Mt. Nazko v. Mt. Gopal*. (Laches disentitles party to benefit of this section.)
- (27) 14 AIR 1927 Lah 747 (748) : 105 Ind Cas 689 (DB), *Mathra v. Ram Singh*. (Last date of limitation was 20th July—Appeal filed on 18th July, but without necessary copy of judgment—Copy of the judgment applied for on 19th July, was delivered to appellant on 20th July and was filed on 23rd July—*Held*, there was no sufficient cause for delay.)
- (27) 14 AIR 1927 Lah 717 (717) : 103 Ind Cas 498 (DB), *George Gowshala v. Balak Ram*. (It is appellant's duty to explain every day's delay.)
- (27) 14 AIR 1927 Lah 192 (192) : 100 Ind Cas 854, *Babu Singh v. Mangat Rai*. (Delay in obtaining copy of judgment—Time not extended.)
- (27) 14 AIR 1927 Lah 59 (59, 60) : 98 Ind Cas 942, *B. B. & C. I. Ry. Co. v. Firm Ram-Sarup*. (Delay in taking delivery of copies not sufficiently explained—Extension of time was not allowed.)

Section 5 Note 7

The basis of the above rule of guidance would seem to lie in the fact that when the time for appeal or applying is once past, a very valuable right is secured to the successful party of which he should not be deprived lightly.⁶ In *Coles and Ravenshear, In re*,⁷ Collins, M. R., quoted with approval the observations of Davey, L. J., in *In re Helsby*,⁸ to the following effect :

('26) 95 Ind Cas 236 (238) (Lah) (DB), *Sher Bahadur v. Abezar*. (Death of party living at distance—Ignorance of death — Application by representative beyond time but with due diligence—Extension of time for setting aside abatement was allowed.)

('14) 1 AIR 1914 All 303 (304) : 23 Ind Cas 874, *Budhu v. Sultan*. (Judgment on 1-10-13—Court closed from 3-10-13—Re-opened on 3-11-13 — Copies applied for and obtained on 14-11-13 at Muzaffarnagar—Appeal filed at Meerut on 15-11-13 —Held, there was reasonable diligence.)

('34) 21 AIR 1934 Oudh 10 (10) : 147 Ind Cas 799 (DB), *Mt. Patraji v. Radhika Baksh Singh*. (The element of good faith is necessary to bring a case within the purview of S. 5.)

('88) 1888 Pun Re No. 183 (FB), *Karm Baksh v. Daulat Ram*.

[See ('38) 25 AIR 1938 Bom 408 (410) : ILR (1938) Bom 704 : 177 Ind Cas 734 (DB), *Maria F. Almeida v. Ramchandra Santuram*. (Ignorance of the legal representatives of a deceased domiciled in a Native State or a foreign place may be sufficient cause for excusing delay in seeking to set aside an abatement, unless there is clear negligence or carelessness or unnecessary delay.)]

6. ('38) 25 AIR 1938 Nag 156 (161) : ILR (1938) Nag 409 : 173 Ind Cas 369 (DB), *Krishna Rao v. Trimbak*.

('14) 1 AIR 1914 All 521 (522, 523) : 25 Ind Cas 30, *Dewan v. Budhu*. (Appeal beyond time—Explanation being that papers were returned by counsel after time for appeal expired—Explanation held insufficient within this section.)

('16) 3 AIR 1916 Bom 153 (154, 155) : 41 Bom 15 : 36 Ind Cas 439 (DB), *Babu Ganesh v. Sitaram Martand*.

('25) 12 AIR 1925 Sind 60 (61) : 17 Sind L R 306 : 78 Ind Cas 953 (DB), *Nur Muhammad v. Hassomal*.

('11) 10 Ind Cas 210 (210) : 5 Sind L R 47 (DB), *Topandas v. The Manager Encumbered Estates*.

('13) 20 Ind Cas 513 (515) (Cal) (DB), *Dand Bahadur Singh v. Deo Nandan*. (When appeal is admitted under this section, *ex parte* order can be re-opened on objection of respondent.)

('13) 18 Ind Cas 37 (40) : 1913 Pun Re No. 59 (DB), *Fakir Chand v. The Municipal Committee of Hazro*.

('11) 12 Ind Cas 677 (679) (Cal) (DB), *Sunder Koer v. Raghunath Sahai*.

('28) 15 AIR 1928 Lah 216 (218) : 9 Lal 76 : 104 Ind Cas 281 (DB), *Secretary of State v. Tirath Ram*. (Misconstruing law is not sufficient cause.)

('23) 10 AIR 1923 Lah 144 (144) : 73 Ind Cas 910, *Lakamidas v. Mehar Chand*. (Case good on merits is not sufficient cause for excusing delay.)

('22) 9 AIR 1922 Lah 390 (392) : 3 Lah 215 : 77 Ind Cas 541 (DB), *Md. Din v. Mt. Zeb-un-nissa*.

[See however ('12) 16 Ind Cas 425 (427) (DB) (Cal), *Bonamali Gaontia v. Padma Lochan Gaontia*. (Acquisition of valuable right is made subject, by Legislature, to judicial discretion in Court to affect such supposed right by its order in interest of substantial justice.)

('20) 7 AIR 1920 Lah 241 (242) : 1 Lah 508 : 59 Ind Cas 556, *Surta Singh v. Emperor*. (Criminal appeal presented to wrong Court—Re-presentation to proper Court— In such a case it could not be said that there was a 'successful litigant' who had secured 'valuable right'—Delay excused.)]

7. (1907) 1 K B 1 (5) : 76 L J K B 27 : 95 L T 750 : 23 T L R 32.

8. (1894) L R 1 Q B 742 (746) : 63 L J Q B 265 : 70 L T 144 : 42 W R 218.

"Upon the question whether time ought to be extended, speaking for myself, I am inclined to adopt the view of the late James, L. J., that a party has a vested right in an order of the Court in his favour and ought not to be deprived of an advantage given him by the rules, 'unless there has been on his part, some conduct raising an equity against him'."

In *Karsondas Dharmsey v. Bai Gangabai*,⁹ Sir Lawrence Jenkins, C. J., observed :

"When the time for appealing is once past, a very valuable right is secured to the successful litigant and the Court must therefore be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree and thus perhaps depriving the successful litigant of the advantages which he has obtained."

In *Sakarchand v. Manilal*,¹⁰ the same learned Judge observed :

"The law prescribes that an appeal must, apart from special circumstances, be presented within a limited time, and if effect is not given to the provisions of the law, a successful litigant may be wrongly deprived of the benefit which has been secured to him by the adjudication of the first Court."

It is thus necessary before a party can claim indulgence under this section that he should prove not only the existence of 'sufficient cause' for the delay but also that he was reasonably diligent in prosecuting his proceeding.¹¹ Where, though there may be said to be sufficient cause, the party has *not* been reasonably diligent in prosecuting his proceeding, time will not be extended in his favour.¹² (See Note 8 for further discussion). In some cases,¹³ however, the existence of sufficient cause has been regarded, without any advertence to the other element of reasonable diligence, as sufficient to enable the Court to extend the time in favour of the appellant or the applicant. It is submitted that this view is not correct.

8. Reasonable diligence in prosecution of proceeding. —

Want of due diligence in prosecuting his proceeding *after the cause for the delay is removed*, will disentitle the party to any indulgence under this section. In *Ram Narain Joshi v. Parameswar Narain Mahta*,¹

9. ('06) 30 Bom 329 (330) : 7 Bom L R 965.

[See also ('51) 38 AIR 1951 Simla 209 (Pr 15) (DB), *Raj Malik v. Susanta Sen.* (30 Bom 329, *Karsondas Dharmasey v. Gungabai*, Rel. on.)

10. ('04) 6 Bom L R 373 (374) (DB).

11. ('29) 16 AIR 1929 Cal 240 (241) : 119 Ind Cas 383 (DB), *Kamiruddin Mullik v. Bishupriya*.

('33) 20 AIR 1933 Oudh 83 (84) : 142 Ind Cas 826 (DB), *Abid Ali Khan v. Kidar Nath*. (Party prosecuting case in good faith and with due diligence—Delay satisfactorily explained—Delay of four years excused.)

12. ('03) 30 Cal 309 (311, 312, 316) : 30 Ind App 20 : 8 Sar 431 (PC), *Ram Narain Joshi v. Parmeswar Narain Mahta*.

('29) 16 AIR 1929 Cal 240 (242) : 119 Ind Cas 383 (DB), *Kamiruddin Mullick v. Bishupriya*.

13. ('34) 21 AIR 1934 All 367 (368) : 56 All 591 : 148 Ind Cas 290 (DB), *Gauri Shankar v. Kashi Nath*. (Limitation expiring on 26th—Applicant ill for 3 or 4 days—Men sent on 26th—Application found barred—Affidavit and petition by applicant on 30th—Four days were condoned.)

('23) 10 AIR 1923 All 536 (536) : 76 Ind Cas 375 (DB), *Deo Indar Singh v. Khushi Ram*. (Sudden illness of party on way held sufficient cause.)

Section 5 — Note 8

1. ('03) 30 Cal 309 (311, 312, 316) : 30 Ind App 20 : 8 Sar 431 (PC).

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the appellant had, owing to a mistake in the valuation of the suit, presented his appeal to the District Court instead of to the High Court and when the mistake was discovered the limitation period for the appeal had expired. The High Court of Calcutta in refusing to extend the time under this section observed as follows :

“ But even supposing that that mistake could be overlooked and *could be treated as a sufficient cause* for not having filed this appeal within time, still there is another circumstance which, we think, would preclude the applicant from having this rule made absolute, and that is, that although he became aware of this mistake on the 9th August 1895, he made no application to this Court until the 16th of September or more than five weeks afterwards and then only in the form of the application to which we have referred. There was no reason whatever why the application could not have been made within a few days of the discovery of the mistake.

* * * * *

That being so, we are of opinion that due diligence was not shown in making this application.”

On appeal to the Privy Council, their Lordships observed that they could not interfere with the decision of the High Court unless they were satisfied that the refusal to admit the appeal after time was wrong, and that they were not so satisfied. See also the under-mentioned cases² to the same effect. The question whether there was due diligence exercised after the cause for the delay was removed would depend upon the facts and circumstances of the case.³ A delay of eighteen days after the cause for delay was removed was considered in the case cited below⁴ as not unreasonable in the circumstances of the case and as not showing want of due diligence. In another case⁵

2. ('42) 29 AIR 1942 Oudh 488 (488) : 202 Ind Cas 87, *Baldeo v. Tejja*. (Where on the last day of limitation a person though he missed the earliest train fails to avail himself of the time available after he reached the place and presents the appeal after Court hours is not entitled to the indulgence of the Court as he has not been prompt in seeking his remedy.)
- ('33) 20 AIR 1933 Cal 462 (463) : 145 Ind Cas 116 (DB), *Khajeh Habibullah v. Abdul Karim*. (Appeal filed out of time by two days—Pleader's clerk inquired from stamp reporter's office about last day for filing appeal and then filed appeal — *Held* extension could not be granted.)
- ('03) 30 Cal 655 (659) (DB), *Shabiuddin v. Deomoyrat Koer*. (Application to prefer an appeal not thought of until very late — No due diligence.)
- ('26) 94 Ind Cas 121 (121) (DB) (Nag), *Kutuab-ud din v. Gulam Rabbani*. (Appellant filing his application on the very last possible day, even according to mistaken view of his pleader is not entitled to benefit of Section 5.)
- ('21) 8 AIR 1921 Nag 141 (142) : 61 Ind Cas 889, *Gandaji v. Kisan*. (An appellant who does not display promptitude must suffer if his calculation is wrong.)
[See ('23) 10 AIR 1923 Pat 417 (418) : 2 Pat 168 : 84 Ind Cas 1001 (DB), *Mt. Bibi Khojima v. Official Liquidator*.]
3. ('29) 16 AIR 1929 Cal 240 (242) : 119 Ind Cas 383, *Kamiruddin Mullick v. Bishupriya*. (Application to adduce further evidence rejected and final order made against applicant — Appeal only against order rejecting application to adduce further evidence in *bona fide* belief that whole relief would be granted — Appeal dismissed — Subsequent appeal against final order preferred out of time — Extension under this section was granted.)
4. ('29) 16 AIR 1929 Cal 240 (242) : 119 Ind Cas 383, *Kamiruddin Mullick v. Bishupriya*.
5. ('16) 3 AIR 1916 Cal 670 (671, 672) : 31 Ind Cas 705 (DB), *Sudhakar Raut v. Sadasiv Jhatap Singh*. (Appellants, minors residing in out-of-way village — Their

a delay of twenty three days in applying for copies for appeal after he previous mistaken proceeding was dismissed, was considered reasonable time having regard to the circumstances of the case.

There is a difference of opinion as to whether the party is bound to show reasonable diligence even during the period *antecedent* to the cause for the delay. The general view is that he should show diligence during such period also. It proceeds on the principle that every litigant is expected to know the last date for filing the appeal or application and that he should not wait till the last moment to find that by some mistake or unforeseen circumstance he is out of time.⁶ Thus, in *Jahar Mal v. Pritchard*,⁷ where the party was inactive till almost the last day of limitation, when he fell ill, which prevented his filing the appeal in time, Dawson-Miller, C. J., observed as follows :

"There is one other matter I should like to draw attention to. It is a matter which is continually being brought to the notice of the Courts in this country, and that is this: It almost invariably happens that one party or the other intending to appeal or to take some other step in the course of an action for which a time limit is prescribed by the rules, waits until the very last moment before taking that step. Sufficient time in all these cases is granted to the parties for doing whatever may be necessary for furthering their suit, and if they choose to put off until the very last minute either the filing of the appeal or the taking of any other steps which are a necessary part of the prosecution of their case, they run a very great risk, and it does not seem to me that it is sufficient for a party to

father's death during hearing of appeal by lower appellate Court — Review by them of judgment passed against them rejected—Appeal afterwards though out of time was registered.)

[See also ('35) 22 AIR 1935 Oudh 30 (32, 33) : 10 Luck 250 : 152 Ind Cas 419 (DB), *Gokul Prasad v. Kunwar Bahadur*. (Time considered reasonable for preparation of appeal.)]

6. ('19) 6 AIR 1919 Cal 585 (585) : 46 Ind Cas 480 (DB), *Guru Charan v. Kashi Chandra*. (Mistake in calculating period of limitation is not sufficient cause.)

('20) 7 AIR 1920 Pat 594 (595) : 55 Ind Cas 17 (DB), *Jaleswar Dayal Singh v. Ram Hari Sahu*. (Papers handed over to clerk for engaging vakil—No enquiry made until the last moment as to what had happened to the papers — Discovery at the last moment that clerk had fallen ill — No excuse.)

(1864) 1864 Suth W R (Gap) Misc 13 (13), *Krishto Proshad v. Radakanto*. (Party not caring to apply for copies until within three days of expiry of limitation of ninety days — No diligence after getting copies — No ground to excuse delay.)

('02) 5 Oudh Cas 183 (185, 186), *Hardwar Prasad v. Raja Pratab Bahadur*, (Want of funds to file appeal is not sufficient cause.)

('23) 10 AIR 1923 Lah 96 (97) : 68 Ind Cas 777 : *Madan Gopal v. Malawa Ram*. (Judgment delivered on 21st April — Period of ninety days allowed, expiring on 20th July—Application for copy of judgment made on 4th July—Copy obtained on 11th July — Appeal filed on 12th October—Court did not show indulgence.)

('16) 3 AIR 1916 Lah 407 (407) : 1916 Pun Re No 79 : 35 Ind Cas 233, *Guran Rakha v. Bindrabai*. (Where the last day of limitation expired on a holiday and the appellant applied for copies on the re-opening of the Court and filed his appeal as soon as he got them, held, that as the appellant had not shown due care and diligence, he was not entitled to any indulgence.)

('25) 12 AIR 1925 Oudh 643 (644) : 90 Ind Cas 115, *Sripat v. Hubdar*. (Judgment pronounced on day preceding last working day before vacation — Copies applied for on day Court opened after vacation—Held there was sufficient cause for delay and further that requiring copies to be sent by post does not involve forfeiture of indulgence.)

7. ('19) 6 AIR 1919 Pat 503 (505) : 52 Ind Cas 225.

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come to Court and say that if everything had gone absolutely smoothly, and if no unexpected accident had happened, he would have been in time in taking the steps required for his appeal. One is not entitled to put things off to the last moment, and hope that nothing will occur which will prevent them from being in time. There is always the chapter of accidents to be considered, and it seems to me that one ought to consider that some accident or other might happen which will delay them in carrying out that part of their duties for which the Court prescribes a time limit, and if they choose to rely upon everything going absolutely smoothly and wait till the very last moment, I think they have only themselves to blame if they should find that something has happened which was unexpected but which ought to be reckoned with, and are not entitled in such circumstances to the indulgence of the Court."

In *Kedarnath v. Zumber Lal*,⁸ a decree was made on 28th March 1916, but copies were applied for only on the 2nd May 1916 and were obtained on the 9th June 1916. The last day of limitation was the 26th of July 1916. The appeal was filed on the 27th of July 1916. The explanation given was that owing to a river across the way being in flood, he was able to reach Akola only on 26th July, too late to catch the train to Nagpur that day. Stanyon, A. J. C., in refusing to extend the time observed as follows :

"I think it is necessary that the Courts should apply the law so as not to encourage eleventh-hour procedure of the kind followed in this case. The law is clear, and S. 5, Indian Limitation Act, 1908, was not provided to encourage negligence, procrastination and laxity. I enunciate nothing new. As far back as in 1880, in *Hukum Chand v. J. Bailey*,⁹ this Court laid down that inability to get stamps, on the last day allowed by law for instituting a suit, is not one of the conditions under which the time allowed by the limitation law can be extended. I follow the same principle when I rule that an appellant, who wilfully leaves the preparation and presentation of his appeal to the last day of the period of limitation prescribed therefor, is guilty of negligence, and is not entitled to an extension of time, if some unexpected or unforeseen contingency prevents him from filing the appeal within time."

See also the undermentioned cases to the same effect.^{9a}

A contrary view has, however, been taken in some cases. In *Karali Charan v. Apurba Krishna*,¹⁰ Graham, J., observed:

"If no explanation whatever is forthcoming why the appeal was not filed during the major portion of the period of limitation, an explanation designed merely to explain why it was not filed on the last day before it became time-barred would, as it seems to me, be insufficient."

Mitter, J., expressed a contrary opinion. He observed :

"It has been argued strenuously for the opposite party that as no explanation has been given as to why the appellant waited for the last possible moment

8. ('16) 3 AIR 1916 Nag 39 (40) : 37 Ind Cas 503 : 12 Nag L R 171.

9. ('80) Digest of Civil Rulings of the Court of Judicial Commissioner, Central Provinces, Part IV, Ruling No. 9.

9a. ('38) 25 AIR 1938 Nag 156 (159): ILR (1938) Nag 409 : 173 Ind Cas 369 (DB), *Krishna Rao v. Trimbak*.

('24) 11 AIR 1924 Lah 599 (600): 75 Ind Cas 1055, *Ata Muhammad v. Pir Khan* (Communication between client and pleader interrupted by heavy rain. It was alleged that his result in one day's delay in filing appeal — No due diligence during the period prescribed.)

('30) 17 AIR 1930 Nag 121 (121, 122) : 119 I. C. 679, *Hakimia v. J. C. Gammon*. (Revision application four days beyond time — Delay due to sudden attack of *asthma* — Delay was not excused.)

10. ('31) 18 AIR 1931 Cal 298 (299, 301, 302, 303) : 58 Cal 549 : 132 Ind Cas 169.

to file the appeal, sufficient cause has not been shewn for extending the period of limitation. I do not think that in the circumstances of the present case his antecedent inaction or negligence should at all be taken into account. The appellant has a right to say that he put the papers of his case in the hands of his advocate within the period of limitation, and his appeal would have been in time but for the slip made by the advocate, and that he is therefore bound to explain only the delay of one day by which the appeal was out of time. The law allows him ninety days to file the appeal, and if he files it on the ninety-first day *he has only to explain how the delay of one day should be accounted for.*"

Suhrawardy, J., before whom the case was laid by reason of the difference between Graham and Mitter, JJ., agreed with Mitter, J., and held that the words "within the period" used in the section do not mean "during such period" but mean "within the period which ends with the last day of the prescribed period." He further observed as follows :

"It seems to me that the language of S. 5 as it stands, is capable of only one construction, namely, that the right to present an appeal extends up to the very last day, and if on account of some sufficient cause it could not be presented on that day the period may be extended"

The view of the Calcutta High Court in the above case was followed by Curgenvin, J., in *Natesa Mudali v. Vedachala Naicken*.¹¹ He observed :

"One cannot therefore insist that a party should file his appeal before the last date of filing it or impute a lack of diligence if he does not do so. Accordingly, it is enough if the petitioner satisfies the Court that he was prevented from filing it on the last day."

The same view was expressed also in the undermentioned case of the Rangoon High Court.¹² It is submitted that this view cannot be supported on principle and is against the view of their Lordships of the Privy Council as expressed in *Ram Narain v. Parmeswar*.¹³ The attention of the learned Judges in *Karali Charan v. Apurba Krishna*¹⁴ does not seem to have been drawn to the necessity of showing reasonable diligence in prosecution of proceeding in addition to the existence of the sufficient cause. They have simply proceeded on the footing that "sufficient cause" means sufficient cause for not filing the appeal on the last day of the prescribed period.

11. ('31) 1931 Mad W N 1161 (1162).

12. ('41) 28 AIR 1941 Rang 194 (196); 1941 Rang L R 194: 195 Ind Cas 296 (DB), *Ma Hmwe Yai v. Daw Win Tha*. ("Diligence" is not a word which occurs in S. 5, and although it is frequently referred to in judgments on the meaning of this section, the question of diligence arises only in cases where there has been a delay beyond the period of limitation after the judgment from which the appeal is preferred has been delivered in accordance with law. Under S. 5, all that the appellants have to do is to satisfy the Court that they had sufficient cause for not preferring the appeal within the period of limitation allowed.)

('28) 15 AIR 1928 Rang 165 (165): 6 Rang 571: 119 Ind Cas 215, *Ma Thein Khin v. Ma U Byu*. (Appellant unwell in last portion of limitation and filing his appeal two days later - Two days' delay should be excused.)

13. ('03) 30 Cal 309 (311, 312, 316): 30 Ind App 20: 8 Sar 431 (PC).

14. ('31) 18 AIR 1931 Cal 298 (299, 300, 301, 302, 303): 58 Cal 549: 132 Ind Cas 169. (Suhrawardy, J., on difference between Graham and Mitter, JJ.)

Section 5 Notes 8-9

The question whether the party was diligent, antecedent to the happening of the cause for the delay, is also one that has to be determined in the circumstances of each case.¹⁵

9. Existence of circumstances contemplated by S. 14. —

Section 14 provides that in computing the period prescribed for any *suit* or *application*, the time during which the plaintiff or the applicant has been prosecuting in *good faith* and with *due diligence* another civil proceeding in another Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it, shall be excluded. That section is not directly applicable to appeals, but in exercising the discretion under this section the principle of S. 14 has been held to be applicable by analogy to appeals also.¹ In *Kunwar Rajendra Bahadur Singh v. Rai Rajeshwar Bali*,^{1a} their Lordships of the Privy Council observed that in applying S. 5 to cases where delay has been caused by taking a wrong proceeding, "the analogy of S. 14 (which applies to suits) is an argument of considerable weight." The existence of circumstances contemplated by S. 14 has consequently been regarded as a ground for excusing the delay caused by the wrong proceeding.² For this purpose, the existence of such circumstances has

15. See ('14) 1 AIR 1914 All 303 (304) : 23 Ind Cas 874, *Budhu v. Sultan*. (One working day only between date of judgment and beginning of holidays — Application for copy filed on re-opening day — No want of due diligence.)

[See also ('24) 11 AIR 1924 All 867 (868) : 78 Ind Cas 677, *Parbhu Dayal v. Murli Dhar*.]

Section 5 — Note 9

1. ('37) 24 A I R 1937 P C 276 (278) : 31 Sind L R 672 : 169 Ind Cas 769 (P C), *Rajendra Bahadur v. Rajeshwar Bali*. (Suit under S. 111 (3), U. P. Land Revenue Act, dismissed—Applicant appealing to District Judge within limitation acting on mistaken but honest view of his counsel as to valuation — Appeal dismissed on point of valuation and appeal to Chief Court beyond limitation preferred—Principle of S. 14 held should be applied to such a case.)

('34) 35 Pun L R 374 (374), *Khazana Mal-Bhagat Ram v. Mangat Ram*. (Appellant first applying for review to lower Court.)

('87) 12 Bom 320 (323) (DB), *Sitaram Paraji v. Nimba Hari Shet*.

('17) 4 AIR 1917 PC 156 (158) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC), *Brij Indar Singh v. Lala Kanshi Ram*.

('22) 9 A I R 1922 Cal 247 (247, 248) : 68 Ind Cas 575 (D B), *Kumudini Ray v. Kamala Kant Sen*.

('11) 11 Ind Cas 814 (815) (All), *Narain Singh v. Bikram Singh*. (Section 14 is not made applicable to appeals also only because of wider discretion already conferred on appellate Courts by this section.)

[But see ('13) 20 Ind Cas 513 (514) (Cal), *Nand Bahadur Singh v. Deo Nandan Prasad*. (It was remarked that S. 14 does not furnish any analogy in acting under S. 5—This is clearly not correct in view of the Privy Council decisions referred to above.)]

1a. ('37) 24 AIR 1937 P C 276 (278) : 31 Sind L R 672 : 169 Ind Cas 769 (PC).

2. ('48) 1948 Bur L R 606 (612, 614) (D B), *U Shwe Kyu v. Ma Tin U*. (Appeal presented to wrong Court on mistaken but *bona fide* advice of pleader — Time should be extended.)

('47) 34 A I R 1947 Lah 76 (78, 79) : 225 Ind Cas 291, *Arura v. Karam Din*. (Appellant choosing wrong forum of appeal owing to mistake of legal adviser and unjustified conduct of respondent—Appeal presented to proper Court beyond period of limitation — Limitation was extended under S. 5 up to date on which appeal was re-presented in proper Court.)

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- (46) 33 A I R 1946 Cal 10 (12) : 222 Ind Cas 475 (D B), *Dwarka Das v. Gajanan*. (Application for leave to appeal to Privy Council — Time taken up in review of judgment sought to be appealed against allowed to be excluded under S. 5—A I R 1917 P C 156 : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 (P C), *Rel. on*.)
- (42) 29 AIR 1942 Lah 94 (94) : 199 Ind Cas 851, *Kishan Chand v. Md. Hussain*. (Appeal filed in wrong Court in good faith owing to mistaken advice given by pleader—Time taken in transmitting appeal to proper Court excluded.)
- (42) 29 AIR 1942 Mad 170 (171) : 201 Ind Cas 84, *Kayambu Pillai v. Court of Wards*. (In considering the question of "sufficient cause" under S. 5 of the Limitation Act, the equities on which Ss. 4 and 14 of the Limitation Act are based may be taken into account.)
- (35) 22 AIR 1935 All 92 (93) : 152 Ind Cas 939 (DB), *Sudama v. Visheshar*.
- (29) 16 A I R 1929 Cal 240 (241) : 119 Ind Cas 383 (D B), *Kamiruddin Mallik v. Bishupriya*. (Section 14 however is not exhaustive of all circumstances that may go to constitute sufficient cause within the meaning of this section.)
- (14) 1 AIR 1914 Upp Bur 49 (50) : 27 I C 967, *Nga Po Kan v. Nga Shwe Dat*.
- (07) 29 All 638 (640) : 4 All L Jour 515, *Anjora Kunwar v. Babu*.
- (03) 25 Mad 166 (178) : 11 Mad L Jour 406 (D B), *Kichilappa Naickar v. Ramanujam Pillai*.
- (90) 13 Mad 269 (271) (DB), *Krishna v. Chathappan*.
- (88) 10 All 524 (527, 530) : 1888 All W N 218 (DB), *Jaglal v. Har Narain Singh*.
- (17) 4 AIR 1917 P C 156 (157, 158, 159) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (P C), *Brij Indar Singh v. Lala Kanshi Ram*. (Approving 1888 Pun Re No. 183 (FB), *Karm Bakhsh v. Daulat Ram*. 5 All 591, *Balwant Singh v. Gumani Ram* and 7 Suth W R 529 (FB), *In re Brojender Coomar*—Prosecution of review application where appeal was the proper course.)
- (37) 24 A I R 1937 All 466 (467) : 170 Ind Cas 874 (D B), *Krishna Chandra v. Emperor*. (Appeal against conviction under S. 124A, Penal Code, preferred to Sessions Judge instead of High Court—Subsequent appeal to High Court but beyond time — *Held* there was sufficient cause for extension of time under this section.)
- (36) 23 A I R 1936 All 366 (366, 367) : 161 Ind Cas 52, *Zahur Hussain v. Chura Singh*. (Jurisdiction question difficult — Revision instead of appeal and then appeal in proper Court but out of time—*Held* time could be extended under this section.)
- (30) 17 A I R 1930 All 15 (16) : 120 Ind Cas 125 (D B), *Ram Khelawan Singh v. Maharajah of Benaras*. (Prosecution of appeal before wrong Court.)
- (28) 15 A I R 1928 All 144 (144) : 108 Ind Cas 123, *Probhu Narain Singh v. Jai Mangal Singh*. (AIR 1922 All 490 : 44 All 636 (FB), *Sh.b Dayal v. Jaganath*, followed.)
- (27) 14 A I R 1927 All 758 (758) : 101 Ind Cas 777, *Ram Lal v. Mushtaq Ali*. (AIR 1922 All 490 : 44 All 636 (FB), *Shib Dayal v. Jagannath*, followed — Appeal filed in Court of Commissioner instead of in Court of District Judge due to wrong advice given by pleader—Litigant mistaken—Time should be extended.)
- (26) 13 A I R 1926 All 252 (253) : 91 Ind Cas 865, *Ram Rup Agrahri v. Naik Ram*. (High Court in second appeal will not interfere with discretion of lower appellate Court.)
- (25) 12 A I R 1925 All 567 (569) : 85 Ind Cas 627, *Ishwar Prasad v. Bishunath Prasad Singh*. (Appellants not appealing in time owing to omission on part of trial Court in not mentioning their names in decree — *Held* delay in appealing should be excused.)
- (24) 11 AIR 1924 All 867 (868) : 78 Ind Cas 677, *Prabhu Dayal v. Murli Dhar*.
- (23) 10 A I R 1923 All 364 (365) : 79 Ind Cas 402, *Mt. Akbari Begam v. Shaikh Zamin Ali* (Appeal filed in wrong Court owing to doubtful point of law — Time was extended.)
- (17) 4 A I R 1917 All 87 (88) : 37 Ind Cas 818 (DB), *Mahabat Rai v. Bharaddwaj Damodar Das*.

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- ('16) 3 AIR 1916 All 296 (297) : 33 I C 546, *Maqbul Ahmed v. Murla*. (Appeal to Commissioner instead of to Additional Judge—Memorandum returned and then presented to proper Court but beyond limitation—Time was extended.)
- ('23) 10 A I R 1923 Cal 291 (291) : 68 I C 200 (D B), *Purna Chandra v. Mabub Baksh*.
- ('31) 18 A I R 1931 Lah 258 (259) : 12 Lah 488 : 130 Ind Cas 526 (D B), *Mihan Chand v. Ishar Das*. (Appeal to District Judge — District Judge after considering remand report of subordinate Judge returning memorandum of appeal for presentation to proper Court — Appellant promptly complying with order—Extension was allowed.)
- ('24) 11 AIR 1924 All 915 (915) : 82 Ind Cas 594, *Chob Singh v. Daryai Singh*. (Suit for ejectment dismissed by Assistant Collector — Appeal preferred to Commissioner instead of to District Judge — Memorandum returned and then presented to proper Court—*Held*, circumstances justified extension.)
- ('27) 14 A I R 1927 All 719 (719) : 101 I C 750 : 49 All 555 (D B), *Kishan Lal v. Tika*.
- ('21) 8 AIR 1921 Bom 302 (302, 303) : 45 Bom 607 : 60 Ind Cas 744 (D B), *Dattatraya Sitaram v. Secretary of State*. ('In good faith' means 'honestly though negligently'.)
- ('18) 5 A I R 1918 Bom 228 (229, 230) : 42 Bom 295 : 46 Ind Cas 14 (D B), *Bai Nemathu v. Bai Nematullabu*.
- ('22) 9 A I R 1922 Cal 247 (247, 248) : 68 Ind Cas 575 (D B), *Kumudini Ray v. Kamala Kant*.
- ('18) 5 A I R 1918 Cal 986 (987) : 46 I C 116 (D B), *Rupa Thakurani v. Kumudnath Karmakar*.
- ('96) 23 Cal 526 (531, 532) (D B), *Balaram Bhramatar Ray v. Sham Sunder Narendra*. (Prosecution of appeal in wrong Court owing to *bona fide* doubt.)
- ('19) 6 AIR 1919 Oudh 91 (91) : 58 I C 995 (D B), *Hewtett v. Behari Lal*. (Judgment altered—Revision by opposite party dismissed—Appeal from decree following upon altered judgment — Appeal beyond time but within time if limitation counted from dismissal of revision—Delay held excusable.)
- ('26) 13 AIR 1926 Cal 378 (379) : 91 Ind Cas 9 (DB), *Jogendra Nath v. Bhagabat Das*. (Suit for possession and mesne profits prior to suit valued at less than Rs. 5000—Decree passed for more than Rs. 5000—Appeal lies to High Court and not to District Judge—Delay caused by proceedings in District Court excused.)
- ('32) 19 AIR 1932 Cal 713 (713, 714) : 138 Ind Cas 848 (DB), *Nilamoni Pal v. Dakshineswar Pal*. (Appeal preferred against decree based on modified award under *bona fide* belief that appeal lies — Appeal can be converted into one from order modifying award and extension can be granted.)
- ('30) 17 AIR 1930 Pat 307 (308) : 129 Ind Cas 660 (DB), *Jiwan Ram v. Hazari Lal*. (Objection to attachment dismissed—Suit filed instead of appeal — Suit rejected as being not maintainable—Then appeal filed—Time was extended.)
- ('97) 21 Bom 552 (555) (DB), *Dadabhai Jamsetji v. Maneksha Sorabji*.
- ('87) 12 Bom 320 (323) (DB), *Sitaram Paraji v. Nimba Harishet*. (Mere ignorance of law cannot be recognized as sufficient reason for delay under this section.)
- ('13) 20 Ind Cas 647 (648) (All) (DB), *Nanhe v. Mangat Rai*.
- ('13) 20 Ind Cas 3 (6, 7) (Lah) (DB), *Mt. Husaina v. Mt. Sahib Nur*. (Prosecution of application under Ss. 151 and 152, C. P. C.)
- ('28) 15 AIR 1928 Lah 136 (137) : 106 Ind Cas 812 (812), *Maula Baksh v. Uddham Singh*. (Presentation of appeal in wrong Court—Court taking time in considering that appeal does not lie to that Court — Subsequent presentation to proper Court beyond time—Time was extended.)
- ('74) 22 Suth W R 79 (79), *Kuller Singh v. Jeevan Singh*, (Prosecution of application for review is sufficient cause for delay in filing appeal.)
- ('71) 15 Suth W R 61 (61) (DB), *Poresh Nath Roy v. Gopal Kristo Deb*, (2 Suth W R (Misc) 35 (2) (FB), *Nobbokissen v. Kaminee Dossee*, followed — Time during which application for review is pending is not to be taken into account within ninety days allowed for appeal.)

- ('66) 5 Suth W R Act X Rul 44 (44), *Modhoo Soodun Mojoomdar v. Brojonath Koond Choudhry*. (Case under S. 333, C. P. C. of 1859.)
- ('80) 1880 Bom P J 345 (345) (DB), *Trimbakraj v. General Traffic Manager, G. I. P. Railway*, (*Bona fide* prosecution of review may be a sufficient cause for delay.)
- ('98) 22 Bom 849 (858) (DB), *Bai Ful v. Desai Manorbhai*. (Pendency of pauper application is sufficient cause for delay caused by stamping the appeal late.)
- ('19) 6 AIR 1919 Lah 200 (201) : 1919 Pun Re No. 70 : 50 Ind Cas 645 (DB), *Bhavanishankar v. Industrial Bank of India Ltd.* (Defendant not objecting to the fixing of valuation of suit below Rs. 5000—Plaintiff was justified in instituting appeal in District Court—Appeal returned for presentation to Chief Court on the ground that the suit valuation was above Rs. 5000—Time spent in prosecuting infructuous appeal was allowed to be deducted in computing period of limitation for appeal to Chief Court on ground of sufficient cause.)
- ('88) 1888 Pun Re No. 161, *Ghulam Hussain v. Shahbez Khan*. (This section does not require that appellant is to show sufficient cause for not presenting appeal sooner, but for not presenting it within prescribed period.)
- ('89) 1889 Pun Re No. 184 (FB), *Sardar Pratap Singh v. Lala Karam Chand*. (Presentation of an appeal within the period of limitation prescribed therefor to a wrong Court, in ignorance of the provision of law, may constitute a sufficient cause.)
- ('04) 1904 Pun Re No. 21 : 1904 Pun L R No. 145, *Maharaj Narain v. Mt. Banoji*. ((1888) Pun Re No. 183 (FB) followed — Time occupied in applying for review and conducting proceedings for declaration of majority and time spent in prison may be sufficient cause within this section.)
- ('08) 1908 Pun Re No. 118 : 1908 Pun W R No. 197, *Sant Singh v. Qaim*. (Although S. 14 has no direct application to appeals, the *bona fide* prosecution of an appeal in a Court which from defect of jurisdiction or other like cause is unable to entertain it, is sufficient cause within the meaning of this section.)
- ('30) 17 AIR 1930 Lah 113 (114):115 Ind Cas 467, *Ghulam Qazam v. Qutabuddin*. (Application by judgment-debtor under O. 21, R. 2, C. P. C. — *Ex parte* order passed in favour of judgment-debtor—Time spent in prosecuting application for setting aside *ex parte* order should be excluded in appeal from original order.)
- ('28) 15 AIR 1928 Lah 964 (965) : 116 Ind Cas 315, *Fateh Nur v. Jiwan*.
- ('29) 16 AIR 1929 Lah 283 (284) : 120 Ind Cas 170, *Mulkhraj v. Guruditta Shah*. (Appellant filing in good faith application for review—Review granted but disallowed in appeal on point of law—Time was extended.)
- ('29) 16 AIR 1929 Lah 824 (824) : 117 Ind Cas 96, *Dullo Mal v. Ganga Ram*. (Prosecuting infructuous application for review is sufficient cause to condone delay in filing appeal.)
- ('33) 20 AIR 1933 Lah 541 (542) : 14 Lah 206 : 149 Ind Cas 968 (DB), *Ghulam Muhammad v. Usman*. (Appeal presented to wrong Court on mistaken but *bona fide* advice by pleader — Time during which appeal remained pending was excluded.)
- ('83) 5 All 591 (593) : 1883 All W N 142 (DB), *Balwant Singh v. Gumani Ram*.
- ('33) 20 AIR 1933 Oudh 231 (233) : 8 Luck 646 : 150 Ind Cas 533 (DB), *Mahabir Singh v. Mt. Radha*. (Time spent by *bona fide* mistake of advocate.)
- ('34) 21 AIR 1934 Pesh 57 (59):152 Ind Cas 323 (DB), *Ahmed Shah v. Atta Khan*. (Appeal filed in wrong Court through mistake of counsel—Time was extended.)
- ('36) 23 AIR 1936 Sind 43 (44) : 30 Sind L R 301 : 162 Ind Cas 257 (DB), *Pevibai v. Motumal Kalachand*. (Period taken by appellant in applying for review can be excluded in computing period of limitation for appeal.)
- ('25) 12 AIR 1925 Lah 534 (534) : 68 Ind Cas 326, *Muhammad v. Muhammad Roshan*. (Time spent in well founded review should be excluded from limitation for appeal.)
- ('07) 4 All L Jour 1 (2) : 1907 All W N 26, *Indar Lal v. Deojit*. (Appellant honestly thinking appeal lay to Commissioner filing it before him — Appeal returned — Presentation before District Judge beyond time—Admission not improper.)

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been regarded as being "sufficient cause" for the delay. The party will also be ordinarily *deemed to have acted with reasonable diligence*, where such circumstances exist, when the whole period between the date of the decree appealed against and the date of presenting the appeal does not, after excluding the period of the wrong proceeding, exceed the period prescribed by law for presenting the appeal.³ In *Brij Indar Singh v. Kanshi Ram*,⁴ their Lordships of the Privy Council cited with approval the following observations of the Full Bench of the Punjab Chief Court in *Karam Baksh v. Daulat Ram*⁵:

- (193) 8 C P L R 121 (123), *Seth Nurbuda Prasad v. Nathuram*.
 ('31) 18 AIR 1931 Sind 3 (4) : 25 Sind L R 242 : 130 Ind Cas 545 (DB), *Pridhan Mal v. Laloo*. (Review application with due diligence — Time taken by review was excluded.)
 ('19) 6 AIR 1919 Mad 1110 (1110):45 Ind Cas 489 (DB), *Rayarappa Nambiar v. Veetul Kamaran*. (Delay due to representation in wrong Court.)
 ('34) 21 AIR 1934 Mad 637 (637) : 152 Ind Cas 155, *Sundaragiriraja Iyengar v. Balasubramaniya Iyer*. (Practice to file appeal in High Court which ought to be filed in District Court—*Held* delay in filing in District Court should be excused.)
 ('15) 2 AIR 1915 Oudh 74 (74, 75):30 Ind Cas 211, *Sheo Pal Singh v. Mt. Kripala*
 ('19) 6 A I R 1919 Oudh 185 (185) : 52 Ind Cas 235, *Mahabir Singh v. Behari Singh*. (Appeal preferred to wrong Court in good faith and under legal advice — Time spent in prosecuting appeal should be excluded.)
 ('99) 1899 Pun Re No. 47, *Mt. Intizam Begam v. Mt. Waziran*.
 ('15) 2 AIR 1915 Lah 181 (183) : 28 Ind Cas 926 (DB), *Winkley v. Wasawa Singh*.
 ('03) 1903 All W N 32 (33), *Wazir Ali Khan v. Zainab*.
 [See ('16) 3 A I R 1916 Cal 231 (231) : 28 Ind Cas 211 (D B), *Beni Singh v. Barham Deo Singh*.
 ('15) 2 AIR 1915 Lah 269 (270): 28 Ind Cas 142, *Ganesha Singh v. Shankar Lal*.
 ('24) 11 A I R 1924 Mad 225 (226) : 76 I C 786, *Lakshumana Iyengar v. Narayana Iyengar*. (Want of knowledge of defect in decree — Application for amendment of decree immediately after knowledge — Dismissal of application on technical grounds—*Held* application could be treated as review and delay excused.)]
 [See also ('36) 23 AIR 1936 All 659 (661) : 164 Ind Cas 1059, *Mt. Jafri Begam v. Asghar Ali Khan*. (Court dismissing suit in case where explanation to O. 17, R. 2, C. P. C., applied—Plaintiff filing application under O. 9, R. 9 — Application granted — Opposite party going in revision — Result of interference in revision likely that plaintiff would go in appeal against order of trial Court, claiming benefit of this section — High Court should not interfere in revision.)
 ('25) 12 A I R 1925 Bom 137 (137): 49 Bom 149 : 85 Ind Cas 191 (DB), *Nariman Rustomji v. Hasham Ismayal*. (Time taken up for review in good faith, should be excluded.)
 ('85) 1885 Bom P J 152 (152) (DB), *Kamalabai v. Mohamed Saheb*. (Prosecuting application to set aside *ex parte* decree may be sufficient cause.)]
 3. ('17) 4 A I R 1917 P C 156 (158) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (P C), *Brij Indar Singh v. Lala Kanshi Ram*. (Approving 1888 Pun Re No 183 (FB), *Karam Baksh v. Daulat Ram*.)
 ('67) 7 Suth W R 529 (530) : Beng L R Sup Vol 728 (FB), *Brojendra Coomar Roy Chowhdury In re*.
 ('24) 11 AIR 1924 Rang 148 (152) : 1 Rang 584 : 77 Ind Cas 385, *Tin Tin Nyo v. Maung Ba Saing*. (Following 1888 Pun Re No. 183 (FB).)
 ('19) 6 AIR 1919 Pat 238 (240): 52 Ind Cas 959 (DB), *Ramcharita v. Ram Narain*.
 ('82) 1882 Pun Re No. 89, *Mt. Ganga v. Madho*.
 4. ('17) 4 A I R 1917 P C 156 (158) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC).
 5. ('88) 1888 Pun Re No. 183 (FB).

"We think further that he ought ordinarily to be deemed to have acted with reasonable diligence, when the whole period between the date of the decree appealed against, and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal.

"We also agree with the High Court of Allahabad in the case of *Balwant Singh v. Gumani Ram*,⁶ that the circumstances contemplated in S. 14 of the Limitation Act should ordinarily constitute a sufficient cause within the meaning of section 5"

But the existence of the circumstances contemplated by S. 14 involves—

1. that the wrong proceeding has been prosecuted *bona fide* (i.e., with due care and attention) and with reasonable diligence,^{6a} and
2. that the Court in which such proceeding is instituted is unable, by reason of *defect of jurisdiction or other cause of like nature*, to entertain it.

Where there are *no reasonable grounds at all* for prosecuting the wrong proceeding, it cannot be said that it was prosecuted in *good faith* (i.e., with due care and attention) and cannot furnish a ground for excusing the delay.⁷ See also the undermentioned

6. ('83) 5 All 591 (593) : 1883 All W N 142 (DB).

6a. ('26) 13 A I R 1926 Cal 677 (679) : 92 Ind Cas 1031, *Ramdhani Muchi v. Khakshar Das Tali*. (Issue of notice is sufficient evidence of reasonableness of filing review application—Prospect of success is no test.)

('93) 3 Oudh Cas 265 (267). *Salikram v. Pratab Narain Singh*. (Suit for arrears of rent—Appeal from District Judge's decree to Board of Revenue instead of to Judicial Commissioner—Mistake *bona fide* and in *good faith*—Presentation of memorandum to proper Court but seventy-three days beyond time—Delay was excused under this section.)

('88) 10 All 524 (530) : (1888) All W N 218 (DB), *Jag Lal v. Har Narain*.

('88) 10 All 587 (594) : 1888 All W N 258 (DB), *Ramjivan Mal v. Chand Mal*.

7. ('44) 31 AIR 1944 Oudh 193 (195) : 216 Ind Cas 107, *Noor Beg v. Abdul Rahman*. (The mere fact that the grounds shown in the application were not such grounds as are referred to in the provisions in R. 1 of O. 47 for such an application does not by itself warrant the inference that the application was made in bad faith merely with the object of gaining time.)

('40) 27 A I R 1940 Oudh 310 (312) : 15 Luck 526 : 187 I C 83, *Mahomed Ali v. Wajid Ali*. (Mere filing of review application is not sufficient cause within the meaning of S. 5—Appellant must show that he had reasonable grounds for review.)

('11) 10 Ind Cas 129 (130) (Lah), *Ganda Singh v. Jawala Singh*. (Time spent in review application in lower Court when there were no reasonable grounds for such application cannot be deducted.)

('09) 2 Ind Cas 961 (962) (Cal) (D B), *Haradhan Chattopadhyaya v. Parankishna*. (Review on ground that applicant was entitled to a finding on question of limitation—This question did not at all arise in case—Application made with no other object than that of gaining time—*Held* application was not *bona fide* one and time for appealing could not be extended.)

('21) 64 Ind Cas 516 (516, 517) (Rang), *Maung Daw Na v. Ma Kya*. (Application for review presented sixty-eight days after passing of decree on grounds which were merely grounds of appeal.)

('10) 8 Ind Cas 1156 (1156, 1157) : 1910 Pun Re No. 100 (D B), *Musadi Lal v. Badhawa*. (Review on grounds which were merely grounds of appeal.)

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- cases^{7a} for other instances of wrong proceedings taken without due care
- (25) 12 AIR 1925 Cal 253 (254) : 80 Ind Cas 786 (DB), *Kailash Chandra v. Bejoy Chandra*. (Do.)
- (23) 10 AIR 1923 Rang 75 (76) : 74 Ind Cas 39, *Maung Lun v. Maung Dun*.
- (94) 18 Bom 84 (85) (DB), *Pundlik v. Achut*.
- (88) 1888 Pun Re No. 183 (FB), *Karam Baksh v. Daulat Ram*. (Mere pendency of an application for review is not a sufficient cause—It must be a reasonable and proper application.)
- (27) 14 A I R 1927 Bom 221 (222) : 101 Ind Cas 432 (D B), *Seshagiri Narayan v. Venkatesh Larman* (A I R 1925 Bom 137 (DB), *Nariman Rustomji v. Hasham Ismayal* and A I R 1917 P C 156 (P C), *Brij Indar Singh v. Kanshi Ram*, distinguished ; 18 Bom 84, *Pundlik v. Achut* and 15 Cal 242, *Ashanulla v. Collector of Dacca*, followed.)
- (1900-02) 1 Low Bur Rul 313 (315), *Maug Po Lu v. Maung Kyin*.
- 7a. (25) 12 AIR 1925 Cal 175 (178) : 79 Ind Cas 924 (DB), *Elahi Newaz Khan v. Biseswar Baisya*. (Illness in family and negligence.)
- (91) 14 Mad 81 (81), *Govinda v. Bhandari*. (All grounds of review being merely grounds of appeal.)
- (04) 6 Bom L R 373 (374, 375) (DB), *Sakarchand Hathisingh v. Manilal Rewadas*. (Review application knowingly filed beyond time without excuse.)
- (88) 15 Cal 242 (243, 244) (DB), *Ashanulla v. The Collector of Dacca*. (Grounds of review all being grounds of appeal only.)
- (16) 3 AIR 1916 Cal 670 (671) : 31 Ind Cas 705 (DB), *Sudhakar v. Sadasiv*. (Do.)
- (06) 1906 Pun Re No. 78, *Ganesha Singh v. Arur Singh*. (Application for leave to appeal in *forma pauperis* filed though it was barred by time.)
- (18) 5 AIR 1918 Lah 91 (92) : 1918 Pun Re No. 107 : 46 I C 23 (DB), *Azizuddin v. Bhag Mal*. (Grounds of review being same as grounds of appeal.)
- (09) 4 Ind Cas 1002 (1003) (Lah) (DB), *Seva Datt v. The Collector of Lahore*. (Unstamped memorandum of appeal filed—No good faith—Stamp furnished later—Delay cannot be excused.)
- (04) 28 Bom 235 (237) (DB), *Daudbhai v. Emnabai*, (Prosecuting appeal in wrong Court while knowing that appeal lay in another Court.)
- (14) 1 AIR 1914 Upp Bur 49 (50, 51) : 27 Ind Cas 967, *Nga Po Kan v. Nga Shue Dat*. (Delay due to presentation in wrong Court through ignorance.)
- (93) 1893 Bom P J 96 (96) (DB), *Anant Appaji v. Laksaimibai*. (Prosecution in wrong Court—Appellant getting knowledge of mistake within the period for filing appeal but not taking steps to do so until after limitation expires—Not sufficient cause.)
- (08) 1908 Pun Re Vo. 118 : 1908 Pun W R No. 197, *Sant Singh v. Qaim*. (Inexcusable negligence or oversight in instituting an appeal in a wrong Court.)
- (36) 23 AIR 1936 Lah 672 (673) : 165 Ind Cas 661, *Ladha Ram v. Barkat Ali*. (Application under S. 151, C. P. C., is not competent when some other provision of law is available—Delay caused by wrong prosecution of such application cannot be condoned.)
- (81) 1881 Pun Re No. 115, *Narain Singh v. Muhammad Amir Khan*. (Dismissal of suit for want of jurisdiction—Rejection of second suit in same Court—Appeal from orders of dismissal in both suits—Sufficient cause for delay not shown.)
- (93-1900) 1893-1900 Low Bur 515, *U Pyin Nya v. Maung Tun*. (Indulgence will not be granted when appellant has not presented his application for review till after the expiry of the period allowed for appeal, appeal having been filed after the rejection of application for review.)
- (84) 8 Bom 260 (263) (DB), *Ghulam Husein v. Sayad Musa Miya*. (Mere pendency of second appeal is not a sufficient cause for delay in applying for review.)
- (68) 9 Suth W R 301 (304) : 5 Wym 195 (DB), *L. T. Lucas v. W. Stephen*. (Do.)
- (34) 21 AIR 1934 Lah 349 (351) : 155 Ind Cas 503, *Kashmiri Lal v. Chuni Lal*. (Surety for appearance of judgment-debtor—Execution petition dismissed for default of decree-holder and surety discharged—Application for restoration also

and attention. Again, where it is clear that the appellant has not been *diligent* in prosecuting the wrong proceeding, the delay will not be excused.^{7b}

Where *two* remedies are open to a party and he elects one of them and fails *on the merits*, the time during which it was sought cannot be excused for the purpose of seeking, thereafter, the other remedy.⁸ The reason is that in such a case the second condition involved for the application of S. 14 is not satisfied.⁹ It is only the delay caused by the *wrong proceeding* (i.e., the period during which it was pending) that can be excused on the analogy of S. 14. Where the period from the date of the decree to the date of the appeal, even after deducting the time spent in the wrong proceeding, *exceeds* the period allowed by law for preferring the appeal, sufficient cause and due diligence must be shown in respect of the period in excess.¹⁰

See also Note 5 to S. 14 and Note 9 to Art. 152.

dismissed—Extension of time spent in prosecuting application for restoration cannot be allowed.)

7b. ('18) 5 AIR 1918 Lah 91 (92) : 1918 Pun Re No. 107 : 46 Ind Cas 23 (DB), *Azizuddin v. Bhag Mal*. (Grounds for review being same as grounds of appeal.)

8. ('42) 29 AIR 1942 Oudh 362 (364) : 199 Ind Cas 835 (DB), *Jagdish v. Hari-kishen*. (Dismissal of appeal for non-prosecution—Appellant waiting till limitation for leave to appeal to Privy Council expired and then filing application for restoration of appeal which was dismissed—Appellant adopting delaying tactics—No sufficient cause for excusing delay for subsequent application for leave.)

('38) 25 AIR 1938 Bom 459 (459, 460) : 178 Ind Cas 307, *Jotiba Limbaji v. Ramappa Jotiba*. (Proceedings to set aside *ex parte* decree—Time spent in those proceedings cannot be excluded in computing period of limitation for appeal against *ex parte* decree.)

('32) 19 AIR 1932 Cal 558 (561) : 59 Cal 1057 : 138 Ind Cas 748 (DB), *Rajendra Nath v. Kamal Krishna*. (Time spent in prosecuting application to set aside *ex parte* decree under O. 9, R. 13 which failed on merits cannot be deducted from time allowed for appeal.)

('96) 23 Cal 325 (327) (DB), *Ardha Chandra Rai v. Matangini Dassi*. (Deduction of time during which applicant was endeavouring to have decree set aside was not allowed.)

('28) 15 AIR 1928 Pat 265 (266, 267) : 113 Ind Cas 580 (DB), *Upendra Chandra v. Umesh Chandra*. (Pendency of application for amendment did not prevent application for leave to appeal being made and therefore did not furnish sufficient cause.)

('16) 3 AIR 1916 Pat 352 (353) : 34 Ind Cas 44 (DB), *Dwarka Singh v. Layakat Ali Khan*. (Review and appeal both lying—Review alone sought—Appeal filed later—Delay not excused.)

('30) 17 AIR 1930 Rang 41 (42) : 124 Ind Cas 266, *Ko Tha Lin Bwin v. Ho Hla Kye*. (Time spent in applying to set aside *ex parte* decree and in appealing from the order refusing to set aside cannot be excused.)

(1865) 2 Suth W R Mise 35 (35) : Beng LR Sup Vol 349 : Bourke A O C 38, *Nobbo Kissen Singh v. Kaminee Dossee*. (Suit instituted instead of appeal.)

9. ('96) 23 Cal 325 (327) (DB), *Ardha Chandra Rai v. Matangini Dassi*.

10. ('88) 10 All 524 (529) : 1888 All W N 218 (DB), *Jag Lal v. Har Narain Singh*. (The delay occurring between the date on which the appeal is returned by the wrong Court and the date on which it is presented in the proper Court should be explained.)

('80) 1880 Bom P J 345 (345) (DB), *Trimbakaraj v. General Traffic Manager, G.I.P. Ry.* (Applicant waiting 7 days after termination of previous proceeding.)

Section 5
Note 10

10. Negligence of party.—It has been seen in Note 6 that the words “sufficient cause” mean some cause *beyond the control of the party*. A cause arising from the *negligence* of the party cannot be said to be beyond the control of the party and cannot be *sufficient cause* within the meaning of the section.¹ There can be no difference in

- (’26) 13 AIR 1926 All 252 (253) : 91 Ind Cas 865, *Ram Rup Agrahri v. Naik Ram*. (Presenting appeal after a week from dismissal of first appeal—Absence of affidavit explaining delay.)
- (’29) 16 AIR 1929 Cal 240 (241) : 119 Ind Cas 383 (DB), *Kamiruddin Mullick v. Bishupriya Choudhrani*.
- (’02) 25 Mad 166 (180) : 11 Mad L Jour 466 (DB), *Kichiliappa Naicken v. Ramanujam Pillai*. (No diligence subsequent to termination of wrong proceeding.)
- (’91) 14 Mad 81 (82), *Govinda v. Bhandari*. (No diligence after review proceeding was over.)
- (’26) 13 AIR 1926 Cal 457 (458) : 85 Ind Cas 996 (DB), *Krishna Dass Acharjee v. Rahimnannessa Bibi*. (Do.)
- (’84) 7 Mad 584 (586) (DB), *Vasudeva v. Chinnasami*. (Presenting application for review on last day for appeal on no reasonable grounds—Delay ought not to be condoned.)
- (’83) 1883 Pun Re No. 166, *Sahibu v. Hira*. (Where there was great delay between the termination of the review proceeding and the presentation of the appeal — Delay was not excused — 1882 Pun Re No. 89, *Mt. Ganga v. Madho*, followed.)
- (’88) 10 All 587 (594) : 1888 All W N 258 (DB), *Ramjiwan Mal v. Chand Mal*. [See also (’11) 10 Ind Cas 129 (130) (Lah), *Ganda Singh v. Jawala Singh*. (Review application in lower Court dismissed and appellant not filing appeal in reasonable time thereafter — Delay not excused.)]

Section 5—Note 10

1. (’51) 38 AIR 1951 Simla 170 (Pr 4, 6), *Karora Singh v. Kartar Singh*. (Delay of one day in filing appeal held could not be condoned as it was due to negligence.)
- (’49) 36 AIR 1949 All 338 (Pr 10) (DB), *Narain Das Devi Prasad v. Srilal*. (Appellant’s failure to add necessary parties at earlier stages in spite of opportunity given to him—Held no further time could be given under S. 5 to make them parties.)
- (’45) 32 AIR 1945 Lah 233 (235) (DB), *Abdul Salam v. Abdul Khaliq*. (Partition decree—Appellant not supplying stamp paper for preparation of decree within time given by Court—Inordinate delay in supplying stamp paper and consequent delay in filing appeal—Appellant cannot claim indulgence under S. 5 he himself being negligent.)
- (’41) 1941 Aj M L J 57 (58), *Abdul Rehman v. Banwari Lal*. (Laches of appellant or his Counsel in not including all respondents to appeal within limitation resulting in total abatement—Delay cannot be excused.)
- (’34) 21 AIR 1934 Oudh 131 (131) : 151 Ind Cas 529 (DB), *Ganesh Das Varma v. Hari Chand*.
- (’40) 1940 All W R (C C) 120 (121, 122), *Bhagwan Din v. Muru*. (Application to set aside abatement of appeal—Ignorance of death of respondent due to negligence—No sufficient cause.)
- (’38) 25 AIR 1938 Mad 218 (218, 229) : ILR (1938) Mad 275 : 174 Ind Cas 951 (DB), *Secy of State v. Vinjamuri Kitsnamacharyulu*. (Ignorance of death of respondent, in absence of negligence, is sufficient cause.)
- (’38) 25 AIR 1938 Rang 214 (215, 216) : 177 Ind Cas 364, *Kong Hiplon and Co. v. C. A. M. A. L. Firm*. (Appeal filed by counsel on behalf of party—Court doubting genuineness of power of attorney and directing party to attend in person to ascertain if he had signed the power—Party failing to attend in person on ground of personal inconvenience and party’s agent offering to sign the power after expiry of limitation for the appeal—Held S. 5 cannot be resorted to in such a case.)

this respect between a private party and a party which is a body corporate.²

**Section 5
Note 10**

- (1929) 16 AIR 1929 Sind 206 (207) : 24 Sind L R 108 : 118 Ind Cas 212 (DB). *Jhamandas v. Bibi Aishan*.
- (1907) 6 Cri L Jour 221 (223) : 9 Bom L R 893 (DB), *Emperor v. Shiva Adar*. (Appeal by Government against acquittal—Delay due to want of clearness in communication between District Magistrate and Government — Delay not excused.)
- (1923) 10 AIR 1923 Lah 208 (208, 209) : 79 Ind Cas 812, *Mt. Nazko v. Mt. Gopal*. (Appeal returned for copy of judgment—Negligence in re-presentation of appeal — Delay not excused.)
- (1902) 5 Oudh Cas 183 (186), *Hardwar Prasad v. Raja Pratab Bahadur Singh*. (Poverty and want of means to file appeal within time - Appellant's difficulties from his own procrastination—Considerable inaction and want of due diligence.)
- (1921) 8 AIR 1921 All 23 (26) : 43 All 660 : 63 Ind Cas 338 (DB), *Bhairon Ghulam v. Ram Autar Singh*. (Mere failure of appellant to obtain and file copy of judgment, cause for delay in filing proper appeal — Cause beyond control not shown— Time was not extended.)
- (1923) 10 AIR 1923 Lah 95 (95, 96), *Mt. Rajan v. Kurria*. (Appeal returned for copy of judgment—Negligence in re-presentation of appeal — Delay cannot be excused.)
- (1927) 14 AIR 1927 Lah 118 (118) : 99 Ind Cas 619, *Gujjar Singh v. Kahan Singh*. (Omission to implead a person as respondent by carelessness is not sufficient cause.)
- (1925) 12 AIR 1925 Cal 175 (178) : 79 Ind Cas 924 (DB), *Elahinewaz Khan v. Biseswar Baisya*. (Delay of two months—Allegation that serious illness in family caused delay—Cause held insufficient for extending period under this section.)
- (1911) 9 Ind Cas 381 (382) (Lah) (DB), *Ashiq Hussain v. Ali Baksh*. (Proper application for copies made after expiry of period for appeal — Appellants guilty of negligence—Time for appeal was not extended.)
- (1975) 24 Suth W R 105 (106) : 15 Beng L R 272 (FB), *Jagarnath v. Shewratan*.
- (1920) 7 AIR 1920 Lah 224 (224) : 59 Ind Cas 965, *Kanhaya v. Nur Muhammad*. (Delay caused by applying for translation of judgment is not sufficient cause.)
- (1935) 22 AIR 1935 Lah 478 (478) : 155 Ind Cas 610 (DB), *Pir Baksh v. Kidar Nath*. (Delay in not bringing legal representative on record within time due to ignorance—*Held*, it was not adequate ground for extension of time.)
- (1936) 23 AIR 1936 Lah 793 (794) : 165 Ind Cas 154 (DB), *Atma Ram v. Harnam Singh*. (Appellate Court informing appellant about wrong person being impleaded and giving time to implead right person — Right person not impleaded within time - No sufficient case.)
- (1932) 19 AIR 1932 Oudh 167 (167, 168) : 136 Ind Cas 838, *Sh. Mahommad Raza v. Ganga Devi*. (Limitation expiring on 9th December — Appeal filed on 19th December—Appellant contended that he misread 9 in letter of counsel's clerk as 19 — Letter not produced—*Held*, no sufficient cause made out.)
- [See (1924) 11 AIR 1924 Mad 713 (715) : 80 Ind Cas 397 (DB), *Seshamma v. Yee-ranki Peda Venkata Rao*.
- (1940) 27 AIR 1940 Cal 530 (531) : 191 Ind Cas 701, *Hari Pada Mukherjee v. Shaila Bala Devi*. (Appeal filed with deficit court-fee — Court by order fixing time for payment of balance — Order communicated neither to party nor to his pleader—Appeal rejected in default of payment—Appellant held not entitled to indulgence under S. 5 inasmuch as it was his or his pleader's business to ascertain date fixed for depositing deficit court-fee.)
- (1938) 25 AIR 1938 Bom 408 (410) : 1 L R (1938) Bom 704: 177 Ind Cas 734 (DB). *Maria F. Almeida v. Ramchandra Santuram*. (Ignorance of the legal representatives of a deceased domiciled in a Native State or a foreign place may be a sufficient cause for excusing delay in seeking to set aside an abatement, unless there is clear negligence or carelessness or unnecessary delay.)]
2. (1930) 123 Ind Cas 83 (84) (Lah), *District Board, Sargodha v. Shamas Din*.

Section 5
Note 11

11. Negligence of party's agent. — The negligence of a party's agent is, in law, the negligence of the party himself and will not furnish a sufficient cause for delay.¹ A party's pleader or pleader's clerk will, for this purpose, stand on the same footing as an agent and consequently his negligence will, on principle, have the same consequences as the negligence of the party himself and will not furnish a sufficient cause,² though if the party suffers from such negligence of

Section 5 — Note 11

1. ('24) 11 AIR 1924 All 176 (176) : 75 Ind Cas 254, *Mt. Mahtab v. Mt. Birhmo*. ('20) 7 AIR 1920 Pat 594 (595) : 55 I. C. 17 (DB), *Jaleswar Dayal v. Ram Hari*. ('19) 6 AIR 1919 Pat 503 (505) : 4 Pat L Jour 381 : 52 Ind Cas 225 (DB), *Jahar Mal v. G. M. Pritchard*. ('11) 10 Ind Cas 866 (869) : 7 Nag L R 67, *Parashram v. Likhan*. (Carelessness of agent — Party must suffer.) ('10) 7 Ind Cas 391 (392) (Cal), *Tiarini Kumar Dutt v. Gopeswar Pal Choudhury*. (Case under O. 22, R. 4 and R. 9 (2), C. P. C.)
2. ('38) 25 AIR 1938 Nag 156 (161) : 1 L R (1938) Nag 409 : 173 Ind Cas 369 (DB), *Krishna Rao v. Trimbak*. (Appellant solely relying upon information carelessly given by pleader's clerk about duration of vacation of Court.) ('41) 1941 A M L J 57 (58), *Abdul Rehman v. Banwari Lal*. (Laches of appellant or his counsel in not including all respondents within limitation resulting in total abatement — Delay not excused.) ('29) 16 AIR 1929 Sind 206 (207, 208) : 24 Sind L R 108 : 118 Ind Cas 212 (DB), *Jhamandas v. Bibi Aishan*. (Negligence on the part of the pleader's clerk is negligence on the part of the party.) ('15) 2 AIR 1915 All 34 (35) : 37 All 267 : 28 Ind Cas 265 (DB), *Budhu v. Dewan*. ('32) 1932 Mad W N 328 (329), *Poongavana Gramani v. Manika Goundan*. (Negligence of vakil's clerk in supplying papers.) ('27) 14 AIR 1927 Pat 232 (232, 233) : 101 Ind Cas 448 (DB), *Gopal Patwa v. Digambar Singh*. (Negligence of pleader's clerk was regarded as negligence of agent which is equivalent to the negligence of the party himself.) ('14) 24 Ind Cas 977 (977) : 7 Sind L R 201, *Alladadshah v. Mukhdum Amin Muhammad*. (Negligence of pleader's clerk in not filing appeal.) ('20) 7 AIR 1920 Pat 581 (582) : 55 Ind Cas 271 (DB), *Sheikh Palat v. Sarwan Sahu*. (Gross carelessness of pleader in not filing vakalatnama with appeal.) ('18) 5 AIR 1918 Pat 336 (338) : 3 Pat L Jour 484 : 46 I. C. 509 (DB), *Jodhan v. Nankhu*. (Appeal filed with insufficient stamp — No vakil acting with reasonable care and intelligence could have imagined that such stamp was sufficient — Vakil must be taken to have acted with wanton negligence — Delay not excused.) ('15) 2 AIR 1915 Low Bur 66 (66) : 27 Ind Cas 639, *Ma Kya Nya v. Mg. Tun Hla*. (Costs and fees sent in name of absent member of advocate's firm — Other member though knowing of receipt of costs and fees failing to file appeal — Appellant's delay in not sending earlier — Delay was not excused.) ('14) 1 AIR 1914 Lah 304 (305) : 23 Ind Cas 86 (DB), *Mahomda v. Ladha Singh*. (Appeal filed in wrong Court through gross carelessness of pleader — Re-presentation to proper Court — Held, mistake could not be excused.) ('24) 11 AIR 1924 Lah 401 (401) : 71 Ind Cas 736, *Shahadat v. Hukam Singh*. (Appeal filed without order appealed against being stamped — Mistake due to carelessness of pleader's clerk.) ('27) 14 AIR 1927 Lah 884 (885) : 102 I. C. 615, *Gursaran Das v. District Board Jullundur*. (Appeal filed with deficit court-fee — Mistake due to gross negligence of party's counsel — Deficit made good beyond time — Delay was not excused.) ('92-96) 1892-1896 Upp Bur Rul 450 (450), *S. S. Manikum v. Maung Sein Hmon*. ('23) 10 AIR 1923 Mad 482 (483, 484) : 72 I. C. 308, *Sundaram Iyer v. Muthuramalinga*. (Copy of decree appealed against not filed along with memorandum of appeal — Delay of fifty-three days in filing the copy afterwards — Delay due to negligence of Dewan of party — Delay was not excused.)

his agent, the latter may be liable to the former in damages.^{2a} In *Poongavana Gramani v. Manika Goundan*,³ Jackson, J., observed as follows :

"I may observe that this is not a question of discipline, where the Court has to be vigilant on behalf of public interests. A delay in presenting a second appeal does not affect the public. It is essentially a question between the parties. A Court acting under section 5 of the Indian Limitation Act takes from one party what it gives to another; for it renders subject to appeal a decree which would otherwise be final.

As between party and party, one side is fully justified in holding the other side responsible for its agent's acts. And, of course, to hold that so long as the principal commits no laches the acts of the agent are immaterial, would be to absolve vakils and vakils' clerks from the obligation to obey rules. From any laches on their part they could take shelter behind the principal's correctitude."

In the cases cited below⁴ it was however held that the negligence of the agent is not always the negligence of the party, that if the party was diligent though the agent was negligent, it cannot be said that the party was negligent, but that if the party simply relied upon the agent without anything more, the neglect of the one will be the neglect of the other. It was also held in the undermentioned cases⁵

('29) 16 AIR 1929 Sind 32 (33, 34) : 114 Ind Cas 101 (DB), *Mt. Ummakulsum v. Ghulam Rasul*. (Memorandum of appeal as originally filed did not include name of one of the defendants as co-respondent—Name brought on record after limitation for filing appeal had expired—Mistake due to inadvertence of legal advisers—Delay was not excused.)

('37) 24 AIR 1937 Nag 97 (98) : I L R (1937) Nag 507 : 170 Ind Cas 118, *Abdeali v. Viswanath Singh*. (Legal representatives not brought on record within period allowed by law—No explanation offered for this—No sufficient ground for holding that there has been no negligence or ignorance—Mistake of counsel—Delay was not excused.)

('01) 4 Oudh Cas 303 (313) (DB), *Shameshar Dat v. Mahadeo Prasad*. (Not presenting appeal in legal manner—Mistake of pleader—Delay was not excused.)

('31) 18 AIR 1931 Rang 80 (80) : 131 Ind Cas 507, *Maung Po Chin v. Po Tha*. (Appeal filed twenty-six days beyond time—Gross negligence on part of pleader—In view of particular circumstances of case delay was not excused.)

('25) 91 Ind Cas 425 (426) (Oudh), *Babulal v. Rampher Singh*. (Wrong application for copy of decree—Subsequent correct application—This mistake of pleader resulting in filing of appeal beyond time—Delay was not excused.)

[See ('40) 27 AIR 1940 Cal 530 (531) : 191 Ind Cas 701, *Hari Pada Mukherjee v. Shaila Bala Devi*. (Appeal filed with deficit court-fee—Order for making good deficiency within time fixed—Appeal rejected on default—Extension cannot be granted under S. 5 on ground that order fixing time for payment of deficit court-fee was not communicated either to appellant or to his pleader.)]

2a. ('15) 2 AIR 1915 All 34 (35) : 37 All 267 : 28 I C 265 (DB), *Budhu v. Dewan*.

3. ('32) 1932 Mad W N 328 (329, 330).

4. ('29) 16 A I R 1929 All 351 (351) : 119 I C 447, *Lachmi Chand v. Unkarmal*. (Judgment on 24th March 1926—Cost for obtaining copy of decree paid to clerk on 25th March 1926—Application for copy on 26th March and copy obtained on 23rd April 1926—Clerk got mixed up and forgot that he had received copy—Party enquiring all the time about copy and filing appeal as soon as copy was obtained—Delay in filing was excused.)

('19) 6 AIR 1919 Mad 581 (582) : 50 I C 518 (D B), *Kadir Mohideen v. Abubakkar*. (Negligence of vakil in not paying printing charges in time—But party otherwise diligent—Delay excused.)

5. ('22) 9 A I R 1922 All 490 (491) : 44 All 636 : 68 I C 812 (F B), *Shib Dayal v. Jaganath*.

Section 5
Notes 11-12

that an honest, though *negligent*, mistake of the pleader is a sufficient cause. It is submitted this view is opposed to principle and is not correct and has been dissented from in other cases.⁶

12. Mistake of fact of party or his agent. — A *bona fide* mistake of fact on the part of the party will be a sufficient cause.¹ The test of *bona fides* is whether it was one committed in spite of due care and attention.² A mistake arising from *negligence*,³ or committed without any real excuse,⁴ or which could have been averted by proper enquiry⁵ cannot be said to be *bona fide* and cannot be a sufficient cause. But a mistake, which might occur even in the most carefully conducted business, cannot be said to be a negligent mistake.⁶

('25) 12 AIR 1925 Mad 462 (462) : 86 Ind Cas 114 (DB), *Kandasamy Mudaliar v. Arunachalla Chetty*. (Delay due to careless arithmetical mistake of vakil.)

('26) 13 A I R 1926 Nag 503 (504) : 96 Ind Cas 857, *Baban v. Emperor*. (Honest though careless mistake in calculation held sufficient cause.)

6. ('33) 20 AIR 1933 Oudh 523 (525) : 146 Ind Cas 127 : 9 Luck 193 (FB), *Mithoo Lal v. Jamna Prasad*.

('35) 22 AIR 1935 Oudh 108 (109) : 153 Ind Cas 161 (DB), *Bhagwan v. Badri*.

('01) 4 Oudh Cas 303 (313), *Shameshwar Singh v. Mahadeo Prasad Singh*. (The fact that party was diligent is irrelevant if the pleader or agent has acted without due care and attention.)

Section 5 — Note 12

1. ('49) 36 A I R 1949 Mad 624 (625), *Ramalingam v. Koteswara*. (Ignorance of death of defendant held sufficient cause for excusing delay in setting aside abatement.)

('31) 18 A I R 1931 Cal 506 (507) : 58 Cal 793 : 133 I C 332 (D B), *Corporation of Calcutta v. A. C. Pal*. (Appeal after period of limitation — Date of order not known and could not be known — Time was extended.)

('26) 13 AIR 1926 Lah 509 (510) : 92 Ind Cas 319 (DB), *Ranzor Singh v. Secy. of State*. (Appellant paying insufficient court-fee due to *bona fide* mistake.)

('16) 3 A I R 1916 Oudh 257 (263) : 32 I C 380, *Ghanshyam Das v. Mt. Hardei*. (One judgment and two decrees in two suits — Appellant confused by this and applying for copy of one judgment and decree — Mistake found too late when copy was obtained — Delay ought to be excused.)

('11) 9 Ind Cas 607 (607) (Lah), *Mohan Ram v. Muhammad Khuda*. (*Bona fide* mistake as to date of completion and delivery of copy of decree held sufficient cause.)

('20) 7 A I R 1920 Lah 508 (509) : 67 Ind Cas 306 (307), *Kartar Singh v. Ralla*. (Legal representatives not brought on record within time through *bona fide* mistake in copy of judgment — Time was extended.)

('13) 21 Ind Cas 444 (445) (All), *Habeeb v. Naush Ali*. (Party not signing vakalat.)

('38) 25 AIR 1938 Mad 218 (218, 219) : I L R (1938) Mad 275 : 174 I C 951 (DB), *Secretary of State v. Kistnamacharyulu*. (Ignorance of death of respondent — No negligence in setting aside abatement.)

2. See Section 2 sub-section (7).

3. See Note 11.

4. ('28) 15 AIR 1928 Cal 249 (249) (DB), *Soneswar Das v. Kanakram*.

('76) 1 All 250 (252), *Zaibunissa Bibi v. Kulsum Bibi*. (Error in the calculation of the time allowed, held no sufficient cause for delay.)

5. ('09) 1 Ind Cas 904 (905) : 5 Nag L R 25, *Vithia v. Sakhya*. (Incorrect entry by clerk.)

[See however ('26) 13 A I R 1926 Sind 215 (216) : 20 Sind L R 90 : 95 Ind Cas 316 (DB), *Gerimal v. Shewaram*.]

6. ('13) 21 Ind Cas 444 (445) (All), *Habeeb v. Naush Ali*. (Memorandum of appeal signed by pleader whose *vakalatnama* was not signed by appellants.)

On the principles referred to in Note 11 the mistake of the agent of the party cannot stand on a higher footing than the mistake of the party himself.⁷ Thus, the mistake of the agent cannot be a sufficient cause unless it is committed *bona fide*, i. e., unless it is one that has occurred in spite of due care and attention.⁸ A mistake of the agent which might occur even in spite of due care and attention, may be a sufficient cause.⁹ Thus where the pleader's name is omitted by oversight in the *vakalatnama* or in the memorandum of appeal, it has been held to be a sufficient cause.¹⁰ As to further instances, see the undermentioned cases.¹¹

[See also ('88) 1888 All W N 58 (59) (D B), *Jamna v. Ibrahim*. (Accidental clerical error.)]

7. ('25) 12 AIR 1925 Oudh 189 (189) : 82 Ind Cas 484, *Ganesh Dat v. Hirde Behari*. (Delay not excused on ground of mistake of clerk—Apparently the mistake was a negligent one.)

8. ('27) 101 Ind Cas 363 (363) (Rang), *Ma Ngwe Yun v. Ma Pu*.

('25) 12 AIR 1925 Oudh 374 (374) : 85 Ind Cas 693, *Mt. Dilan v. Ram Bharosey*. (Delay caused by forgetfulness of pleader.)

('19) 6 A I R 1919 Cal 585 (585) : 46 Ind Cas 480 (D B), *Guru Charan Ghose v. Kashi Chandra Ghose*. (Foolish mistake of agent in calculation of time.)

('28) 15 A I R 1928 Lah 488 (489) : 110 Ind Cas 374, *Mt. Pana Bibi v. Mahla*. (Mistake of counsel's clerk is not sufficient ground for extension of time.)

('17) 4 AIR 1917 Lah 407 (407) : 37 Ind Cas 828 (DB), *Jaidal Mal v. Amar Nath*. (Mistake through want of good faith in that the party relied on an unauthorised publication known as "Legal Diary" and preferred an appeal beyond limitation.)

9. ('13) 21 Ind Cas 444 (445) (All), *Habeeb v. Naush Ali*. (Memorandum of appeal signed by pleader whose *vakalatnama* was not signed by appellants.)

('32) 19 A I R 1932 Mad 142 (144) : 135 I C 737, *Ramji Das v. Kumarakalathi Mudali*. (Challan being mislaid by a *bona fide* mistake of vakil's clerk.)

10. ('32) 19 AIR 1932 Lah 134 (135) : 134 Ind Cas 114, *Mangal Singh v. Babu Singh*. (Counsel presenting appeal — Power of attorney without counsel's name but signed by counsel and appellant — Defect rectified after limitation — Held appeal filed within time.)

('21) 8 AIR 1921 All 210 (211) : 43 All 392 : 61 Ind Cas 410, *Shambhu v. Badri*.

('30) 17 AIR 1930 All 112 (113) : 121 Ind Cas 546 (DB), *Muhammad Qamar Shah Khan v. Mohammad Salamat Ali Khan*.

('27) 14 A I R 1927 All 816 (817) : 102 Ind Cas 255, *Loknath Misir v. Sheo Saran Misir*. (*Vakalatnama* signed by vakil but his name not entered in body.)

('21) 63 Ind Cas 726 (727) (Lah), *Balwant Singh v. Sunder Singh*. (Omission to sign memo of appeal.)

('23) 10 AIR 1923 Lah 402 (403) : 84 I C 518 (DB), *Mathra Das v. Ram Lal*. (Do.)

('27) 14 A I R 1927 Lah 618 (619) : 103 Ind Cas 537, *Ram Lal v. Budho Mal*. (*Vakalatnama* not properly signed.)

('37) 24 AIR 1937 Nag 65 (65) : I L R (1937) Nag 494 : 169 Ind Cas 117, *Ramdeo Tilakchand v. Lalu Natha*.

('34) 21 A I R 1934 Pat 290 (292) : 149 Ind Cas 596 (D B), *Mt. Bindu Kuer v. Lalita Prasad*. (*Vakalatnama* in two sheets, purporting to be on behalf of four parties—One sheet signed by one and other by other three—Pleader stating that *vakalatnama* was on behalf of all four — *Vakalatnama* was held proper at least for extension of period under this section.)

11. ('20) 7 A I R 1920 All 290 (291) : 59 Ind Cas 937 (D B), *Sheo Mohan v. Kali Prasad*. (Mistake in calculation on assumption which was not unreasonable.)

('32) 19 A I R 1932 Mad 142 (143) : 135 Ind Cas 737, *Ramji Das v. Kumarakalathi Mudali*. (Challan mislaid by clerk, held, *bona fide* mistake and delay excused.)

Section 5 Notes 12-13

There is, however, this difference in effect between a *bona fide* mistake of the party and such mistake of his agent, namely, that if the party has acted without due care and attention in relying upon the agent, the mistake of the latter even though *bona fide*, will not be a sufficient cause.¹²

13. Mistake of law of party or his agent.—A mere mistake or ignorance of law is not *per se* sufficient reason for asking the Court to exercise its discretion under S. 5.¹ But a mistake of law which is

(‘07) 12 Cal W N 25 (27) (DB), *Beshandut Tewari v. Nandan Pershad Dube*. (*Bona fide* mistake of pleader in calculation.)

(‘13) 21 Ind Cas 444 (445) (All), *Habeeb v. Naush Ali*. (Mistake which might occur in the most carefully conducted business.)

(‘30) 17 A I R 1930 Sind 252 (253) : 25 Sind L R 63 : 130 I C 554, *Goverdhandas v. Mt. Rijhibai*.

(‘28) 15 A I R 1928 Lah 643 (646) : 108 Ind Cas 619, *Nizam Din v. Muhammad Iqbal*. (Mistake of vakil’s clerk resulting in filing appeal late by one day—Delay was excused.)

(‘33) 20 A I R 1933 Lah 1 (2) : 140 Ind Cas 495, *Thakar Singh v. Jagat Singh*. (Mistake in not filing decree appealed from.)

(‘34) 21 AIR 1934 Lah 1011 (1012) : 155 Ind Cas 893, *Kanshi Ram v. Municipal Committee, Moga*. (Vakalatnama not containing names of parties—Defect might be condoned and time extended.)

(‘34) 21 A I R 1934 Lah 444 (445) : 150 I C 731, *Dost Muhammad v. Sardar Ali*. (Counsel A having no authority presenting appeal instead of counsel B who was authorised to present the same—*Bona fide* mistake—Time was extended.)

12. (‘33) 20 AIR 1933 Cal 462 (463) : 145 Ind Cas 116 (D B), *Khajeh Habibullah v. Abdul Karim*. (Reliance placed on the wrong calculation of a stranger who is neither the pleader nor the pleader’s clerk.)

Section 5 — Note 13

1. (‘43) 30 A I R 1943 Oudh 57 (58) : 203 Ind Cas 579 (DB), *Court of Wards v. Chhedi*. (Adding necessary party to appeal after limitation — Ignorance of law is not sufficient cause.)

(‘43) 30 A I R 1943 Oudh 78 (80) : 205 Ind Cas 628 (D B), *Nageshwar Prasad v. Chandraj Bahadur*. (Omission to implead necessary party to appeal within limitation.)

(‘17) 4 AIR 1917 P C 156 (159) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC), *Brij Indar Singh v. Kanshi Ram*.

(‘32) 19 A I R 1932 Cal 171 (176, 177) : 144 Ind Cas 561 (DB), *Secretary of State v. Hindustan Co-operative Insurance Society Ltd.* (Party applying for review after dismissal of appeal is not protected by this section.)

(‘88) 12 Bom 320 (321) (D B), *Sitaram Paraji v. Nimba*. (Mistake of law as to deduction of time spent in another litigation in respect of same subject-matter.)

(‘11) 9 Ind Cas 222 (223) (Lah) (D B), *Mt. Masum Begam v. Madan Mohan Lall*. (Copy of decree filed after time—Pardanashin lady not knowing that decree was required to be filed with appeal.)

(‘14) 1 AIR 1914 Lah 123 (124) : 1915 Pun Re No. 41 : 21 I C 951 (D B), *Hadu v. Lala*. (In an appeal, application to bring on record the heirs of defendant-respondent made six months after respondent’s death due to ignorance of law—Delay was not excused.)

(‘25) 12 AIR 1925 Lah 602 (602) : 87 Ind Cas 952, *Ramji Lal v. Lakshmi Chand*. (Application for leave to appeal as pauper filed beyond time due to ignorance of law—Delay was not excused.)

(‘29) 16 AIR 1929 Nag 74 (75) : 117 Ind Cas 282, *Nandu v. Bhuwanoo*. (Statutes of limitation must be strictly construed against claimants.)

[See also (‘28) 15 AIR 1928 Mad 690 (694) : 110 Ind Cas 837 (D B), *Sutharsana Chariar v. Samarapuri Chettiar*. (The expression “sufficient cause” in the

committed *bona fide*, i. e., in spite of due care and attention, has been regarded as a sufficient cause in this country.² In *Brij Indar Singh*

context must be regarded as merely indicating that the Court must be satisfied that the delay was an excusable delay.)

('26) 13 AIR 1926 Oudh 206 (206, 207): 91 Ind Cas 867 (DB), *Mt. Hasib-un-Nisa v. Bishnath*. (Agent misconstruing order of Court—Delay not condoned.)]

2. ('41) 28 AIR 1941 Pesh 74 (76): 196 Ind Cas 654 (DB), *Shivan Ditta v. Radha Kishan*. (Conflict of view on certain point—Delay in filing appeal due to party adopting one view.)

('13) 18 Ind Cas 37 (40, 41): 1913 Pun Re No. 59 (DB), *Fakir Chand v. Municipal Committee of Hazro*.

('37) 24 AIR 1937 Rang 199 (200): 169 Ind Cas 398, *Daw Sein v. Chinese Kwan*.

('32) 19 AIR 1932 Cal 589 (597): 59 Cal 781: 140 Ind Cas 662 (DB), *Surendra Mohan Rai v. Mohendra Nath Banerjee*.

('09) 1 Ind Cas 902 (902) (All), *Ganga Sahai v. Mt. Rai Kunwar*. (*Bona fide* mistake as to forum of appeal.)

('25) 12 AIR 1925 Cal 684 (684): 94 Ind Cas 929 (DB), *Krishna Mohan Ghose v. Surapati Banerjee*. (*Bona fide* ignorance of law is sufficient cause.)

('12) 15 Ind Cas 140 (141): 1912 Pun Re No. 115 (DB), *Dhan Singh v. Kahn Singh*. (Appellant misled by the Court framing two decrees instead of drawing up one.)

('23) 73 Ind Cas 788 (790, 791) (Pesh), *Murli Mal v. Vaishno Ditta*. (Deficiency in court-fees in partition suit—Mistake deliberate—Extension cannot be granted.)

('86) 13 Cal 266 (267) (DB), *Hurro Chunder Roy v. Surna Moyei*. (Wrong impression about forum of appeal was held sufficient cause to grant extension.)

('24) 11 AIR 1924 Rang 148 (149): 1 Rang 584: 77 Ind Cas 385 (DB), *Tin Tin Nyo v. Maung Ba Saing*.

('36) 23 AIR 1936 Nag 246 (247): 167 Ind Cas 260, *Gangaprasad Rajaram v. Mt. Banaspati*. (This rule is subject to qualifications that there must be no negligence, no inaction and no want of good faith.)

('18) 5 AIR 1918 Mad 703 (704): 39 Ind Cas 975 (DB), *Soundararaja Iyengar v. Srinivasa Chariar*. (Preliminary order not capable of being mistaken for final—Delay in such case, in filing appeal would not be excused.)

('99) 3 Oudh Cas 13 (17) (DB), *Jagan Nath v. Rae Madho Parshad*. (Ignorance of law is not sufficient cause where applicant does not inform his pleader that opposite party was dead nor takes any trouble to enquire and ascertain what steps should be taken consequent on the death of the opposite party.)

('91) 1891 Pun Re No. 66, *Mt. Ghauhar v. Khan Muhammad*. (Memorandum of appeal received and retained by wrong Court—Mistake by oversight—Presentation to proper Court beyond time—There is sufficient cause for delay.)

('25) 12 AIR 1925 Lah 381 (383): 6 Lah 233: 48 Ind Cas 1 (DB), *Raghubir Saran v. Mt. Sohan Debi*. (Delay in filing appeal—Appellant doubtful whether order appealed against was order or decree and therefore paying insufficient court-fee—Delay was excused.)

('36) 23 AIR 1936 Lah 168 (170): 161 Ind Cas 251 (DB), *Hira Lal v. Khizar Hayat*. (Decree of lower Court was not clearly worded and its exact meaning was also not beyond doubt—Appellant misled by this, filed appeal in wrong Court—Time was extended.)

[See ('89) 1889 Pun Re No. 184 (FB), *Sardar Pratab Singh v. Lala Karam Singh*. (Presentation of appeal within the period of limitation prescribed therefor to a wrong Court in ignorance of the provision of law may constitute a sufficient cause.)

('24) 11 AIR 1924 Lah 41 (42): 4 Lah 122: 74 Ind Cas 451 (DB), *Muhammad Hassan-ud-din v. Saif Ali*. (Rule, that in addition to copies specified in O. 41, R. 1, C. P. Code, memorandum of appeal should be accompanied by a copy of judgment of Court of first instance, newly published—Delay caused by ignorance of rule is sufficient excuse.)

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v. Kanshi Ram,³ where the delay was due to a wrong proceeding being taken on a *bona fide* mistake of law, their Lordships of the Privy Council observed as follows :

"Now if the matter were entirely open, inasmuch as a mere mistake in law is not *per se* sufficient reason for asking the Court to exercise its discretion under S. 5 (instances of which are given in some of the cases cited by the learned Judge), there would be a good deal to be said in argument in favour of making the rule universal, and upholding in its entirety the ruling given in the case of *Ramjiwan Mal v. Chand Mal*,⁴ above cited. *But the matter is not open.* To interfere with a rule which, after all, is only a rule of procedure, which has been laid down as a general rule by Full Benches in all the Courts of India, and acted on for many years, would cause great inconvenience, and their Lordships do not propose so to interfere."

On the principles stated in Notes 11 and 12, a mistake of law committed by a party's legal adviser will stand on the same footing as a mistake by the party himself. If the mistake of the lawyer is one that can be condoned under the section and the party has acted on his advice, the party is not prevented from relying upon it for claiming the indulgence under this section. In *Sunderbai v. Collector of Belgaum*,⁵ their Lordships of the Privy Council observed as follows :

"The fact that the defendants had acted on mistaken advice as to the law in appealing to the High Court in 1910 did not preclude them from showing that it was owing to their reliance on that advice that they had not presented the appeal to the Court of the District Judge within the prescribed period of limitation. See *Brij Indar Singh v. Kanshi Ram*.⁶"

See also the undermentioned cases.⁷

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- (23) 10 AIR 1923 Lah 513 (514) : 77 Ind Cas 416, *Muhammad Aslam v. Jodh Singh*. (Appeal filed in time — Court-fee paid beyond time but under order of Court — *Held*, mistake was *bona fide* and time could be extended.)
- (33) 20 AIR 1933 Lah 264 (265) : 144 Ind Cas 184, *Bhagwan Das v. Tikaya Ram*. (Honest belief of appellant regarding adequacy of court-fee while presenting memorandum of appeal—Delay in giving adequate court-fee was condoned.)
- (1900) 1900 Pun L R No. 206 (207) (DB), *Pala v. Ishar*.
- (28) 15 AIR 1928 Mad 404 (406) : 108 Ind Cas 288, *Ramchandran v. Sabapathy Mudaliar*. (Per Venkatasubba Rao, J.; following Bramwell, L. J., in *Collins v. Vestry of Paddington*, (1880) 5 Q B D 368.)
- (90) 13 Mad 269 (270) (DB), *Krishna v. Chathappan*.]
- See also cases cited in Note 9 which are all cases of mistakes of law.
3. (17) 4 AIR 1917 P C 156 (159) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC),
4. (88) 10 All 537 (594, 596) : 1888 All W N 258 (DB).
5. (18) 5 AIR 1918 P C 135 (137) : 43 Bom 376 : 46 Ind App 15 : 52 I. C. 897 (PC).
6. (17) 4 AIR 1917 P C 156 (159) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC).
7. (47) 34 AIR 1947 Lah 76 (78) : 225 Ind Cas 291, *Arura v. Karam Din*. (It cannot be laid down as a general proposition that the delay caused by counsel's mistake can never be regarded as a sufficient cause within the meaning of S. 5.)
- (46) 33 AIR 1946 Bom 437 (439) : ILR (1946) Bom 431 : 226 Ind Cas 95 (DB), *Bhausahab v. Sonabai*. (Application for copies — Delay in making caused by erroneous advice of advocate—Sufficient cause for excusing delay in filing application for leave to appeal to His Majesty in Council.)
- (42) 29 AIR 1942 Lah 94 (94) : 199 Ind Cas 851, *Kishan Chand v. Md. Husain*. (Mistaken advice of pleader—Party filing appeal in good faith in wrong Court — Time taken in transmitting appeal to proper Court should be excluded.)

It is not, however, every wrong advice by the legal adviser that will amount to a sufficient cause^{7a} entitling the party to claim the indulgence under this section. Acting upon wrong advice will amount to a "sufficient cause" —

(1) when the advice was itself given *bona fide*, i. e., after the exercise of due care and attention,^{7b} and

(2) the party himself has acted with due care and attention in seeking and relying upon such advice.

Thus, where the wrong advice given by the legal adviser is honest and *bona fide*, but it is based on an untrue statement of facts made by the party to the pleader, the party cannot be said to act with due care and attention, and acting upon the advice so given cannot be a sufficient cause.⁸ Similarly, where the party consults legal practitioners of inferior standing and little experience and acts upon the advice given by them, he cannot be said to have acted with due care and attention.⁹ See also the undermentioned cases.^{9a}

('37) 24 AIR 1937 P C 276 (278) : 31 Sind L R 672 : 169 Ind Cas 769 (PC), *Rajendra Bahadur v. Rajeshwar Bali*. (Mistaken advice given by a legal practitioner may, in the circumstances of a particular case, give rise to sufficient cause within the section.)

('27) 14 AIR 1927 All 758 (759) : 101 Ind Cas 777, *Ram Lal v. Mustaq Ali*.

('30) 17 AIR 1930 Cal 426 (427) : 126 I. C. 781 (DB), *Jnanada Prosad v. G. M. Falkner*.

('07) 29 All 638 (640): 1907 All W N 219: 4 A.L.J. 515, *Aniora Kunwar v. Babu*.

('06) 28 All 414 (416): 1906 All W N 67: 3 A.L.J. 218 (DB), *Kura Mal v. Ram Nath*.

('03) 1903 All W N 32 (33) (DB), *Wazir Ali v. Zainab*.

('16) 3 AIR 1916 Lah 202 (203) : 33 Ind Cas 808, *Azam Ali v. Akhtar Hussain*.

('33) 20 AIR 1933 Lah 541 (541, 542) : 14 Lah 206 : 149 I. C. 968 (DB), *Ghulam Muhammad v. Usman*. (Mistaken but *bona fide* advice given by pleader — Acting on this, appellant filing appeal in wrong Court — Appeal returned and re-presented to proper Court — Time extended.)

7a. ('50) 37 AIR 1950 Raj 2 (Pr 3), *Badrinarain v. Chandanmal*.

('37) 24 AIR 1937 P C 276 (278): 31 Sind L R 672 : 169 Ind Cas 769 (PC), *Rajendra Bahadur v. Rajeshwar Bali*. (There is no general doctrine which saves parties from the results of wrong advice.)

('32) 19 AIR 1932 Cal 589 (597) : 59 Cal 781 : 140 Ind Cas 662 (DB), *Surendra Mohun Rai v. Mohendra Nath Banerjee*.

('02) 5 Oudh Cas 384 (389, 390), *Gajadhar Parshad v. Mt. Lachmin*. (Merely acting on wrong advice is not sufficient cause.)

('26) 13 AIR 1926 Nag 162 (163) : 92 I. C. 33, *Sadashiv v. Bapu*.

7b. ('27) 14 AIR 1927 Rang 20 (21) : 4 Rang 265 : 98 Ind Cas 417 (FB), *J. N. Surty v. T. S. Chettyar Firm*.

8. ('19) 6 AIR 1919 Pat 38 (42) : 49 Ind Cas 1000 (DB), *Mt. Bibi Fakirunnissa v. Rambhajan Singh*.

9. ('13) 20 Ind Cas 3 (6, 7) (Lah) (DB), *Mt. Husaina v. Mt. Sahib Nur*.

9a. ('47) 34 AIR 1947 Pat 225 (232) : 25 Pat 432 : 225 Ind Cas 256 (DB), *Sona Debi v. Bhola Prosad*. (Wrong advice given by counsel that application for final decree should not be made till appeal against preliminary decree is disposed of — Application for final decree barred — Delay cannot be condoned on analogy of S. 14, Limitation Act.)

('40) 27 AIR 1940 Cal 150 (152): 187 Ind Cas 416 (DB), *Amulya Krishna v. R. P. Co-operative Bank*. (Cross objection not filed by party within time — Wrong impression of his legal adviser regarding cross-objection would not entitle him to extension of time.)

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In considering when an advice by the legal practitioner may be relied upon as an excuse for extending the time, Brett, L. J., in *Highton v. Treherne*,¹⁰ observed as follows :

"In cases where a suitor has suffered from the negligence, or ignorance or, gross want of legal skill of his legal adviser, he has his remedy against that legal adviser, and meantime the suitor must suffer. But, where there has been a *bona fide* mistake, not through misconduct nor through negligence nor through want of reasonable skill, but such as a skilled person might make, I very much dislike the idea that the rights of the client should be thereby forfeited."

This view has been generally followed by the High Courts in India.^{10a} Thus if the mistake proceeds from the culpable negligence of the legal adviser, it is not a sufficient cause.¹¹ If it is not *bona fide*

('26) 13 AIR 1926 Lah 693 (693) : 98 Ind Cas 514 (DB), *Ichhar Singh v. Natha*. (Appeal filed one day late through oversight of counsel's clerk—Time extended.)

('33) 20 AIR 1933 Cal 796 (797) : 146 Ind Cas 359 (DB), *Benodini Choudhurani v. Jagabandhu Roy*. (Wrong advice as to time for appeal—Appeal filed within such time, though after the correct period of limitation, but without any stamp at all—Delay not excused.)

10. (1878) 48 L J Ex 167 (168) : 39 L T 411 : 27 W R (Eng.) 245.

10a. ('38) 67 Cal L Jour 107 (109) (DB), *Phani Bhusan Pal v. Sm. Nalinibala*.

('38) 25 AIR 1938 Pat 413 (418) : 17 Pat 507 : 177 Ind Cas 564 (DB), *Nrisingha Charan Nandy v. Trigunand Jha*. (Party acting on advice of lawyer who was known to be a careful advocate—Lawyer's advice not unreasonable and lawyer not careless or negligent—Delay should be excused.)

('33) 20 AIR 1933 Oudh 523 (524) : 9 Luck 193 : 146 Ind Cas 127 (FB), *Mithoo Lal v. Jamna Prasad*.

[See also ('32) 19 AIR 1932 Cal 589 (589) : 59 Cal 781 : 140 Ind Cas 662 (DB), *Surendra Mohan v. Mohendra Nath*. (Citing *Highton v. Treherne*, (1878) 48 L J Ex 167 and observing that this furnishes the true rule of guidance.)]

11. ('51) 38 AIR 1951 Simla 209 (Pr 15) (DB), *Raj Malik v. Susanta Sen*.

('44) 31 AIR 1944 Oudh 135 (139) : 211 Ind Cas 499 (DB), *Municipal Board, Lucknow v. Kali Krishna*. (Application for leave to appeal to Privy Council filed beyond limitation due to misapprehension of counsel of long standing as to period of limitation—Counsel consulting old edition of commentary prior to amendment shortening period of limitation—Misapprehension cannot be said to be *bona fide* but is due utter carelessness—Delay not excused.)

('38) 67 Cal L Jour 107 (110) (DB), *Phani Bhusan Pal v. Sm. Nalinibala*.

('38) 25 AIR 1938 Nag 156 (159) : 1 L R (1938) Nag 409 : 173 Ind Cas 369 (DB), *Krishna Rao v. Trimbak*.

('33) 20 AIR 1933 Oudh 523 (525) : 9 Luck 193 : 146 Ind Cas 127 (FB), *Mithoo Lal v. Jamna Prasad*.

('29) 16 AIR 1929 Bom 393 (395) : 122 Ind Cas 64 (DB), *Bijuboo v. Rajaballi*. (AIR 1924 Rang 148 (DB), *Tin Tin Nyo v. Maung Ba Saing* and 34 Cal 216 (DB), *Sarat Chander v. Saraswati*, followed.)

('34) 21 AIR 1934 Nag 52 (54) : 144 Ind Cas 41, *Nareshwar v. Chabildas*. (Mistake of pleader in failing to notice Full Bench decision of High Court in province where the pleader practised—Extension under this section cannot be granted.)

('30) 17 AIR 1930 Rang 209 (210) : 127 Ind Cas 379, *Hatin v. Osi Ullah*. (Advocate himself not looking into question of time for appeal but accepting statement of his clerk that eight days were allowed for obtaining copies—Advocate himself not examining papers to see if statement is correct.)

('33) 20 AIR 1933 Nag 219 (220) : 145 Ind Cas 760 : 29 Nag LR 295, *Ramarao v. Santoshrao*. (Pleader whose power to appear had expired with trial Court, presenting appeal in ignorance but not taking steps to find out whether appeal was properly presented though mistake in form brought to his notice—Delaying in the hope that irregularity might escape detection—*Held*, there was no proper cause for delay in filing appeal.)

i. e., not one committed in spite of due care and attention¹² or is one

- ('26) 13 AIR 1926 Lah 343 (344) : 92 Ind Cas 991, *Puran Chand v. Emperor*. (Negligence of party and counsel in not paying deficit court-fee ordered to be paid—Time cannot be extended.)
- [But see ('28) 15 AIR 1928 Cal 468 (471, 472) : 55 Cal 798 : 111 Ind Cas 708 (DB), *Ambika Ranjan v. Manikganj Loan Office*. (It was held that where party acted *bona fide* on advice negligently given, there may be a sufficient cause—It is submitted that this view is not correct.)]
- ('20) 7 AIR 1920 Lah 241 (242) : 1 Lah 508 : 59 Ind Cas 556, *Surta Singh v. Emperor*. (Through want of due diligence of counsel, criminal appeal, instead of being filed in Sessions Court, was filed in High Court—Appeal re-presented in Sessions Court after limitation—*Held*, accused should not be deprived of his appeal being heard on merits merely because his counsel had been somewhat careless—Delay excused—Submitted wrong.)]
12. ('40) 27 AIR 1940 Rang 14 (16) : 1939 Rang L R 639: 186 Ind Cas 715, *Firm R. M. A. L. v. Ko Shan*. (Litigant asking his advocate to file appeal and leaving it entirely to him to take necessary steps—Advocate filing appeal in wrong Court—Litigant cannot claim to have acted in good faith unless lawyer so acted.)
- ('39) 26 AIR 1939 Oudh 245 (247) : 14 Luck 701 : 183 Ind Cas 436 (DB), *Nazir Hasan Khan v. Ganga Din*.
- ('23) 10 AIR 1923 Lah 612 (614) : 72 Ind Cas 732, *Umrao Baksh v. Malik Muhammad Khan*.
- ('32) 19 AIR 1932 Cal 589 (600) : 59 Cal 781 : 140 Ind Cas 662 (DB), *Surendra Mohan v. Mohendra Nath*.
- ('18) 5 AIR 1918 Pat 336 (338) : 46 Ind Cas 509 (DB), *Jodhan v. Nankhu*. (Appeal filed with stamp which no vakil exercising due care and intelligence could have imagined was sufficient—Delay caused in supplying full fee when alone the appeal becomes valid, not excused.)
- ('24) 11 AIR 1924 Rang 148 (149) : 1 Rang 584 : 77 Ind Cas 385 (DB), *Tin Tin Nyo v. Maung Ba Saing*. (Per Pratt, J.)
- ('33) 20 AIR 1933 Oudh 523 (525) : 9 Luck 193 : 146 Ind Cas 127 (FB), *Mithoo Lal v. Jamna Prasad*.
- ('07) 34 Cal 216 (219, 220) : 5 Cal L Jour 380 (DB), *Sarat Chander v. Saraswati*.
- ('26) 93 Ind Cas 846 (877) (Lah), *Labhu Ram v. Mohammad Din*. (Mistake of counsel not due to ignorance but to want of due care and attention.)
- ('18) 5 AIR 1918 Lah 67 (67, 68) : 43 Ind Cas 317 : 1917 Pun Re No. 95 (DB), *Resal Singh v. Shadi*. (Revision application filed in place of appeal—On application of party, revision converted into appeal at a time when period for appeal had expired—Mistake not shown to be *bona fide*—Extension of time was not granted.)
- ('28) 15 AIR 1928 Lah 216 (218) : 9 Lah 76 : 104 Ind Cas 281 (DB), *Secretary of State v. Tirath Ram*. (Alteration of law proved to be known to Secretary of State through his law officers—Extension urged on ground that effect of alteration was not fully appreciated—*Held* extension could not be granted.)
- ('33) 20 AIR 1933 Lah 568 (569) : 144 Ind Cas 627 (DB), *Uttam Chand v. Vishan Das*. (Preferring appeal to wrong Court after consulting counsel.)
- ('36) 23 AIR 1936 Lah 935 (936) : 167 Ind Cas 756, *Ghulam Muhammad v. Barkat Ali*. (Deficient court-fee—Application for extension of time to make up deficiency not made till after about seven months after its discovery—Appeal barred during that time—Extension was not granted.)
- ('18) 5 AIR 1918 Lah 355 (356) : 45 Ind Cas 542, *Ahmed Hussain v. Mt. Shamsulnisa*. (Mistake is not *bona fide* when appeal is presented to Court having no jurisdiction.)
- ('12) 15 Ind Cas 170 (171) (Lah) (DB), *Mt. Harnam Kaur v. Sohan Singh*. (Probate—Appointment of receiver—Appeal to Divisional Court—Subsequent appeal to High Court preferred out of time—Mistake due to carelessness—Time was not extended.)

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which could have been avoided by due care and attention,¹³ it is not a sufficient cause. If it is due to want of reasonable skill on the part of the legal adviser, it will stand on the same footing as negligence. A normal standard of efficiency is expected of a legal adviser, and where an advice is given which no legal adviser of reasonable skill would be expected to give, it must be considered that the adviser acted negligently; in such a case there is no sufficient cause.¹⁴ An *obvious* mistake cannot be said to be *bona fide*.¹⁵ But where the advice is given after

(1938) 25 AIR 1938 Lah 81 (82) : I L R (1938) Lah 379 : 178 Ind Cas 510, *Amrit Lal v. Phool Chand*.

[See also (1949) 36 AIR 1949 Assam 24 (24) (DB), *Sambhunath v. Gobindapriya*, ("Sufficient cause"—Mistake of pleader on question of limitation for filing appeal held by lower appellate Court not to be *bona fide* so as to extend period of limitation—High Court would not interfere in second appeal.)

(1903) 30 Cal 309 (314, 315, 316) : 30 Ind App 20 : 8 Sar 431 (PC), *Ram Narain Joshi v. Parmeswari Narain Mahta*.

(1911) 11 Ind Cas 812 (813) (Rang), *Salvador v. Meyer & Co.* (Mistake of law owing to lack of ordinary diligence.)

(1929) 16 AIR 1929 Mad 91 (92) : 112 Ind Cas 307 (DB), *Lakshmikanthamma v. Ranganayakulu*. (Insolvency matters discussed in proceeding before District Munsif acting in exercise of original jurisdiction—Vakil's affidavit not saying that he advised that an appeal lay only under S. 75, Provincial Insolvency Act, and not under S. 47, C. P. C. — Appeal filed in sub-Court beyond time as an afterthought — Delay not excused.)]

13. (1909) 1 Ind Cas 904 (905, 906) : 5 Nag L R 25, *Vithia v. Sakhya*. (Test is whether the wrong action was taken under an honest though mistaken belief formed with due care and attention.)

(1911) 12 Ind Cas 677 (678, 679) (DB) (Cal), *Sundar Koer v. Raghunath Sahai*. (Do.)

(1924) 11 AIR 1924 Nag 279 (280) : 78 Ind Cas 154 (DB), *Padamraj Fhulchand v. Mitsui Bushan Kesha Ltd.* (Ignorance of lawyer as to shortened period of limitation which could have been avoided with due care and attention is not a sufficient cause.)

(1928) 110 Ind Cas 533 (534, 535), (DB) (Lah), *Muhammad Amin v. Chanan Mal*.

(1986) 13 Cal 62 (65, 66) (DB), *Bhopal Chandra Lahiri v. Solomon*. (Vakil not having read the document is no sufficient cause.)

14. (1950) 37 AIR 1950 Raj 2 (Pr 3), *Badrinarain v. Chandanmal*. (Case of appeal filed with no court-fee stamp owing to wrong advice of counsel due to gross want of legal skill.)

(1944) 31 AIR 1944 Oudh 135 (138) : 211 Ind Cas 499 (DB), *Municipal Board, Lucknow v. Kali Krishna*. (Ignorance of lawyer of long standing as to shortened period of limitation which was in vogue for a number of years—Counsel consulting old edition—No sufficient cause.)

(1938) 67 Cal L Jour 107 (110) (DB), *Phani Bhusan Pal v. Sm. Nalinibala Dasi*.

(1923) 10 AIR 1923 Pat 140 (141, 142) : 63 Ind Cas 278 (DB), *S. C. Dey v. Mt. Rajwanti Kuer*. (Where a mistake is such that it could not have been committed by a practitioner with ordinary experience, delay will not be excused.)

(1932) 19 AIR 1932 Cal 171 (176, 177) : 144 Ind Cas 561 (DB), *Secy. of State v. Hindustan Co-operative Insurance Society, Ltd.* (Advice which no responsible lawyer could have been expected to give — Wrong proceeding on such advice — Delay was not excused.)

15. (1945) 32 AIR 1945 Oudh 94 (96), *Ram Ablakh v. Debi Prasad*, ((1878) 48 L J Ex 167, *Highton v. Treherne* and (1937) AIR 1937 P C 276: 31 Sind L R 672 (PC), *Rajendra v. Rajeshwar*, Rel. on.)

(1924) 11 AIR 1924 Rang 148 (149, 153) : 1 Rang 584 : 77 Ind Cas 385 (DB), *Tin Tin Nyo v. Maung Ba Saing*. (No care at all was taken to consider forum of appeal.)

due care and attention,^{15a} or proceeds on a mistake which even a practitioner possessing reasonable skill is likely to commit, then the mistaken advice would be a sufficient cause.¹⁶ In *Nagindas v.*

- (06) 3 Cal L Jour 53n (SN), *Diem Sana v. Gunendra Nath*. (Valuation obviously over Rs. 5000 — Appeal preferred to District Court — Case of negligence — No indulgence.)
- (07) 34 Cal 216 (220, 221) : 5 Cal L Jour 380 (DB), *Sarat Chandra Bose v. Saraswati Debi*.
- (29) 16 AIR 1929 Mad 91 (92) : 112 Ind Cas 307 (DB), *Lakshmikanthamma v. Benganayakulu*. (Where the mistake is both stupid and unaccountable, the suspicion of ulterior motive can hardly be said to have been displaced.)
- 15a. (40) 27 AIR 1940 Rang 14 (15) : 1939 Rang L R 639 : 186 Ind Cas 715, *Firm R. M. A. L. v. Ko Shan*.
- (38) 25 AIR 1938 Pat 413 (415) : 17 Pat 507 : 177 Ind Cas 564 (DB), *Nrisingha Charan Nandy v. Trigunand*. (Pleader filing appeal rightly in his view — Anticipation regarding Judge's view on valuation of suit difficult — Lawyer should be deemed to have used due care.)
- (13) 20 Ind Cas 3 (6, 7) (DB) (Lah), *Fakhur Ali v. Mt. Sahib Nur*. (Senior pleader giving advice after due deliberation — Due diligence also shown — Delay was excused.)
- (26) 133 Ind Cas 877 (878) (Lah) (DB), *Parja v. Dumanun*. (Mistake in failing to get fresh power of attorney from legal representatives.)
- (13) 19 Ind Cas 931 (933) (Cal) (DB), *Rakhal Chandra Ghose v. Ashutosh Ghose*. (Mistake in calculating period of limitation.)
- (30) 17 AIR 1930 Oudh 49 (50) : 124 Ind Cas 362 (DB), *Chhotey Lal v. Mt. Devi Brij Rani*. (Mistaken advice by counsel.)
- (06) 10 Oudh Cas 291 (294) (DB), *Nawab Mirza Muhammad Bakar Ali Khan v. Muhammed Bakar*. (Do.)
- (16) 3 AIR 1916 Lah 268 (269) : 32 Ind Cas 640, *Azim Ullah v. Gokal Chand*. (Mistaken advice by counsel due to change in law.)
- (17) 4 AIR 1917 Low Bur 74 (76) : 8 Low Bur Rul 566 : 37 Ind Cas 815 (DB), *Ma Mai Gali v. Maung Tun Win*.
16. (51) 38 AIR 1951 Sau 12 (Pr 4), *Ahmed Arabi v. Osman Isa*. (Application for leave to appeal as pauper filed by advocate on last day of limitation — Wrong impression of advocate that personal presentation was not necessary — Application returned but re-presented on next day by appellant — Delay of one day held should be condoned.)
- (48) 1948 Bur L R 606 (612, 614) (DB), *V. Shwe Kyw v. Ma Tin U*. (Appeal filed in wrong Court due to mistaken but *bona fide* advice of pleader — Question of proper forum a matter of justifiable doubt — Time for filing appeal in proper Court extended.)
- (42) 29 AIR 1942 Oudh 125 (127, 128) : 17 Luck 487 : 197 Ind Cas 723 (DB), *U. P. Govt. v. C. M. T. Association*. (Connected suits with a common judgment having different forums of appeal — Delay in filing appeal due to wrong advice of pleader that appeals lay to same Court — No gross negligence but mistake natural — Sufficient cause for delay.)
- (38) 25 AIR 1938 Pat 413 (415) : 17 Pat 507 : 177 Ind Cas 564 (DB), *Nrisingha Charan v. Trigunand*.
- (11) 12 Ind Cas 677 (679) (Cal) (DB), *Sunder Kuer v. Raghunath Sahai*.
- (23) 10 AIR 1923 Pat 140 (141, 142) : 63 Ind Cas 278 (DB), *S. C. Dey v. Mt. Rajwanti Kuer*.
- (26) 13 AIR 1926 Cal 688 (689) : 95 Ind Cas 245 (DB), *Dabendra Nath v. Nagendra Nath*. (Conflicting authorities — No want of due diligence in giving wrong advice — Delay excused.)
- (12) 16 Ind Cas 425 (426, 427) (Cal) (DB), *Bonomali Gaontia v. Padma Lochan Gaontia*. (Mistake not obvious or inexcusable — No negligence.)
- (12) 13 Ind Cas 116 (117) (All) (DB), *Abdul Ghani v. Abdul Majid*. (Mistake not unnatural under the circumstances — Delay excused.)

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Nilaji,¹⁷ it was held that the delay caused by the wrong advice of the legal adviser not knowing a recent change in the law curtailing the period of limitation was a "sufficient cause" for the delay. It was observed that the English authorities were to the same effect. Where the wrong advice amounts to a sufficient cause, it must further be shown that the appellant or applicant has otherwise been reasonably diligent in prosecuting his proceeding, before the discretion can be exercised in his favour.¹⁸ See also Note 7.

Where extension is claimed on the ground of mistake of the legal adviser, there ought to be proper evidence establishing the fact that there was a mistake and that it was *bona fide*. The legal adviser should file an affidavit to that effect.¹⁹

('12) 16 Ind Cas 940 (942) (Cal) (DB), *Ranjit Missir v. Ramudar Singh* (Mistake as to forum due to conflict of judicial decisions.)

('09) 1 Ind Cas 687 (688) : 12 Oudh Cas 31, *Kishan Dayal v. Raja Singh*. (Mistake in spite of due care and attention on doubtful point — Held, sufficient cause.)

('22) 9 AIR 1922 All 490 (491) : 44 All 636 : 68 Ind Cas 812 (FB), *Shib Dayal v. Jagannath*. (Mistake of pleader in *muffasil* about High Court practice.)

('13) 17 Ind Cas 155 (156, 157) (DB) (Cal), *Prosonno Kumar Debi v. Ram Chandra Singha*. (Decree obtained before filing appeal — Decree not filed with appeal owing to accidental mistake.)

('98) 2 Oudh Cas 133 (135), *Lal Bahadur v. Mir Bakar Husain*. (Point of law of some difficulty — Pleader's mistaken action supported by some authorities — Extension of period under this section was allowed.)

('07) 1907 Upp Bur Rul 3rd Quarter Lim 1 (2), *Nga Po An v. Nga Nyun Bu*. (*Bona fide* mistake of law is sufficient cause where there is no want of diligence or *bona fides* and there was some reason for entertaining the mistaken view of law.)

('33) 20 AIR 1933 Rang 96 (98) : 142 I C 185 (DB), *Ma Sein v. S. T. R. M. Firm*. [See ('13) 19 Ind Cas 438 (439) : 1913 Pun Re No. 85, *Harjas Mal v. Mt. Kahni*. (Decree obtained before filing appeal — Decree not filed with appeal owing to accidental mistake.)

('95) 11 Cal 767 (776), *Gopal Chandra Lahri v. Solomon* (*Bona fide* mistake — Party diligent after mistake was discovered — Delay excused.)]

17. ('24) 11 AIR 1924 Bom 399 (406, 407) : 48 Bom 442 : 80 Ind Cas 862 (DB).

[See however ('25) 12 AIR 1925 Nag 193 (193) : 75 Ind Cas 878, *Gopal Ganesh v. Walabdas Santukiram*. (Ignorance of change, of which sufficient notice has been given, is not sufficient cause.)]

18. ('24) 11 AIR 1924 All 867 (868) : 78 Ind Cas 677, *Prabhu Dayal v. Murli Dhar*.

('27) 14 AIR 1927 Cal 829 (829, 830) : 105 Ind Cas 217 (DB), *Promotha Nath v. Bhabataran Ganguly*. (Wrong advice held sufficient cause — Diligence shown — Delay was excused.)

[See ('32) 19 AIR 1932 Cal 534 (535) : 59 Cal 1052 : 138 Ind Cas 754 (DB), *Nandalal Ganguli v. Dasarathi Mukherji*. (Party acting on wrong advice — Delay was excused on the ground that he had been shown to be diligent.)

('25) 12 AIR 1925 Cal 175 (178) : 79 Ind Cas 924 (DB), *Ilahi Newaz Khan v. Biseswar Baisya*.]

19. ('18) 5 AIR 1918 Cal 53 (55) : 45 I C 725 (DB), *Iswar Chandra v. Arjan*.

('18) 5 AIR 1918 Lah 67 (67) : 1917 Pun Re No 95 : 43 Ind Cas 317 (DB), *Resal Singh v. Shadi*.

[See also ('45) 32 AIR 1945 Oudh 94 (96), *Ram Ablakh v. Debi Prasad*. (Party attributing delay to wrong legal advice not filing affidavit to prove such fact nor disclosing name of lawyer — Party is not entitled to indulgence.)]

14. Amendment of decree. — The amendment of a decree under S. 152 of the Code of Civil Procedure does not give a fresh starting point of time for appeal.¹ But such an amendment may be a "sufficient cause" under this section for not filing the appeal within time,^{1a} though every amendment does not necessarily entitle a party to claim an extension of time under this section.^{1b} Whether there is a sufficient cause for such extension will depend upon the circumstances of the case.² If the grounds on which the appeal is based are intimately connected with the amendment of the decree, or if the grounds are directed against the decree only in so far as it has been amended, the Court should exercise in the appellant's favour the discretion vested in it under S. 5.³ There is a difference of opinion as to whether, when the grounds of appeal have no reference to the amendment, the discretion under S. 5 can be exercised in favour of the appellant. On the one

Section 5 — Note 14

1. ('06) 3 Cal L Jour 188 (191) (DB), *Brojolarai v. Tara Prasanna*.
 ('36) 165 Ind Cas 53 (55) (Cal), *Kedar Nath Moyra v. Gollam Hossein Mollah*.
 ('29) 16 AIR 1929 Cal 676 (677) : 57 Cal 549 : 122 Ind Cas 634 (DB), *Nagendra Nath v. Ambica Charan*.
 [But see ('31) 18 AIR 1931 Cal 578 (579) : 133 Ind Cas 571 (DB), *Soudamini Dasi v. Nabalak Mia Bhuia*, (Submitted not correct.)]
 See also A. I. R. Commentary on the Civil Procedure Code, 5th (1950) Edn., S. 152 Note 14.
- 1a. ('31) 18 AIR 1931 Cal 578 (579) : 133 Ind Cas 571 (DB), *Soudamini Dasi v. Nabalak Mia Bhuia*. (Mortgagor allowed to redeem on payment of certain sum — Sum subsequently reduced — Appeal questioning right of redemption preferred within limitation of amended decree but after limitation from original decree — Extension was allowed.)
 ('29) 16 AIR 1929 Cal 676 (678) : 57 Cal 549 : 122 Ind Cas 634 (DB), *Nagendra Nath v. Ambica Charan*.
 ('35) 22 AIR 1935 Oudh 461 (462) : 11 Luck 413 : 157 Ind Cas 810 (DB), *Md. Yasin Khan v. Mt. Hansa*.
 [See also ('01) 24 Mad 646 (649) (DB), *Visvanathan Chetty v. Ramanathan Chetty*.
 ('19) 6 AIR 1919 Lah 250 (251) : 51 Ind Cas 712 : 191 9 Pun Re No. 64 (DB), *Har Kishan v. Lahore Bank, Ltd.* (One party applied for amendment of decree within time allowed for appeal — Another party thereafter preferring appeal — Time for appeal can be extended.)]
- 1b. ('06) 3 Cal L Jour 188 (192) (DB), *Brojolarai v. Tara Prasanna*.
2. ('06) 3 Cal L Jour 188 (192) (DB), *Brojolarai v. Tara Prasanna*. (Grounds of appeal directed against decree only in so far as it has been amended — Extension was allowed.)
 ('21) 8 AIR 1921 All 60 (61) : 43 All 389 : 61 Ind Cas 69 (DB), *Gajadhar Singh v. Baant Lal*. (Amendment unconnected with grounds of appeal — Time was not extended.)
 ('32) 19 AIR 1932 Cal 534 (535) : 59 Cal 1052 : 138 Ind Cas 754 (DB), *Nandalal v. Dasarathi*.
3. ('06) 3 Cal L Jour 188 (192) (DB), *Brojolarai Choudhury v. Tara Prasanna Bhattacharjee*. (22 Mad 364 (SB), *Parameshwara v. Seshagiriappa* and 32 Cal 908 (DB), *Amar Chandra v. Asad Ali*, followed.)
 ('32) 19 AIR 1932 Cal 534 (535) : 59 Cal 1052 : 138 Ind Cas 754 (DB), *Nandalal v. Dasarathi*.
 ('36) 165 Ind Cas 53 (55) (Cal), *Kedar Nath Moyra v. Gollam Hossain Mollah*.
 ('19) 6 AIR 1919 Oudh 91 (91) : 58 Ind Cas 995, *Hewlett v. Behari Lal*.
 ('30) 17 AIR 1930 Pat 142 (143) : 117 Ind Cas 187 (DB), *Mt. Gopi Bibi v. Chanu Prasad*.

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hand it has been held in the undermentioned cases⁴ that the discretion cannot be exercised; while it has been held in the cases noted below⁵ that even in such cases circumstances may appear which may amount to sufficient cause. Where the appellant is under a *bona fide* mistake that time runs from the date of the amendment and he is not shown to be negligent or guilty of any laches, time may be extended.

Where after an appeal is preferred the name of a defendant which had been omitted in the decree is added by way of amendment, and the appellant gets such name substituted in the appeal but after the expiry of the period of limitation, it would be a sufficient cause within the meaning of section 5.⁶ See also the undermentioned case.⁷

See also Article 156 Note 8.

15. Illness of party.—A mere plea of sickness is not a sufficient cause for excusing the delay in filing an appeal or application,¹ unless the effect of the illness was such as, in the circumstances, will afford reasonable excuse for the delay.² The question whether the effect of the sickness is such that it afforded sufficient cause for failure to present the appeal or application within the prescribed period is one

4. ('20) 7 AIR 1920 Pat 622 (624, 625) : 57 Ind Cas 236 (FB), *Golab v. Janki Kuer*. (3 Cal L Jour 188 (DB), *Brojolar v. Taraprasanna*, followed.)

('21) 8 AIR 1921 All 60 (61) : 43 All 380 : 61 Ind Cas 63 (DB), *Gajadhar Singh v. Basant Lal*. (Do).

('30) 17 AIR 1930 Oudh 463 (465) : 129 Ind Cas 171, *Deep Singh v. Raghunath Singh*.

5. ('32) 19 AIR 1932 Cal 534 (535) : 59 Cal 1052 : 138 I C 754 (DB), *Nandalal v. Dasarathi*. (3 Cal L Jour 188 (DB), *Brojolar v. Taraprasanna*, and ('21) AIR 1921 All 60, (DB), *Gajadhar v. Basant Lal*, dissented from.)

('16) 3 AIR 1916 Cal 348 (349) : 34 Ind Cas 556 (DB), *Satikanta Banerjee v. Ram Chandra Chatterjee*.

('36) 165 Ind Cas 53 (55) (Cal), *Kedar Nath Moyra v. Gollam Hossain Mollah*.

6. ('36) 23 AIR 1936 All 666 (667, 668) : 164 Ind Cas 1066 (DB), *Mt. Kulsoom-un-nissa v. Nur Mohammad*.

7. ('45) 32 A I R 1945 Mad 62 (64) : ILR (1945) Mad 378 (DB), *Janikamma v. Rajagopala*. (Mortgage decree amended under S. 19, Madras Agriculturists' Relief Act, and amendment substantially affecting relief granted to mortgagee under the original decree — Appeal filed within time prescribed by Art. 156 from date of amendment is not barred — Even otherwise period can be extended under S. 5.)

Section 5 — Note 15

1. (1864) 1 Suth W R (Misc App) 23 (23) (DB), *Mazoom Ali v. Panchoo Bibee*.

('22) 9 AIR 1922 Pat 47 (49) : 64 I. C. 55 (DB). *Md. Abdul Kasim v. Chaturbhuj*. (Illness of agent of party.)

('25) 12 AIR 1925 Cal 175 (178) : 79 Ind Cas 924 (DB), *Elahinewas v. Biseswar*. (Illness in party's family.)

('36) 23 AIR 1936 Rang 183 (184) : 14 Bang 155 : 162 Ind Cas 664 (DB), *S. M. Ally v. Maung San Nyein*.

[But see ('04) 1904 Pun Re No 21 : 1904 Pun L R No. 145. *Maharaj Narain v. Mt. Banoji*]

2. ('42) 1942 Nag L Jour 311 (312) *Madho v. Shamrao*. (Delay of 16 days in filing revision application, caused by an acute attack of appendicitis to the applicant a week before the expiry of limitation was condoned.)

('36) 23 AIR 1936 Rang 183 (184) : 14 Rang 155 : 162 Ind Cas 664 (DB), *S. M. Ally v. Maung San Nyein*.

('83) 1883 Pun Re No. 25, *Laxman v. Atma*. (Appeal presented out of time — In this case illness of party was held sufficiently good cause.)

of fact to be decided in the circumstances of the particular case.³ Even where the sickness may be said to be sufficient cause, it is further necessary for the party to show that he was reasonably diligent in prosecuting his appeal till the day when he fell ill. If he negligently waited till the last moment and then found himself ill, the delay will not be excused.⁴ In *Ma Thein Khin v. Ma U Byu*,⁵ the High Court of Rangoon held that antecedent diligence need not be shown and that the illness, without more, will afford a sufficient ground for excusing the delay. In the undermentioned cases,⁶ time was extended on the ground of illness, but the question of previous diligence by the party was not adverted to. On the principles discussed in Notes 7 and 8 it is submitted that the view of the Rangoon High Court is not correct.

The illness of a party *after* the expiry of the period of limitation will, in any case, not be a sufficient cause for extending the time under this section.⁷

16. Minority, if sufficient cause. — In respect of *suits* and *applications for execution of decrees*, s. 6 recognises minority as a ground for extension of time. There is no such absolute right to the extension of time on the ground of minority so far as appeals and other applications are concerned.¹ In *Brijobuttee v. Pertaub Singh*,^{1a} where an appeal on behalf of certain minors had been dismissed by the

3. (36) 23 AIR 1936 Rang 183 (184) : 14 Rang 155: 162 I. C. 664 (DB), *S. M. Ally v. Maung San Nyein*. (Dissenting from 2 Upp Bur Rul 451, *Le Hu v. Ah Yin*, where it was held that proof of *entire* disability, such as paralysis is necessary to be proved.)

[See also ('15) 2 AIR 1915 Lah 176 (176): 27 Ind Cas 703, *Kalu v. Sowaria*. (Application to re-admit petition for review — Under the circumstances, held that illness of petitioner was no ground for extending time.)]

4. ('47) 1947 Oudh W N (C C) 527 (528) (DB), *Kalka Singh v. Pratapbhan*. (AIR 1919 Pat. 503, *Rel. on.*)

('42) 1942 Nag L Jour 311 (312) *Madho v. Shamrao*. (Acute appendicitis a week before the expiry of limitation—Applicant cannot be said to be acting without due diligence in not filing application till last week of limitation — Daly of 16 days condoned.)

('30) 17 AIR 1930 Nag 121 (121, 122), 119 I. C. 679 *Hakimiya v. J. C. Gammon*. (Steps not taken to file application before applicant was attacked with serious illness — Time not extended.)

('19) 6 AIR 1919 Pat 503 (505) : 52 I C 225 (DB), *Jahar Mal v. G. M. Pritchard*.

('20) 7 AIR 1920 Pat 594, (594, 595): 55 Ind Cas 17 (DB), *Juleswar Dayal Singh v. Ram Hari Sahu*. (Illness of party's servant.)

5. ('28) 15 AIR 1928 Rang 165 (165) : 6 Rang 571 : 119 Ind Cas 215.

6. (34) 21 AIR 1934 All 367(368) : 56 All 591 : (DB), *Gouri Shankar v. Kashi Nath*. (23) 10 AIR 1923 All 536 (537) : 76 I. C. 375 (DB), *Deo Indar Singh v. Khushi Ram*.

7. ('34) 21 AIR 1934 Lah 464 (465) : 148 I. C. 818, *Qumri Charan v. Din Dayal*.

Section 5 — Note 16

1. (18) 5 AIR 1918 Oudh 163 (165, 166) : 46 Ind Cas 68 (70) (DB), *Narendra Bahadur Singh v. Oudh Commercial Bank of Fazabad*.

See also Section 6 Note 13.

1a. (1860) 8 Moo Ind App 160 (161, 162) : 3 Suth W R P C 36 : 13 Moo P C 465 : 1 Suther 408 : 1 Sar 740 (P C).

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Privy Council for non-prosecution and the appellant applied for restoration of the appeal, Lord Justice Knight-Bruce observed as follows :

"The delay, in various ways, has been so considerable that . . . it is probable, to say the least, that if Baboonan's personal interests had been alone concerned in this matter, the application now made would have been wholly unsuccessful. Their Lordships, however, cannot but give some degree of consideration to the circumstance that there are *infants* concerned whose interests were confided to him. Now, their Lordships do not mean to go to the length of saying, that where infants are concerned any degree of delay may be considered justifiable, or excusable, or such as may be passed over ; as there may be circumstances so strong as even to prevent infancy from being an apology or an excuse. Their Lordships, however, after much consideration, do not view the present case in that light, and considering the apology, or excuse of infancy, and considering the manner in which the interests of minors are involved; and the state in which the part of India from whence the case comes was, in and after the year 1857, they are of opinion, that on certain terms this application may be acceded to."

The principle of this decision would seem to apply to the excuse of delay in filing appeals and applications on behalf of minors. There is, however, a difference of opinion on the point. In *Ganesh v. Sitaram*,² it was held that where infants are concerned they ought not, when they can be protected consistently with fairness to other people, to be prejudicially affected by the negligence or omission of their adult relations. In *Kursondas Dharmsey v. Bai Gangabai*,³ where the guardians of the minors *acted with propriety* in consulting pleaders and not filing the appeal on their advice, it was held that there was no sufficient cause for extending time. In *Prabh Dial v. Isher Devi*,⁴ it was observed that a minor is in no better position than his guardian would be if he were the appellant and that the minor has his remedy against the guardian for loss suffered through his neglect. In *Umrao Begum v. Rahmat Ilahi*,^{4a} it was held that minority is a factor to be taken into account when considering circumstances which justify the application of this section. It was further observed that applications for the extension of time under the section should be more liberally construed in favour of minors than other litigants. In *Cursandas Nathu v. Ladkavahoo*,⁵ where the guardian's failure to appeal was due to his having a strong personal motive for not appealing which was opposed to the interests of the minor, it was held that it was a sufficient cause for extending time. In the undermentioned case,⁶ where a decree-holder died pending

2. ('16) 3 AIR 1916 Bom 153 (154) : 41 Bom 15 : 36 Ind Cas 439 (DB). (8 Moo Ind App 160 (PC), *Birjobuttee v. Pertaub Singh* and 30 Bom 329 (DB), *Karsondas v. Gungubai*, referred to.)

[See also ('90) 12 All 461 (480) : 1890 All W N 149 (FB), *Bechi v. Ahsan Ullah*. ('25) 12 AIR 1925 Sind 60 (62) : 17 Sind L R 306 : 78 Ind Car 953 (DB), *Nur Muhammad v. Hassomal*.]

3. (06) 30 Bom 329 (331, 332) : 7 Bom L R 965 (DB).

4. ('06) 1906 Pun L R No. 164, p. 544 (545). (Laches of guardian — Delay cannot be excused.)

4a. (39) 26 AIR 1939 Lah 439 (445) : I L R (1939) Lah 433 : 186 I. C. 77 (DB).

5. ('96) 20 Bom 104 (108, 109) (DB).

6. ('24) 11 AIR 1924 Oudh 82 (84) : 26 Oudh Cas 244 : 73 Ind Cas 215, *Akhtar Husain v. Quadrat Ali*.

execution proceedings and his legal representatives were minors who could not obtain execution without a succession certificate being obtained and such certificate was obtained after three years, it was held that the circumstances amounted to sufficient cause for extending time for the application to be impleaded as the legal representatives. See also the undermentioned cases⁷ in which time was extended.

17. Fraud. — Where the appeal was not presented owing to the deliberate fraud of the vakil's clerk in running away with the money and the pleader could not be said to be negligent and the party implicitly trusted him, it was held that it was a sufficient cause for extending the time for filing the appeal under this section.¹ Where an appeal filed in a representative suit was returned for some corrections but was fraudulently not re-presented by the appellants, and the persons represented applied that they should be allowed to prosecute the appeal, it was held that the application must be regarded as a fresh appeal, and that the delay should be excused.²

A mere threat, however, used against the applicant is not a sufficient cause for the delay in filing the application.³

18. Poverty or want of funds. — The poverty of a party or his want of funds is not a 'sufficient cause' within the meaning of this section. In *Moshaullah v. Ahmedullah*,¹ their Lordships of the Calcutta High Court observed :

"The grounds assigned by the appellant for special indulgence under S. 5 of the Limitation Act were then stated to be that he had not sufficient funds to

7. ('48) 35 AIR 1948 Mad 201 (202), *Ankamma v. Raghavamma*. (Suit dismissed for default in bringing minor legal representatives of deceased defendant — Application by minors for setting aside order and for bringing them on record filed within three years of date when one of them attained majority—Applicant not guilty of any gross laches and had no knowledge of such adverse order — Time extended.)

('48) 35 AIR 1948 Pat 300 (302) : 26 Pat 220 (DB), *Kamakshya v. Fateh Kumar*. (Previous suit for possession on behalf of minor dismissed — No appeal by guardian against decision — Suit by minor on attaining majority for possession of same property barred by limitation — Minor should have filed appeal against previous decision on attaining majority after getting time for appeal extended under S. 5.)

('16) 3 AIR 1916 Cal 670 (671, 672): 31 Ind Cas 705 (706) (DB), *Sudhakar Raut v. Sadasiv Jhatap Singh*. (Appellants, minors, residing in out-of-way village were allowed to file appeal beyond limitation.)

('04) 1904 Pun Re No. 21 : 1904 Pun L R No. 145, *Maharaja Narain v. Mt. Banoji*. (Time occupied in applying for review and conducting proceedings for declaration of majority and time spent in prison held sufficient cause to file appeal beyond time.)

Section 5 — Note 17

1. ('34) 21 AIR 1934 Lah 986 (987) : 155 Ind Cas 135 (DB), *Allah Wadhaya v. Haji Md. Ramzan Amiruddin*.

2. ('28) 15 AIR 1928 Mad 456 (458) : 108 Ind Cas 298 (DB), *Kumaraswami v. Lakshmana Goundan*.

3. ('15) 2 AIR 1915 Mad 132 (133) : 26 Ind Cas 472, *Kandasamy v. Murugappa*.

Section 5 — Note 18

1. ('86) 13 Cal 78 (79) (DB).

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proceed in the regular manner within the time prescribed by law, and it is now objected that this is not a sufficient cause. We think that the objection is fatal. If such ground be accepted as sufficient cause for a special order of this description, there would be no limit to the period for extending the usual term of limitation to presenting an appeal."

And this view has been followed in a number of cases.²

19. Subsequent decisions altering law. — The fact that subsequent to a decision given against a party, the High Court or the Privy Council has given another decision which has the effect of modifying the law or practice is not a sufficient ground for extending the time for filing an application for review of the judgment.¹ "It is neither consistent with the law nor reason that questions, which have been long ago finally decided by competent tribunals, are to be re-opened at any period of time however remote, in consequence of a decision either in this Court or the Privy Council, which is supposed to modify the law or practice which prevailed at the time of such decisions."² In *Shamacharan v. Bindabun Chunder Roy*,³ Sir Barnes Peacock in delivering the judgment of a Full Bench of the Calcutta High Court observed as follows :

"Now, let us see what would be the consequence of holding that the new decision or the new exposition of the law by the Full Bench was a sufficient excuse for not having applied for the review of judgment within the period of ninety days.

2. ('47) 34 AIR 1947 Lah 210 (213, 215) : 227 Ind Cas 95 (DB), *Balwant v. Jagjit*. (Suit for pre-emption dismissed — Appeal filed with insufficient court-fee for want of sufficient funds — Deficiency made up after period of limitation — Extension of time under S. 5, Limitation Act, held could not be granted.)
- ('09) 1 Ind Cas 73 (75) (Mad) (DB), *Krishnasamy Panikundar v. Ramasamy Chettiar*. (Confirmed on appeal to Privy Council. (A I R 1917 P. C. 179 (P C), *Krishnasami v. Ramasami*.)
- ('14) 22 Ind Cas 884 (885) : 7 Low Bur Rul 90 (DB), *Annamalai v. O. M. M. R. M. Chetty Firm*.
- ('02) 5 Oudh Cas 183 (186), *Hardwar Parshad v. Raja Partab Bahadur Singh*.
- ('87) 9 All 655 (659) : 1887 All W N 185 (DB), *Husrini Begam v. Collector of Muzaffarnagar*. (Appeal under Cl. 10 of Letters Patent.)
- ('90) 12 All 461 (491, 492) : 1890 All W N 149 (FB), *Bechi v. Ahsan Ullah Khan*.
- ('19) 6 AIR 1919 Lah 252 (253) : 49 Ind Cas 871, *Mt. Amtul Quadir v. Muhammad Yusuf*.
- ('89) 3 C P L R 125 (125), *Chamoo Sao v. Mt. Ooji Kalarin*. (Poverty even though accompanied with circumstance that the appellant is a widow would not be sufficient cause.)

Section 5 — Note 19

1. ('68) 10 Suth W R 26 (26) (DB), *Pran Kishen Bhattacharjee v. Bukshee Caze*.
- ('70) 13 Suth W R 120 (120) (DB), *Roy Goodur Suhaye v. Achebur Lall*. (Reversal by Court of appeal of any decree or order in another case in no ground for admitting review after prescribed period.)
- ('72) 17 Suth W R 163 (163), *Bolakee Lall v. Monjee Lall*.
- ('72) 18 Suth W R 317 (318) : 9 Beng L R 187 (DB), *Punchanun v. Gooroodoss*.
- ('73) 19 Suth W R 189 (190), *Jadub Ram Deb v. Ram Lochun Mudduck*.
- ('71) 1871 Pun Re No. 51, *Hurree Singh v. Mukha*. (But when application has been granted on good cause shown then exposition of law laid down since date of judgment sought to be reviewed may properly govern case.)
2. ('66) 6 Suth W R 167 (168) (DB), *Oncop Chunder Paul v. Ekhowree Singh*.
3. ('68) 9 Suth W R 181 (185) : Beng L R Sup Vol 892 (FB).

If it was sufficient excuse for not having applied within the period of ninety days, it would be a sufficient excuse for applying to review every judgment which has been given on resumption suits within the last fifty years, and consequently almost all the titles which depend upon decrees in resumption suits would be altogether upset; because if we hold that there were sufficient grounds to apply for a review of the judgment, in consequence of that decision, we must also hold that there would be sufficient ground for applying for the review of every judgment of the same character which has been passed within the last fifty years. No title, therefore, would be safe which depends upon a decree in a resumption suit."

Still less would such ground be sufficient for excusing the delay in filing an appeal against the judgment.⁴

20. Imprisonment of party. — The imprisonment of a party may constitute a sufficient cause for excusing delay in filing an appeal or application.¹ But the mere fact that the party was in jail without anything more is not necessarily a sufficient cause for extending the time.² In the undermentioned case³ it was held that in the case of criminal offences it is not a sufficient cause for the convict to say that he did not know he had a right of appeal or that he thought his relations would prefer an appeal.

An appeal by a prisoner from jail may be presented to the officer-in-charge under S. 420, Criminal P. C. and such presentation is for the purposes of limitation equivalent to presentation in Court, whatever delay there may be in forwarding it to Court.⁴

21. Non-availability of court-fee stamps. — If a party is prevented from filing his appeal within time by difficulties encountered in procuring the necessary court-fee stamps, he may rely upon the difficulties as constituting "sufficient cause" for the delay.¹ But, as has

4. ('42) 29 AIR 1942 Oudh 447 (447): 201 Ind Cas 658, *Basdeo v. Murlidhar*. (In view of certain rulings of High Court appellant advised that no second appeal lay — These rulings subsequently upset by Full Bench — Second appeal subsequently filed beyond limitation — *Held*, that there was no good ground for excusing delay.)

('68) 10 Suth W R 178 (179) : 2 Beng L R A C 184n (DB), *Mowree Bewa v. Soorundarnath Roy*.

Section 5 — Note 20

1. ('04) 1904 Pun Re No. 21 : 1904 Pun L R No. 145, *Maharaj Narain v. Mt. Banoji*.

2. ('15) 2 AIR 1915 All 240 (240, 241) : 29 I. C. 975 (976) (DB), *Janki v. Parmeshwar*. (Defendant in jail when *ex parte* decree passed — Application under O. 9 R. 13, C. P. C., made after five years when released — Munsif granted application — *Held* application barred by time and proceedings irregular and order without jurisdiction.)

('01) 4 Oudh Cas 303 (312) (DB), *Shameshwar Dat Singh v. Mahadeo Pershad*. (As Act makes no distinction between prisoners and other persons.)

3. ('91) 1891 All W N 10 (10) (DB), *Queen-Empress v. Bhoni Ram*. (Provisions of Act are to be applied with as much strictness to criminal as they are to civil cases.)

4. ('90) 1890 Pun Re (Cr) No. 29 page 96 (97), *Muhammad v. Empress*.

Section 5 — Note 21

1. ('17) 4 AIR 1917 Pat 701 (701) : 1 Pat L Jour 163 : 37 I. C. 211, *Kesho Prasad Singh v. Harbans Raut*.

[See ('17) 4 AIR 1917 Pat 26 (27) : 42 I. C. 675 (DB), *Ram Saray v. Lakshmi Narain*.]

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been seen already in Note 8, the party must have been reasonably diligent in order to claim the indulgence under this section. If he was reasonably diligent, the delay will be excused,² otherwise not.³ Where an appeal was filed in time with stamps of the value of Rs. 3 which was the fee required by law but instead of a single stamp of Rs. 3 two stamps of Rs. 2 and Re. 1 were affixed and it was shown that at the time of filing the appeal no single court-fee label of Rs. 3 was procurable, it was held that time should be extended.⁴

22. Mistake of Court or of its officers — Explanation.

—Under the Act of 1877, there was a specific section, S. 5A, providing for the matter dealt with in the explanation, with this difference that its provisions were mandatory,¹ while the present explanation gives a discretion to the Court to excuse the delay in such cases. The principle on which this explanation is based is that an act of the Court or of its officers shall prejudice no man, the maxim being, *Actus curiae neminem gravabit*. Where the appellant is misled by a doubtful point of practice, or by a change of practice, the delay generally amounts to sufficient cause.² Similarly, where the party is misled or prevented from filing

2. ('17) 4 AIR 1917 Pat 701 (701) : 37 Ind Cas 211, *Kesho Prasad v. Harbans*.

3. ('17) 4 AIR 1917 Pat 26 (27) : 42 Ind Cas 675 (DB), *Ram Sahay v. Lakshmi Narain*. (Appellant deliberately paying insufficient court-fee — He cannot get time to make good deficiency.)

4. ('87) 1887 All W N 212 (212) (DB), *Bansi Lal v. Raghunath Sahai*.

Section 5—Note 22

1. ('96) 20 Bom 736 (743) (DB), *Shrimant Sagaji Rao v. S. Smith*.

2. ('50) 37 AIR 1950 Assam 83 (Pr 7) (DB), *G.-G. in Council v. Jesraj Tilakchand*. (Appeal originally filed in Calcutta High Court transferred to Assam High Court — Appellant being misled by practice of Calcutta High Court not filing appeal in time — Held, there was sufficient cause — Formal application held was not necessary.)

('50) 85 Cal L Jour 299 (302) (DB), *Kedar Lall v. Hari Lall*. (In this particular case there was no change of practice.)

('41) 28 AIR 1941 Pesh 74 (76) : 196 Ind Cas 654 (DB), *Shivan Ditta v. Radhakishan*. (Delay due to party adopting view for which there is authority but on which there is conflict of opinion.)

('16) 3 AIR 1916 Pat 267 (268) : 35 I C 868 (FB), *Ram Asray v. Sheonandan*.

('25) 12 AIR 1925 Pat 765 (770) : 4 Pat 448 : 93 Ind Cas 129 (DB), *Tofa Lal Das v. Moinuddin Mirza*. (One plaintiff dying during suit — Plaintiff misled by Court's order and hence not applying to bring proper legal representatives on record — Held there was sufficient cause.)

('21) 8 AIR 1921 Pat 175 (176) : 62 Ind Cas 649 (FB), *Jotindranath v. Lodna Colliery Co. Ltd.* (Overruled on another point in 23 A I R 1936 Pat 45 (FB). *Gubriel v. Chandra*.)

('17) 4 AIR 1917 Pat 239 (239) : 39 Ind Cas 542 (DB), *Gulab Chand v. Abbas Ali* (Delay in presenting appeal on account of conflicting decisions of High Court — Held sufficient cause.)

('19) 6 AIR 1919 Pat 238 (239, 240) : 52 Ind Cas 959 (DB), *Ramcharita Sahu v. Rama Narain Sahu*. (Appeal against *ex parte* order under O. 21, R. 90, C.P.C. — Delay due to prosecution of application under O. 9, R. 9 — Previous practice that O. 9 was held applicable to execution — Appellant misled by practice — Held sufficient cause.)

('27) 14 AIR 1927 Cal 718 (720) : 104 Ind Cas 456 (DB), *Rajani Kanta v. Bistoo Moni Dassi*. (Decision of High Court giving differing opinions of two Judges about limitations — Appellant probably misled — Time should be extended.)

an appeal within the time by a mistaken order of Court,³ or by the omission to give timely notice of the time and place at which the vacation Judge proposed to hold his sitting,^{3a} it will be a sufficient

('12) 15 Ind Cas 59 (62) : 39 Cal 766 (DB), *Harish Chandra v. The Chandpur Co. Ltd.* (Misled by Full Bench judgment of the High Court.)

('20) 7 AIR 1920 Cal 304 (305); 58 Ind Cas 408 (DB), *Nibaran Chandra v. Martin & Co.* (Attorney misled by practice of Court.)

('25) 12 AIR 1925 Mad 725 (726) : 48 Mad 631 : 88 Ind Cas 443 (DB), *Bhimasena Rao v. Venugopal Mudali.* (Misguidance by rules of Court.)

('27) 14 AIR 1927 Nag 247 (248) : 102 Ind Cas 123, *Mukand Rao v. Ragho Mali.* (Party misled by judgment of High Court in computing period of limitation.)

('07) 10 Oudh Cas 201 (203, 204) (DB), *Shambhu Ratan v. Sheo Balak.*

('90) 1890 All W N 122 (123) (DB), *Bakhshi Ram Narain Lal v. Bakhshi Avadh Narain Lal.* (Time given by High Court for giving deficit in court-fee paid within time but beyond limitation being misled by Court's order granting time.)

3. ('12) 14 Ind Cas 244 (244) (Lah), *Imam Din v. Banshi Ram.* (Appeal filed without copy of decree—Appellant directed to file copy on next date—Copy filed on that date after expiry of period of limitation—*Held* there was sufficient cause for extension of period under this section.)

('23) 10 AIR 1923 Oudh 238 (239); 26 Oudh Cas 56 : 74 Ind Cas 253, *Beni Madho Lala v. Shamsad Ali Syed.* (Civil Court returning plaint to be presented to Revenue Court—Revenue Court returning the same to be presented to Civil Court—Civil Court on re-presentation holding that suit was barred by *res judicata*—Party then appealing after time against the first order returning plaint—*Held* delay was due to Court's order which the party was only obeying—Due diligence also shown—Therefore delay excused.)

('23) 10 AIR 1923 Oudh 93 (95) : 26 Oudh Cas 24 : 74 Ind Cas 214 (DB), *Bhagwati Prasad v. Achhaibar Singh.* (Application for leave to appeal to Privy Council—Wrong dismissal of application for review after granting review—Time taken must be deducted in computing period of limitation for appeal from original order.)

('30) 17 AIR 1930 Rang 182 (183) : 127 Ind Cas 167, *U Po Thet v. Hawk Pet.* (Copy of decree not obtained as no decree was on record—Appeal filed without decree stating circumstances—Appellate Court dispensing with the copy of the decree—Later on, copy filed but after time—Appellants can claim that they were misled by order of Court.)

('24) 11 AIR 1924 Nag 271 (275) : 20 Nag L R 131 : 78 Ind Cas 996, *Pandu v. Rajeswar.* (Court's neglect to do its duty.)

('24) 11 AIR 1924 Lah 692 (693) : 75 Ind Cas 903, *Kidar Nath v. Wazir Chand.* (Misled by wrong entry of dead man's name in decree.)

('37) 24 AIR 1937 All 82 (89, 90) : 167 Ind Cas 405, *Abrar Husain v. Ahmed Raza.* (Per Sulaiman C. J., and Niamatullah, J.; Smith J., Contra—Misled by frame of decree.)

('14) 1 AIR 1914 Mad 418 (420) : 22 I C 919 (DB), *Numberumal v. Krishnaje.*

('14) 1 AIR 1914 Oudh 332 (333) : 24 Ind Cas 113, *Som Nath v. Ram Bilas.* (Delay due mostly to decree being incorrect.)

('30) 17 AIR 1930 Rang 235 (235) : 126 Ind Cas 641, *Maung Po Hlaing v. Ma Phee.* (Appeal filed without copy of decree—Mistake not brought to notice of appellant and subsequently appeal dismissed as time-barred—*Held* there was sufficient cause for extension.)

('30) 17 AIR 1930 Rang 67 (68) : 126 Ind Cas 543, *U Po Thaw v. Ma Thit.* (Appellant was misled by the date actually entered on the decree, which was different from date of judgment.)

[See ('26) 13 AIR 1926 Lah 509 (510) : 92 Ind Cas 319 (DB), *Ranzor Singh v. Secy. of State.* (Appellant misled by error of Court and therefore paying insufficient court-fee.)

3a. ('21) 61 Ind Cas 714 (715) (Cal) (DB), *Sona Sheikh v. Naib Ali Sheikh.* (Criminal appeal which had to be presented in person.)

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cause. Where the delay is attributed to the copyist department and not to the party himself, it may be a sufficient cause.⁴ Where, under the law, the Court was bound to inform the parties of the date of delivery of judgment, the delay caused by the failure to give such information will be a sufficient cause,⁵ but, where no such notice need

4. ('41) 28 AIR 1941 Lah 402 (404) : I L R (1942) Lah 603 : 198 Ind Cas 726 (DB). *Shanti Lal v. Hira Lal*. (Omission of name of Official Receiver from array of parties to appeal — Mistake caused by error in certified copy of judgment of the lower Court supplied to the appellant — Application to add the Official Receiver after the period of limitation had expired : *Held*, that delay should be condoned under S. 5, and the name be added.)
- ('39) 26 AIR 1939 Lah 492 (492) : ILR (1940) Lah 447 : 185 Ind Cas 877 (DB), *Salig Ram v. Charan Dass*.
- ('38) 25 AIR 1938 Nag 287 (288) : ILR (1940) Nag 312 : 177 Ind Cas 538, *Mt. Hira Bai v. Indra Bahadur Singh*.
- ('36) 23 AIR 1936 Lah 670 (672) : 161 Ind Cas 215 (DB), *Abdul Ghani v. Maula Baksh*. (Delay due to action of copying department in not following the rules prescribed.)
- ('36) 23 AIR 1936 Lah 132 (132) : 161 Ind Cas 457, *Ghulam Rasul v. Ali Bhakhsh*.
- ('14) 1 AIR 1914 Oudh 146 (147) : 25 Ind Cas 26, *Daljit v. Ram Ratan*. (Grant of incorrect copies by mistake is good ground for extension.)
- ('36) 23 AIR 1936 Lah 693 (694) : 165 I C 516, *Mani Singh v. Anand Parkash*.
- ('36) 23 AIR 1936 Lah 550 (550) : 163 Ind Cas 223, *Piare Lal v. Karta Ram*. (Dilatory methods of copying department.)
- ('36) 23 AIR 1936 Lah 200 (201) : 159 Ind Cas 178, *Rura Mal v. Ram Chand*. (Delay in copying department due to wrong practice — Copying department is not agent of applicant — Delay in filing appeal due to delay in copying department—There is sufficient cause.)
- ('26) 13 AIR 1926 Lah 458 (458) : 7 Lah 447 : 94 Ind Cas 959 (DB), *Mt. Bhuri v. Mt. Askhari*. (Copy of trial Court's judgment applied for within time but not filed in time with memo of appeal owing to inordinate delay in its preparation — Time was extended.)
- ('26) 13 AIR 1926 Lah 84 (84) : 91 Ind Cas 6, *Madan Singh v. Puran Singh*. (Applicant not informed when copy of decree would be ready — Applicant an ignorant villager—Delay in producing copy excused.)
- ('31) 18 AIR 1931 Oudh 314 (315) : 132 Ind Cas 777 : 6 Luck 578, *Rahim Bux v. Maiku*. (Application for copy of judgment and decree dismissed for insufficient fee and deficiency in folios — Applicant receiving no such information owing to Court practice — Appeal time-barred — Such delay should be condoned.)
- ('99) 3 Cal W N 55 (56) (DB), *Dulali Bewa v. Saroda Kinker Pandit*. (Information not given by copying office as required by rules — Delay caused thereby.)
- ('12) 13 Ind Cas 943 (943) (All) (DB), *Balmukand v. Kundan Lal*. (Delay due to copying department delaying to send the copy by post.)
- ('12) 13 Ind Cas 850 (851) (Lah), *Sarkhara v. Nawab*. (Omission of copying department to inform party of date when copy would be ready.)
5. ('41) 28 AIR 1941 Rang 194 (195) : 1941 Rang L R 213 : 195 Ind Cas 296 (DB). *Ma Hmuwe v. Daw Win Tha*. (Where a Judge in appeal pronounced judgment in contravention of O. 41, R. 30 and the parties came to know of the delivery of judgment only a couple of months later, it was held, that the aggrieved party was entitled to the full period allowed by law commencing from the date of the knowledge of the delivery of judgment.)
- ('17) 4 AIR 1917 L. B. 90 (90) : 38 I C 575, *Ma Hla Dun v. Maung Shwe Ya*.
- ('15) 2 AIR 1915 Low Bur 108 (109) : 27 I C 784, *Ma Me Thin v. Maung San Lun*.
- ('19) 6 AIR 1919 Lah 102 (103) : 51 Ind Cas 239 : 1919 Pun Re No. 27 (DB), *Lalli v. Sain Ditta*. (Judgment reserved and subsequently delivered on 2nd July

be given, a party cannot ask for extension of time by reason of the failure to give such information.⁶

Though a party may claim an extension of time on the ground of being misled by an order of the Court, or by the act or negligence of its officers, it will be necessary for him to show that he acted with due care and caution. Where the advocate of the party merely relied upon the words of a clerk that no application for copy would be received until the decree was prepared, it was held that the advocate did not act with due care and caution in placing such reliance upon the words of the clerk, and that it was not a sufficient cause.⁷ Similarly, where the practice of the Court is clear, a party cannot claim that he was misled by the practice of another High Court.⁸

See also the undermentioned cases.⁹

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- Absence of intimation of delivery of judgment as required by O. 41, R. 30, C. P. C.—On 13th October appellant's pleader discovered fact of delivery of judgment—Thereafter acting promptly appeal was filed on 26th November—*Held*, there was sufficient cause.)
6. ('03) 1903 Pun Re No. 22 : 1903 Pun L R No. 91, *C. v. C.* (Plea that delay be excused on the ground that neither the appellant nor his counsel was given any notice of the date when judgment was to be pronounced—*Held* that appellant had not made out any sufficient cause.)
7. ('29) 16 AIR 1929 Rang 116 (116, 117) : 7 Rang 18 : 117 Ind Cas 251, *Maung Po Kyaw v. Ma Lay*.
- ('98) 1 Oudh Cas 47 (48), *Ghafur Baksh v. Tilochan*. (Appellant misled by a subordinate official who failed to follow a judgment of the High Court, cannot claim benefit of Section 5.)
- [See also ('35) 22 AIR 1935 Nag 109 (110) : 155 Ind Cas 588, *Balwant Rao v. Balmukand*. (Where delay in filing appeal is due to the supply of wrong information to the copyist department, time cannot be deducted as of right. He must satisfy the Court that the wrong information was given under circumstances for which he was not responsible and if satisfied, Court will extend time under Section 5.)]
8. ('20) 7 AIR 1920 Pat 267 (270) : 57 Ind Cas 312 (DB), *Mahadeo v. Gajadhar*. (Practice that where there are two appeals although they are decided by one judgment there are two decrees and you cannot by one petition seek leave to appeal to His Majesty in Council from two decrees.)
9. ('50) 37 AIR 1950 Cal 356 (Prs 5, 20 & 21) (DB), *Province of Bengal v. Amulya Dhon*. (Appeal under S. 3, Calcutta Improvement (Appeals) Act (1911)—Certificate of fitness—Application for, kept pending through no fault of appellant—Period of pendency held should be executed.)
- ('33) 20 AIR 1933 Lah 938 (939) : 147 Ind Cas 13 (DB), *Wazira v. Mt. Nandan*. (Decree not properly drawn up—Appeal accompanied by judgment and such decree—Proper decree filed later—Appeal is not barred.)
- ('28) 15 AIR 1928 Lah 737 (738) : 112 Ind Cas 455, *Johaga v. Bir Chand*. (Value of court-fee incorrectly given in copy of judgment—Appellant consequently failing to pay proper court-fee in time—Extension of time was granted.)
- ('32) 19 A I R 1932 Lah 183 (185) : 135 Ind Cas 221, *Kanshi Ram v. Rama Mal*. (Time during which memorandum of appeal remained in appellate Court through mistake of Court, was excluded in calculating period of limitation.)
- ('08) 1908 Pun W R No. 71, *Mela Mal v. Natha Singh*. (Box kept for depositing appeals misleading parties into the belief that presentation in person is not necessary—It is sufficient cause.)
- ('90) 1890 Pun Re No. 101, *Sukh Diyal v. Jey Singh*. (Do.)

Section 5
Notes 23-26

23. Discovery of fresh evidence. — In *Indrarajbhan v. Sitaram*,¹ it was observed :

"There is no warrant for supposing that this sufficient cause mentioned in S. 5 of the Limitation Act may not include the late discovery of the new evidence on which the application for review was granted. I will not go so far as to say that where there are good grounds for granting review on the discovery of new evidence, those grounds will always be also sufficient for admitting the application after the period of limitation, provided that there has been no delay in making the application after the discovery. But I do hold that the grounds for granting review on account of the discovery of fresh evidence may, in certain cases, be a ground for also extending time under S. 5 of the Limitation Act."

See also the undermentioned case.²

24. Party misled by declaration as to holidays. — Where a particular day was gazetted as a public holiday and subsequently another day was substituted in its place, and the appellant was misled thereby, it was held that there was sufficient cause for extending the period for presenting the appeal.¹

25. Party being a woman or a pardanashin lady. — The fact that the appellant is a woman or a widow and not in good circumstances is not a sufficient cause for not presenting the appeal within time.¹ The fact that the appellant is a pardanashin lady, may, no doubt, in some cases, furnish grounds for exercising the discretionary power contained in the section,² but the ground can be available only where this fact has prevented the party from presenting the appeal herself or from retaining counsel to do so. The mere fact that the appellant is a *pardanashin* lady is, by itself, not a sufficient cause.³

26. Party being Government or body corporate. — In the undermentioned case¹ where it was held that the Act makes no

Section 5 — Note 23

1. ('21) 8 AIR 1921 Nag 174 (176) : 78 Ind Cas 527.
2. ('18) 5 A I R 1918 Cal 888 (889) : 35 Ind Cas 651 (DB), *Chandrakanta v. Lakshan Chandra*. (Discovery of fresh evidence which was the ground of review was held to be sufficient cause.)

Section 5 — Note 24

1. ('18) 5 AIR 1918 Lah 396 (397) : 42 Ind Cas 343 : 1917 Pun Re No. 77 (DB), *Nand Singh v. Gulli*.

Section 5 — Note 25

1. ('90) 3 C P L R 125 (125), *Chamoo v. Mt. Ooji Kalarin*.
2. ('86) 9 All 11 (18, 19) : 1886 All W N 245 (DB), *Hussaini Begum v. The Collector of Muzaffarnagar*.
3. ('33) 20 A I R 1933 Cal 796 (797) : 146 Ind Cas 359 (DB), *Benodini v. Jagabandhu*. (Memorandum of appeal filed without stamp and out of time by twentyone days — Time was not extended even though litigant was a *pardanashin* lady.)
- ('87) 9 All 655 (659) : 1887 All W N 185 (FB), *Hussaini Begum v. The Collector of Muzaffarnagar*.

Section 5 — Note 26

1. ('29) 16 AIR 1929 Sind 211 (211) : 125 Ind Cas 43 (DB), *Secretary of State v. Gurmukhdas*.
[See however ('07) 6 Cri L Jour 221 (223) : 9 Bom L R 893 (DB), *Emperor v. Shiva Adar*. (Appeal by Government against acquittal — Delay due to want of clearness in District Magistrate's letter to Government — Delay not excused.)]

distinction between Government and a private individual, but that nevertheless, in considering an application under S. 5 a distinction must be made, it was observed as follows :

"A private person has only himself to consider and must be presumed to be familiar with every aspect of his case. Government has to consider the public interest and cannot be expected to know the fact of each individual case. They require time for inquiry and consideration before taking action and must consult the local officers, to whom they cannot delegate their powers. It follows that a time which may be ample for a private litigant may be none too great for Government. We think, then, that though any delay is evidence of laches in the case of a private individual, the same cannot be said of Government."

The fact that a party is a *body corporate* cannot make any difference in the requirement of due diligence under this section (see Note 10). But, as in the case of the Government, a delay which may be evidence of laches in the case of a private individual may not be so in the case of a body corporate.

See also the undermentioned cases.²

27. Importance of matter. — The fact that the matter is important or that the value of the subject-matter of the litigation is considerable cannot have any weight in the consideration of the question whether the discretion vested under this section should be exercised in favour of the appellant.¹

27a. Public interests involved. — Where the plaintiff in a suit under S. 92, Civil Procedure Code appealed against a compromise decree passed in the suit alleging that the compromise petition had been tampered with in favour of the defendant, the Court allowed the appeal to be treated as one against the order recording the compromise and condoned the delay for filing such appeal on the ground that public interests were involved and sufficiently grave allegations were made in the memorandum of appeal to warrant an inquiry into the effect of the compromise upon the public interest, even though the conduct of the appellant was such as to disentitle him to such indulgence.¹

28. Being engaged in important litigation. — The fact that the party had been engaged in important litigation and could not file

2. ('44) 31 AIR 1944 Oudh 135 (137) : 211 Ind Cas 499 (DB), *Municipal Board, Lucknow v. Kali Krishna*. (Applicant, a Municipal Board having a legal department of its own merely entrusting work to a lawyer — No further steps taken by it to look whether lawyer took action in the matter — Application becoming time barred due to carelessness of lawyer — Applicant held not entitled to any indulgence.)

('46) 1946 J L R 124 (126) (DB), *State v. Choteylal*. (Appeal against acquittal by Government — Delay due to deliberate delay of Police Prosecutor in forwarding report to Senior Officer — Delay excused.)

Section 5 — Note 27

1. ('13) 20 Ind Cas 513 (514) (Cal) (DB), *Dand Bahadur v. Deo Nandan*.
(86) 1886 Pun Re No. 92, *Gharib v. Pohlomal*. (Goodness of cause.)

Section 5 — Note 27a

1. ('48) 35 A I R 1948 Pat 97 (102) : 26 Pat 83 (DB), *Mohd. Idris v. Habibur Rahman*.

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his appeal or application earlier is not a sufficient cause for extending time.¹

29. Application for leave to appeal in forma pauperis.
— As has been seen in Note 3 the words 'leave to appeal' are wide enough to include 'leave to appeal as pauper' and therefore the provisions of this section are applicable to applications for leave to appeal in forma pauperis.

It was provided in S. 582A of the Civil Procedure Code, 1882, that in cases of *appeals and applications for review* the Court could, where the proceeding had not been stamped properly, extend the time for furnishing the necessary stamp. That provision did not apply to applications for leave to appeal in *forma pauperis*. In such cases, where the appellate Court refused such leave, but granted time to pay the necessary court-fee and such court-fee was paid within the time so allowed, it was held that the Court could extend the time under S. 5 of the Limitation Act.¹ Section 149 of the present Civil Procedure Code corresponds to section 582A of the old Code, but applies to *all* proceedings. Consequently, it is not necessary to apply S. 5 to cases such as those stated above.²

Where an appeal is filed with deficient court-fee and on the appeal being returned the party applies that he should be permitted to appeal as a pauper and it is then beyond the time prescribed, the time may be extended if there is sufficient cause for the delay. Thus, where a party was advised that a stamp of Rs. 2 was sufficient for the appeal and he filed the appeal with such stamp, but subsequently the appeal was returned calling upon him to pay a larger amount of

Section 5 — Note 28

1. ('72) 4 N W P H C R 74 (76) (DB), *George v. Messrs. Hamilton Brown & Co.*

Section 5 — Note 29

1. ('99) 26 Cal 925 (928, 929, 930) (DB), *Durga Charan Naskar v. Dookhiram Naskar*. (Appeal as pauper — Appellant subsequently getting property and paying court-fee — Delay is due to sufficient cause.)
('04) 26 All 329 (331) : 1904 All W N 24 (DB), *Girwarlal v. Lakshminarain*.
('97) 22 Bom 849 (861), *Bai Ful v. Desai Bhavanidas*.
('12) 13 Ind Cas 73 (73) (Lah) (DB), *Shadi Khan v. Mt. Umdan Begum*. (Appeal in *forma pauperis* — Subsequent acquisition of property — Appellant held not a pauper — Court-fee paid within time fixed — Delay should be excused.)
('04) 1904 Pun Re No. 84, *Buta v. Parmanand*. (Appeal in *forma pauperis* — Permission refused but time granted to file appeal on proper stamp — Stamp paid in time allowed but after limitation for appeal — Held, there was a proper case for exercise of Court's discretion under Section 5.)
[See also ('10) 7 Ind Cas 944 (944) : 34 Bom 589 (DB), *Chintaman v. Ramchandra*. (If application for leave to appeal in *forma pauperis* be treated as falling under S. 5, it would be an appeal and Court could excuse delay.)
2. ('45) 32 A I R 1945 Oudh 172 (173) (DB), *Gur Dularey v. Durga Prasad*. (Appeal in *forma pauperis* — Leave refused — Time granted for paying court-fee on subsequent application — Court-fee paid after limitation but within time allowed — Order is covered by S. 149, C. P. C. — Even if it is not, delay can be condoned under S. 5, Limitation Act.)
('16) 3 AIR 1916 Lah 6 (6) : 36 Ind Cas 84 : 1916 Pun Re No. 74 (DB), *Bhagwan Das v. Mt. Balwanti*. (Application to appeal as pauper rejected after limitation — Full Court-fee paid — Time extended.)

court-fee, and the appellant thereupon applied for permission to apply as a pauper, it was held that there was sufficient cause under this section for extending the time.³

See also Note 12 to Section 3 and the A. I. R. Commentaries on the Civil Procedure Code 5th (1950) Edn., O. 44 R. 1 N. 7.

30. Application in revision treated as appeal.—Where an application for revision is filed in a case in which an appeal lies, the Court may treat the petition as an appeal, provided the same is filed within the time prescribed for filing the appeal,¹ and provided the proper court-fee is paid.² In a case where the time for filing the appeal has expired on the date when the revision is converted into an appeal, the Court has discretion under this section to excuse the delay, if any, in the presentation of appeal.³ But where the party has acted negligently and without due care and caution, the delay will not be excused.⁴

30a. Appeal treated as revision.—The principles given in Note 30 will also apply where an appeal is treated as revision. Thus where an appeal originally filed within time is treated as revision but is found to be beyond time as revision and the reason assigned for the delay is the doubt which the conflicting decisions have raised as to whether an appeal lies or a revision lies, the delay may be condoned.¹

31. Two appeals against same decree—One decree copy filed.—Where two appeals were filed against the same order but only

3. ('42) 29 A I R 1942 Oudh 240 (242) : 17 Luck 628 : 199 Ind Cas 614, *Ram Dulari v. Alian Bibi*. (Following A I R 1928 All 499.)
(28) 15 AIR 1928 All 499 (500) : 111 I. C. 655 (DB). *Ramcharan v. Bansidar*.

Section 5 — Note 30

1. ('32) 19 AIR 1932 Bom 77 (78) : 135 I. C. 812, *Abdul Gafur v. Md. Mukaram*.
(34) 21 A I R 1934 Pat 281 (282) : 150 Ind Cas 703, *Mt. Prabhawati Kuer v. Phulmani Bibi*. (Suit dismissed as against one defendant — Objection by such defendant to attachment by decree-holder rejected — Revision does not lie — But revision can be converted into appeal.)
- (11) 10 Ind Cas 542 (543) (Cal) (DB), *Tarabati v. Gagdeo Narain*.
(15) 2 AIR 1915 Cal 268 (271) : 27 I. C. 294 (DB) *Arjundas v. Gunendra Nath*.
(84) 7 Mad 555 (556) (DB), *Venkatamma v. Chengalrayappa*. (Revision application against order directing cancellation of certificate granted to collect debts of deceased person was treated as appeal.)
- (27) 14 AIR 1927 All 120 (120, 121) : 98 Ind Cas 993 : 49 All 178, *Sahdeo Singh v. Melhu Singh*. (Case filed as second appeal — Judge admitting it as revision — At the hearing it can be treated again as appeal even by the admitting Judge.)
- (19) 6 AIR 1919 Mad 358 (358) : 50 Ind Cas 931, *Matharasappa v. Muthu*.
2. ('10) 7 Ind Cas 481 (483) (Cal) (DB), *Golap Khan v. Bholu Nath Mariak*.
(99) 23 Mad 101 (104) : 9 Mad L Jour 350 (DB), *Sridharan v. Puramathan*.
3. ('20) 7 AIR 1920 Lah 450 (451) (DB), *Mohamud v. Jawahar*.
(18) 5 AIR 1918 Lah 67 (68) : 43 Ind Cas 317 : 1917 Pun Re No. 95 (DB), *Rasul Singh v. Shadi*.
4. ('22) 9 AIR 1922 Lah 233 (234) : 2 Lah 1 (DB), *Umed Ali v. Municipal Committee*. (Revision converted into appeal — Held there was no sufficient cause for extending time.)

Section 5 — Note 30a

1. ('41) 28 A I R 1941 Nag 308 (308) : I L R (1942) Nag 487 : 197 Ind Cas 221, *Anandrao v. Parvatibai*.

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one copy of the order was filed, and a second copy was furnished on requisition by the Court but after the period of limitation expired, the High Court of Patna excused the delay in the circumstances of that case.¹ In similar circumstances the High Court of Madras² observed as follows :

"An appellate Court would ordinarily, no doubt, do well to exercise the discretion vested in it by law to excuse the delay in the presentation of an appeal, if copies of the lower Court's judgment were made available somehow for the use of the Court and of the respondent at a reasonable time before the date fixed for the hearing of the appeal, though no copy was filed with the appeal memorandum provided that a connected appeal had been filed in time."

See also the undermentioned cases.³

32. Failure of Court of Wards to file proceeding, if sufficient cause.—Where a decree against a ward under the superintendence of the Court of Wards was not appealed against by the Court of Wards, and after the release of the estate from the superintendence of the Court of Wards the ward applied for leave to appeal to the Privy Council but after the expiry of the period prescribed, it was held that there was no sufficient cause to extend the time.¹ The Oudh Chief Court observed as follows :

"The conclusion at which we arrive is that, inasmuch as the Court of Wards had the authority to apply for leave to appeal on the applicant's behalf, as it was their duty to consider whether such an appeal was for the benefit of their ward, as the Court of Wards abstained from applying for leave to appeal, and as in addition, and this is the most important point, the legal personality of the applicant must be considered as absorbed in the personality of the Court of Wards during the period that his property remained under their superintendence, it cannot be said that the applicant had sufficient cause for not making the application within the period. We thus do not consider that the provisions of S. 5 of Act IX of 1908 can be utilised on behalf of the applicant."

33. Delay in filing copy of first Court's judgment in second appeal, or the copy of the judgment in review.—Where a review application is filed, it is not necessary that a copy of the judgment reviewed should be filed along with the application. But where under the practice of the Court such a copy should be filed, and is filed

Section 5 — Note 31

1. ('32) 19 AIR 1932 Pat 349 (349) : 12 Pat 36 : 141 Ind Cas 37 (DB), *Domi Lal v. Bijoy Prasad*.
2. ('15) 2 A I R 1915 Mad 493 (494) : 25 Ind Cas 28 (DB), *Avudai v. Ganapathy*, (Delay was not, however, excused, as there was no substance in the appeal.)
3. ('48) 35 AIR 1948 Oudh 261 (262) : 23 Luck 68 (DB), *Tahawar v. Radhey Lal*. (Where in an appeal under S. 45, U. P. Encumbered Estates Act, the appellant being under a misapprehension in good faith files one single copy of the judgment in two appeals the appellant may be granted time to file the other copy as there is sufficient cause for condoning the delay.)
- ('24) 11 A I R 1924 Lah 731 (731) : 82 Ind Cas 609, *Khan Muhammad v. Mt. Nur Jahan*. (Filing copy of order referred to as part of judgment after time—Delay may be excused if judgment is filed in time.)
- ('22) 9 AIR 1922 Lah 93 (93), *Lakshmi Das v. Ishar Das*. (Do.)

Section 5 — Note 32

1. ('18) 5 A I R 1918 Oudh 163 (166) : 46 Ind Cas 68 (D B), *Narendra v. Oudh Commercial Bank*.

subsequently on requisition by Court, the delay, if any, may be excused under S. 5.¹ Where the delay in filing an appeal was due to the time taken for obtaining a copy of the judgment on review which though not absolutely necessary for filing the appeal might have helped in the drafting of the appeal the delay was excused under this section.^{1a} Where in calculating the time for a second appeal the time requisite for obtaining a copy of the judgment *appealed against* only is excluded, but under the rules of the High Court the memorandum of appeal should be accompanied by a copy of the first Court's judgment also, and a delay is caused in obtaining the first Court's judgment, the delay may be excused under this section if the party can be said to have acted *bona fide*.² But delay caused by obtaining copy of a judgment which is not required to be filed, but which is obtained merely for purposes of consultation, cannot be excused.³

See also the undermentioned case.⁴

34. Unforeseen circumstances causing delay. — An unforeseen circumstance which causes delay may be a "sufficient cause." And if the party has been reasonably diligent in the prosecution of his appeal, the discretion should be exercised in his favour. Where the appeal as filed lay to the Commissioner, but the subsequent filing of

Section 5 — Note 33

1. ('35) 22 AIR 1935 Pat 486 (487, 488) : 157 Ind Cas 965, *Mahabir v. Baldeo*.
- 1a. ('46) 1946 A M L J 26 (27), *Bhuralal v. Shrilal*.
2. ('28) 15 A I R 1928 All 416 (416) : 115 Ind Cas 880, *Banke Lal v. Bhola Nath*. ('47) 34 AIR 1947 Lah 276 (277, 278), *Sunder Singh v. Diwan Singh*. (No satisfactory explanation by appellant for delay in filing second appeal after he had obtained copy of trial Court's judgment—Time not extended.)
- ('36) 23 AIR 1936 Lah 1007 (1008) : 169 Ind Cas 176, *Mt. Ghulam Aishan Bibi v. Md. Sharif*.
- ('25) 12 AIR 1925 Rang 344 (344, 345) : 3 Rang 310 : 90 Ind Cas 910 (DB), *Maung Po Aung v. U Bya*. (Delay was however not excused on other grounds.)
- ('12) 16 Ind Cas 488 (488, 489) (Lah) (DB), *Bibi Putli v. Jawala Devi*.
- ('27) 14 AIR 1927 Lah 92 (92) : 94 Ind Cas 629 (DB), *Amba Prasad v. Jwala Dat*. (Delay due to mistake of pleader.)
- ('26) 13 A I R 1926 Lah 458 (458) : 94 Ind Cas 959 (960) : 7 Lah 447 (D B), *Mt. Bhuri v. Mt. Asghari Begam*. (Copy of trial Court's judgment applied within time but not filed in time with memo of appeal owing to inordinate delay in its preparation—Time was extended.)
- ('19) 6 A I R 1919 Lah 42 (43) : 53 Ind Cas 137 : 1 Lah 83, *Bhan Singh v. Gokal Chand*. (Attaching of copy of first Court's judgment with appeal was not a rule of Court but was merely a practice which was observed and insisted upon—Delay was excused under this section.)
- [But see ('34) 21 A I R 1934 Lah 464 (465) : 148 Ind Cas 818, *Qumri Charan v. Din Dayal*. (Copy of trial Court's judgment obtained before expiry of limitation—Time in obtaining it cannot be deducted in calculating limitation.)]
3. ('25) 12 A I R 1925 Rang 361 (362) : 92 Ind Cas 786, *Chan Elliam v. Neo Thein Theong*.
4. ('46) 33 A I R 1946 Cal 10 (12) : 222 Ind Cas 475 (D B), *Dwarka v. Gajanan*. (Application for leave to appeal to Privy Council made beyond time due to delay in obtaining a copy of order refusing review of judgment—Copy of such order not reasonably required for drawing up either the petition for leave or grounds of appeal directed against the judgment—Delay not excused.)

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the cross objection raised questions which made the appeal to the Commissioner incompetent and at that time the period of limitation for appealing to the District Judge had expired, it was held that the time should be extended.¹ Where, however, the party has not been diligent, the happening of an unforeseen circumstance at the last moment will not be a ground to exercise the discretion in his favour. See Note 8.

35. Other cases of delay. — See the undermentioned cases.¹

Section 5 — Note 34

1. ('23) 10 A I R 1923 All 170 (171) : 77 I C 955, *Bhagwan Das v. Mohabbat Shah*.

Section 5 — Note 35

1. ('46) 33 A I R 1946 Pat 417 (418) : 224 Ind Cas 160 (D B), *Jan Muhammad v. Shital Prasad*. (Application for review—Delay—Disturbed state of Country not permitting to make application for or to take delivery of copies of documents held sufficient cause.)
- ('41) 28 A I R 1941 Pat 108 (109) : 190 Ind Cas 671, *Gajadhar Bhagat v. Moti Chand*. (Appeal memo filed on last date of limitation with deficit court-fee rejected without calling upon appellant to make up deficiency—Application under O. 41, R. 19, C. P. C., also rejected—Fresh memo of appeal with application under S. 5 filed on Court's advice also rejected—Rejection of memo is invalid—Appellant held entitled to benefit of S. 5.)
- ('39) 26 A I R 1939 Mad 293 (293) : 189 Ind Cas 320, *Venkataramayulu v. Venkata Rattamma Naidu*. (Application for copy of the order on 10th August 1922—Memorandum asking decree to be drafted and copy of it to be furnished filed on 3rd September 1929—Delay in asking copy of decree held could not be excused.)
- ('38) 25 A I R 1938 Lah 836 (837) : 181 Ind Cas 248 (D B), *Hakim Rai v. Ganga Ram*. (Agreement between parties to end litigation and accept High Court's decree as final—One party resiling and filing application for leave to appeal—Application for leave filed by other party some days out of time—Held there was sufficient cause for extending time.)
- ('20) 7 A I R 1920 Cal 207 (208) : 56 Ind Cas 551 (DB), *Abdul Sheikh v. Muhamed Ayab*. (Application for review of judgment of Small Cause Court—Requirements of S. 17 of Provincial Small Cause Courts Act must be complied with—Application on last date without deposit or security—Time granted to make deposit—Application held not properly made within time—Time not extended as there was no sufficient cause.)
- ('07) 6 Cri L Jour 221 (223) : 9 Bom L R 893 (D B), *Emperor v. Shiva*. (Appeal by Government against acquittal—Delay due to want of clearness in communications between the District Magistrate and Government—Delay not excused.)
- ('90) 14 Bom 365 (369) (D B), *Thucker Vussonji v. Canji Purbhut*. [(i) Two different suits but involving a common question—Decrees in both suit based on the same view as to this question—One of the decrees reversed in appeal—This is no ground for excusing delay in filing appeal against the other decrees. (ii) Executors of wills are not entitled, as such, to any special consideration in regard to the excusing of delay under S. 5.)
- ('37) 24 A I R 1937 Lah 691 (692) : 171 Ind Cas 812, *Barkat Ali v. Municipal Committee, Gujrat*. (Copy not given owing to negligence of copying department—Appeal filed after copy given on fresh application—Time held could be extended.)
- ('14) 1 A I R 1914 Sind 83 (84) : 8 Sind L R 235 : 28 Ind Cas 82 (D B), *Karachi Trading Co. v. Firm Tejbhandas Jethanand*. (Uncertified copy of decree wrongly dated—Appellant's pleader, hence, misled as to date of decree—Appeal, consequently filed out of time—Held there was no sufficient cause within meaning of this section.)
- ('27) 14 A I R 1927 Lah 734 (734) : 100 Ind Cas 19, *Pir Baksh v. Channan Din*. (Accidental loss of copy of judgment on the day the appeal was to be filed—Delay caused thereby—This was sufficient cause.)

Section 5
Note 36

36. Admission ex parte — Right of other person to reopen it. — Where an appeal or application filed beyond time is admitted *ex parte* after excusing delay, without notice to the opposite party, the latter is entitled, at the hearing, to object to the admission and the Court can re-open the question and decide whether there is sufficient cause for admitting the appeal or application beyond time.¹ The

(28) 15 AIR 1928 Lah 263 (264) : 112 Ind Cas 797 (DB), *Narsingh Das v. Secretary of State*. (In this case filing of a copy of award was allowed at the time of hearing argument — Time was extended under the peculiar circumstance of the case — Compare AIR 1928 Lah 216 (DB), *Secy. of State v. Tirath Ram*.)

(17) 4 A I R 1917 Lah 13 (14) : 42 Ind Cas 54 (D B), *Mt. Nikki v. Gujar Mal*. (Review — Cross-review — Time for, should be extended.)

(16) 3 A I R 1216 Mad 869 (871) : 31 Ind Cas 38 (D B), *Kyroom Bee v. Administrator General of Madras*. (This fact that two of the applicants were quarrelling between themselves is not sufficient cause to excuse delay under S. 5 read with O. 22, R. 9, C. P. C.)

(1871) 1871 Pun Re (Cr) No. 7 page 9 (9) (DB), *Crown v. Mohamed Bux*. (Where one of several accused is acquitted on appeal by him it is a sufficient cause to admit appeal by others out of time.)

(83) 1883 Pun Re No. 145, *Mt. Dyakour v. Mt. Amraokour*. (Time taken for translating judgment.)

Section 5 — Note 36

1. (17) 4 AIR 1917 P C 179 (180) : 41 Mad 412 : 45 Ind App 25 : 43 Ind Cas 493 (P C), *Krishnasami Panikondar v. Ramasami Chettiar*.

(29) 16 AIR 1929 All 31 (32) : 111 Ind Cas 816, *Ramcharan Lal v. Ghafoor*.

(18) 5 A I R 1918 Cal 53 (54) : 45 Ind Cas 725 (D B), *Iswar Chandra v. Arjan* (Party making *ex parte* application for extension must call attention of Court to matters for and against order extending time for filing appeal.)

(14) 1 A I R 1914 Bom 111 (111) : 38 Bom 613 : 25 I C 369 (D B), *Raoji Keshav v. Krishnarao Anandarao*.

(27) 14 AIR 1927 Bom 445 (446) : 103 I C 109 (DB), *Nuruddin v. Emperor*.

(01) 1901 Pun L R No. 159, p. 606 (608), *Mt. Murad Bibi v. Manohar Lal*.

(15) 2 AIR 1915 Mad 534 (534) : 25 Ind Cas 746 (DB), *Mali Reddi v. Peddakka*.

(20) 7 A I R 1920 Mad 320 (320) : 60 I C 212 (DB), *Krishnaswamy v. Veerappa*. (*Ex parte* order excusing delay in re-presenting pauper appeal.)

(23) 10 AIR 1923 Mad 482 (483, 484) : 72 Ind Cas 308, *Sundaram Iyer v. Muthuramalinga Sethupathi*.

(36) 23 AIR 1936 Mad 600 (602) : 165 Ind Cas 471, *Rajammal v. Parthasarathy*.

(36) 23 A I R 1936 Oudh 9 (11) : 158 Ind Cas 19, *Gaya Charan v. Jagannath*. (Court condoning delay and admitting appeal *ex parte* — Transferee Court on objection at hearing dismissing appeal as barred.)

(75-77) 1 All 34 (37) (FB), *Dubey Sahai v. Ganeshi*. (Appeal admitted *ex parte* by single Judge Division Bench hearing appeal as barred.)

(81) 1881 All W N 88 (88) (DB), *Mitter Sen v. Barekullah*.

(87) 9 All 11 (15, 16, 19) : 1886 All W N 245 (DB), *Hussaini Begam v. Collector of Muzaffarnagar*.

(86) 9 Mad 450 (451) (DB), *Venkatarayadu v. Nagadu*.

(86) 13 Cal 78 (79) (DB), *Moshaullah v. Ahmedullah*.

(90) 14 Bom 594 (596, 597), *Mulna Amad v. Krishnaji Ganesh*.

(13) 20 Ind Cas 513 (515) (Cal), *Dand Bahadur Singh v. Deo Narain Prosad*.

(12) 16 Ind Cas 407 (408) : 40 Cal 259 (DB), *Bhismadeo Das v. Sita Nath Roy*. (Admission of appeal by District Judge on *ex parte* statement by appellant — Transfer of appeal to Sub-Judge — Sub-Judge, on hearing, can dismiss appeal as barred.)

(22) 9 A I R 1922 Pat 47 (48) : 64 Ind Cas 55 (DB), *Md. Abdul Kasim v. Chaturbhuj Sahai*. (Appeal admitted subject to objection — Procedure is irregular.)

(83) 12 Cal L Rep 541 (545) (DB), *Nobin Chunder Roy v. Brojendro Kumar Roy*.

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leading case on the point is *Krishnasami v. Ramasami*,² where their Lordships of the Privy Council observed as follows :

"It has been argued that the admission of the appeal by Sankaran Nair, J., was final, and that the Division Bench had no jurisdiction at the hearing of the appeal to re-consider the question whether the delay was excusable. But this order of admission was made not only in the absence of Ramasamy Chettiar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour, so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore, in common fairness be regarded as a tacit term of an order like the present that, though unqualified in expression, it should be open to re-consideration at the instance of the party prejudicially affected; and this view is sanctioned by the practice of the Courts in India."

It was held in the undermentioned case³ that where an appeal is admitted *ex parte*, the respondent cannot wait till the *hearing*, but must apply by motion as early as possible to set aside the order. This view was however dissented from in a later case of the High Court of Madras⁴ as being opposed to the decision of the Privy Council in *Krishnasami's case*.² But where *at the hearing* of the appeal the respondent did not object to the *ex parte* admission, the High Court will refuse to interfere in revision.⁵

As regards the practice itself of admitting such appeals or applications *ex parte*, their Lordships said in *Krishnasami's case*² :

"But while this procedure may have the sanction of usage, it is manifestly open to grave objection. It may, as in this case, lead to a needless expenditure of money and an unprofitable waste of time, and thus create elements of considerable embarrassment when the Court comes to decide on the question of delay. Their Lordships, therefore, desire to impress on the Courts in India the urgent expediency of adopting, in place of this practice, a procedure which will secure at the stage of admission the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal."

This last view was reiterated in the cases noted below.⁶

2. ('17) 4 A I R 1917 P C 179 (180, 181) : 41 Mad 412 : 45 Ind App 25 : 43 Ind Cas 493 (PC).
3. ('23) 10 AIR 1923 Mad 82 (82) : 70 I C 827, *Murugappa Naicker v. Thayammal*.
4. ('36) 23 AIR 1936 Mad 600 (602) : 165 I.C. 471, *Rajammal v. Parthasarathy*.
5. ('25) 12 AIR 1925 Oudh 148 (148) : 80 Ind Cas 617, *Bharat v. Basant*.
[See also ('20) 7 AIR 1920 Cal 574 (574) : 50 Ind Cas 374 (DB), *Telendrajit v. Gunendrajit*. (Appeal admitted subject to objection at hearing—In absence of objection by respondent Court cannot go behind the order admitting the appeal.)]
6. ('46) 1946 Rang L R 270 (277) (DB), *A. R. O. V. R. Chettyar v. Thenammai Achi*.
(42) 29 AIR 1942 Cal 606 (607) : ILR (1942) 1 Cal 403 : 203 Ind Cas 580 (DB) *Balchand v. Bejaychand*. (Appeal under Letters Patent (Cal) Cl. 15—Extension of time without notice to respondent is irregular.)
(18) 5 AIR 1918 P C 135 (136) : 43 Bom 376 : 46 Ind App 15 : 52 Ind Cas 897 (PC), *Sunderbzi v. Collector of Belgaum*.
(30) 17 AIR 1930 All 815 (816) : 128 Ind Cas 753, *Nathu Ram v. Ganga Bux*. (Failure to do so is not only irregular but without jurisdiction.)
(19) 6 AIR 1919 Cal 585 (585) : 46 I.C. 480 (DB), *Guru Charan v. Kashi Chandra*.
(20) 7 AIR 1920 Cal 574 (575) : 50 Ind Cas 374 (DB), *Telendrajit Raj Kumar v. Gunendrajit*.
(20) 7 AIR 1920 Pat 280 (281) : 54 I.C. 36, *Chaturbhuj Sahay v. Muhammad Habib*.
(25) 12 AIR 1925 Cal 175 (175, 176) : 79 I.C. 924 (DB), *Elahinewaz v. Biseswa*.

When an appeal or application is presented beyond the prescribed period of limitation, it has been held by the Privy Council that the proper order which a Judge should endorse upon it would be "presented for admission on the (date when the memorandum of appeal or application was handed into the office of his Court). Let notice go to the respondents (date of the order)."⁷

A Court is bound to consider whether there was sufficient cause for extending the period of time. Where a review is admitted without such determination, the order passed is not only irregular but possibly without jurisdiction. The entire proceedings must be set aside.⁸

It was held in the undermentioned case⁹ that where an appeal filed after period of limitation was admitted by the District Judge *ex parte*, and then the appeal was transferred to the Subordinate Judge for disposal, the latter had no power to re-open the question of sufficient cause at the hearing. This view has not been followed in other cases.¹⁰

37. Burden of proof.—In *Krishnaswami v. Ramasami*,¹ their Lordships of the Privy Council observed as follows :

"It is the duty of the litigant to know the last day on which he can present his appeal and if through delay on his part it becomes necessary for him to ask the Court to exercise in his favour the power contained in S. 5 of the Indian Limitation Act, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies."

See also the undermentioned cases.²

('32) 19 AIR 1932 Cal 482 (484, 485) : 59 Cal 388 : 138 Ind Cas 643 (DB), *Jnanda-sundari Shaha v. Madhabchandra Mala*.

7. ('18) 5 AIR 1918 P C 135 (136) : 43 Bom 376 : 46 Ind App 15:52 Ind Cas 897 (P C), *Sunderbai v. Collector of Belgaum*.

8. ('21) 8 AIR 1921 All 23 (26) : 43 All 660 : 63 Ind Cas 338 (DB), *Bhairon Ghulam v. Ram Autar Singh*.

('30) 17 AIR 1930 All 815 (816) : 128 Ind Cas 753. *Nathu Ram v. Ganga Bux*. (AIR 1915 All 240 (DB), *Janki Prasad v. Parmeshwar Din*, followed.)

9. ('80) 5 Cal 1 (2):3 Shom L.R 81 (DB), *Jhotee Sahoo v. Omesh Chunder Sircar*.

10. ('98) 2 Cal W N 461 (463) (DB), *Manick Dukandar v. Naibulla Sircar*.

('90) 14 Bom 594 (596) (DB), *Mulna Amad v. Krishnaji Ganesh*.

('98) 21 Mad 228 (230) : 7 Mad L Jour 188 (DB), *Krishna Bhatta v. Subraya*.

('97) 1897 All W N 15 (16), *Wahid Nur Khan v. Haqdad Khan*.

Section 5 — Note 37

1. ('17) 4 AIR 1917 P C 179 (181) : 41 Mad 412 : 45 Ind App 25 : 43 Ind Cas 493 (PC).

2. ('38) 25 AIR 1938 Nag 156 (161) : ILR (1938) Nag 409:173 Ind Cas 369 (DB), *Krishna Rao v. Trimbak*. (AIR 1917 PC 179 : 41 Mad 412 : 45 Ind App 25 (PC), *Krishnasami v. Ramasami*, followed.)

('21) 8 AIR 1921 All 23 (26) : 43 All 660 : 63 Ind Cas 338 (DB), *Bhairon Ghulam v. Ram Autar Singh*.

('19) 6 AIR 1919 Cal 585 (585):46 I.C. 480 (DB), *Gurucharan v. Kashi Chandra*.

('32) 19 AIR 1932 Cal 589 (596) : 59 Cal 781 : 140 Ind Cas 662 (DB), *Surendra Mohan v. Mohendra Nath*.

('33) 20 AIR 1933 Lah 681 (682) : 146 Ind Cas 45 : 14 Lah 656 (DB), *Kanhya Lal v. Baldeo Das*. (Appeal filed beyond time—Appellant has to show sufficient cause for delay.)

('36) 23 AIR 1936 Sind 169 (170):30 Sind L R 242:165 Ind Cas 91 (DB), *Tejmal Bhagwandas v. Murad*.

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In the cases cited below³ it was held that every day's delay must be properly explained. The mere fact that the delay is of *one* day only is not a sufficient explanation. The delay of one day is as fatal as a delay of fifty days if it is not explained.⁴

38. Exercise of discretion, when binding on appeal. — The appellate Court will not interfere with the discretion exercised by the lower Court in admitting or rejecting the application for *excusing* delay unless it appears that it has not been exercised at all or has not been exercised on judicial principles.¹ Where the lower Court held that

(31) 18 AIR 1931 Sind 58 (58, 59) : 24 Sind L R 415 : 132 Ind Cas 473 (DB), *Manghoomal v. Bibi Sardar Khatun*,

3. ('47) 34 AIR 1947 Lah 276 (278), *Sunder Singh v. Diwan Singh*.

('01) 25 Mad 166 (180) : 11 Mad. L Jour 406 (DB), *Kichilappa Naicker v. Ramanujam Pillai*.

('09) 1 Ind Cas 73 (76) (DB) (Mad), *Krishnasami Panikondar v. Ramasami Chettiar*.

4. ('17) 4 AIR 1917 Sind 52 (53) : 38 Ind Cas 464 : 10 Sind L R 165 (DB), *Tola Ram v. Jaffer Khan*.

Section 5 — Note 38

1. ('47) 34 AIR 1947 Lah 76 (78) : 225 Ind Cas 291, *Arura v. Karam Din*. (Exercise of discretion arbitrarily or on a wrong conception of law.)

('45) 32 AIR 1945 Oudh 94 (96), *Ram Ablakh v. Debi Prasad*. (Where the Court does apply its mind and considers in a judicial manner the explanations offered by the applicant for the delay and comes to a conclusion against the applicant's submission, the appellate Court will seldom interfere with such a discretion.)

('44) 31 AIR 1944 Oudh 193 (196) : 216 Ind Cas 107, *Noor Beg v. Abdul Rahman*.

('38) 25 AIR 1938 Bom 408 (410) : ILR (1938) Bom 704 : 177 Ind Cas 734 (DB). *Maria F. Almeida v. Ramchandra Santuram*. (Even if another Judge in the lower Court may have taken a different view.)

('38) 25 AIR 1938 Pat 413 (417) : 17 Pat 507 : 177 Ind Cas 564 (DB), *Narsingha Charan Nandy v. Trigunand*. (If the lower Court misdirects itself on a point at law and refuses to extend the time upon the findings of fact which it arrives at, it will be set aside by the superior Court.)

('36) 23 AIR 1936 Sind 169 (171) : 30 Sind L R 242 : 165 Ind Cas 91 (DB), *Tejmal Bhawandas v. Murad*.

('29) 16 AIR 1929 Nag 8 (10) : 114 Ind Cas 612, *Shrikison v. Secretary of State*. (Exercise of discretion in a judicially unsound manner without proper materials to support its decision.)

('17) 4 AIR 1917 Low Bur 74 (76) : 8 Low Bur Rul 566 : 37 Ind Cas 815 (DB), *Ma Mai Gale v. Maung Tun Win*.

('17) 4 AIR 1917 Low Bur 90 (90, 91) : 33 Ind Cas 575. *Ma Hla Dun v. Maung Shwe Ya*.

('04) 26 All 329 (331) : 1904 All W N 24 (DB), *Girwarlal v. Lakshmi Narain*. (Lower appellate Court acting upon a ruling of the High Court in which the question of application of S. 5 was not considered at all and not considering the section itself.)

(1900) 3 Oudh Cas 37 (41), *Kanhaya Lal v. Bashir Ahmad*. (Court concluding that applicant had sufficient cause on ground not urged by him.)

('82) 8 Cal 251 (253) : 11 Cal L R 177 (DB), *Chunder Doss v. Boshoon Lall Sockul*. (It is competent for the High Court on section appeal to look into the grounds upon which the Court below has admitted an appeal after the time prescribed by the Limitation Act.)

('16) 3 AIR 1916 All 296 (297) : 33 Ind Cas 546, *Maqbul Ahmed v. Murla*.

('23) 10 AIR 1923 All 455 (456) : 45 All 432 : 74 Ind Cas 1039 (DB), *Ahmed Husain v. Muhammad Fasih-ulla*.

- (26) 13 AIR 1926 All 252 (253) : 91 Ind Cas 865, *Ram Rup v. Naik Ram*.
 (29) 16 AIR 1929 All 31 (32) : 111 Ind Cas 816, *Ram Charan v. Ghafoor*.
 (30) 17 AIR 1930 All 131 (132) : 123 Ind Cas 824, *Chatur v. Baijnath*.
 (28) 15 AIR 1928 Bom 64 (65) : 53 Bom 164 : 108 Ind Cas 26 (DB), *Doga Devji Patil v. Emperor*.
 (26) 92 Ind Cas 724 (725) (Mad), *Komarasami v. Sundar Mudaliar*.
 (04) 26 All 327 (328, 329) : 1904 All W N 23 (DB), *Hamid Ali v. Gayadin*.
 (02) 25 All 71 (73) : 1902 All W N 203 (DB), *Tulsi Kunwar v. Gajraj Singh*.
 (67) 7 Suth W R 337 (337), *Raj Coomar Roy v. Shaikh Mahomed Wais*.
 (67) 7 Suth W R 296 (297), *Roghnath Singh v. Roy Mohan Lal Mitter*.
 (66) 6 Suth W R 100 (100) (DB), *Rakhal Doss Moskerjee v. Raees Shurno Moyee*.
 (Case under Section 377 of the Civil Procedure Code, 1859.)
 (07) 31 Bom 33 (36) : 8 Bom LR 858 (DB), *Bhimrao Ramrao v. Ayyappa Yellayya*.
 (82) 6 Bom 304 (307, 309) (DB), *Ranchodji v. Lallu*.
 (30) 17 AIR 1930 Lah 749 (749) : 126 Ind Cas 442, *Nihal Chand v. Jai Dayal*.
 (12) 14 Ind Cas 59 (60) (All) (DB) *Bikram Singh v. Narain*.
 (16) 3 AIR 1916 Pat 317 (318) : 35 Ind Cas 888 : 1 Pat L Jour 485 (DB), *Debi Charan Lal v. Mehdi Hussain*.
 (96) 11 C P L R 3 (4), *Gopal Modi Bania v. Mt. Ganga Bania*.
 (17) 4 AIR 1917 Lah 463 (464) : 36 Ind Cas 614 : 1916 Pun Re No. 92, *Hardhan v. Ram Chand*.
 (16) 3 AIR 1916 Lah 202 (203) : 33 Ind Cas 808, *Azam Ali v. Akhtar Hussain*.
 (Court in second appeal should interfere only in exceptional cases.)
 (16) 3 AIR 1916 Lah 146 (148) : 35 Ind Cas 67 : 1916 Pun Re No. 88, *Asa Ram v. Budhu Mal*.
 (22) 9 AIR 1922 Lah 170 (171) : 69 Ind Cas 895 (DB), *Municipal Committee, Chiniot v. Bashi Ram*.
 (26) 13 AIR 1926 Lah 542 (543) : 95 Ind Cas 565 (DB), *Bur Singh v. Firm Jodha Ram Hanru Ram*.
 (37) 24 AIR 1937 Lah 767 (769) : 174 Ind Cas 927, *Mangal Ram v. Sat Deo*.
 (85) 1885 Pun Re No. 106, *Joti Pershad v. Chunnial*.
 (17) 4 AIR 1917 P C 179 (181) : 41 Mad 412 : 45 Ind App 25 : 43 Ind Cas 493 (PC), *Krishnasami Panikondar v. Ramasami Chettiar*.
 (31) 18 AIR 1931 All 28 (28) : 130 Ind Cas 840 (DB), *Rama Shankar v. Janki*.
 (33) 20 AIR 1933 All 294 (295) : 144 I C. 133 (DB), *Badri Prasad v. Amjid Ali*.
 (02) 25 Mad 166 (180, 181, 182) : 11 Mad L Jour 406 (DB), *Kichilappa Naicker v. Ramanujam*. (Mere difference in view as to mode in which discretion conferred by section ought to have been exercised is in itself no ground for interference.)
 (85) 1885 Bom P J 152 (152) (DB), *Kamalabai v. Mahomed Sahib*. (Total disregard of ground for extension)
 (73) 10 Bom H C R 397 (398), *Surbhai Dayalji v. Raghunathji*. (Time extended without any material.)
 (99) 23 Bom 513 (518) (DB), *Parvati v. Ganpati Rokdaji*.
 (85) 9 Bom 452 (454), *Raghunath Gopal v. Nilu Nathaji*. (Reasons not given for refusing to excuse delay.)
 (35) 153 Ind Cas 259 (259) (Lah), *Khazana Mal Bhagat Ram v. Mangat Ram*.
 (30) 123 Ind Cas 83 (83, 84) (Lah), *District Board Sargodha v. Shamas Din*.
 (19) 6 AIR 1919 Pat 503 (505) : 4 Pat L Jour 381 : 52 Ind Cas 225 (DB), *Jahar Mal v. G. M. Pritchard*.
 (22) 9 AIR 1922 Pat 47 (48) : 64 Ind Cas 55 : 6 Pat L Jour 444 (DB), *Md. Abdu Kasim v. Chaturbhuj Sahai*. (No discretion exercised at all.)
 (26) 13 AIR 1926 Cal 677 (679) : 92 Ind Cas 1031, *Ramdhani Nuchi v. Khakshardas Tati*.
 (1900-02) 1 Low Bur Rul 313 (315), *Maung Po Lu v. Maung Kyin*.
 (76) 1 All 250 (251) (DB), *Zaibunissa Bibi v. Kulsum Bibi*. (No cause, whatsoever, assigned for not presenting appeal within time—Still Court excused delay—Appellate Court reversed order of lower Court and rejected appeal as filed beyond time.)

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there was no general rule applicable for exercise of discretion under this section, when in fact general rules of guidance in such matters had been laid down in various decisions of the High Court, the Privy Council interfered with the order of the Court and set it aside.² Similarly, when the Court does not apply its mind to consider the explanation for the delay,³ or has acted illegally in admitting the application,⁴ or the discretion is exercised in an arbitrary or fanciful manner, or upon a ground which is not material, the appellate Court will interfere.⁵ It has been held in the undermentioned cases⁶ that the question whether the facts and circumstances constitute sufficient cause is one of law and not of fact and can be raised in second appeal.

39. Order under section 5, if open to revision.—An order refusing, in the exercise of its discretion, to excuse delay in presentation of an appeal is not open to revision even for the purposes of showing

(’87) 9 All 244 (246) : 1887 All W N 29 (DB) *Fatima Begam v. Hansi*.

(’26) 13 AIR 1926 Lah 445 (446) : 94 I. C. 396 (DB), *Bachint Singh v. Harnam*.

(’36) 23 AIR 1936 Lah 742 (743) : 166 I. C. 698, *Ladha Mal-Bishen Das v. Nadar*.

(’76) 1876 Pun Re No. 114, *Hyat v. Rahimuddin*.

(’86) 1886 Pun Re No. 92, *Gharib v. Pohlmal*.

[See (’26) 13 AIR 1926 All 111 (112) : 89 Ind Cas 956. *Megh Baran Singh v. Rama Das*.]

2. (’17) 4 AIR 1917 P C 156 (159) : 45 Cal 94 : 44 Ind App 218: 1917 Pun Re No. 104 : 42 Ind Cas 43 (PC), *Brij Indar Singh v. Lala Kanshi Ram*.

[See also (’21) 62 Ind Cas 957 (958) (Cal) (DB), *Sm. Thakamani Dasi v. Pitambar Bhuiya*.

(’23) 10 AIR 1923 All 455 (456) : 45 All 432 : 74 Ind Cas 1039 (DB), *Ahmed Husain v. Muhammad Fasihullah*. (A I R 1917 P C 156 (PC), followed.)]

3. (’14) 1 AIR 1914 All 521 (523) : 25 Ind Cas 30, *Dewan v. Buddhu*. (Only explanation for delay being that papers were returned by counsel to whom they were made over after time for appeal had expired — *Held*, explanation insufficient.)

(’15) 2 AIR 1915 All 240 (241) : 29 I.C. 275 (DB). *Janki Prasad v. Parameshwar Din*. (Defendant in jail when *ex parte* decree passed — Application under O. 9, R. 13, C. P. C., made after five years when released — Munsif granted application — *Held*, application barred and proceedings irregular and without jurisdiction.)

(’18) 5 AIR 1918 Lah 396 (397) : 42 I. C. 343 : 1917 Pun Re No. 77 (DB), *Nand Singh v. Gulli*. (Particular day gazetted as public holiday and subsequently another day substituted in its place and appellant misled thereby — Lower Court failing to consider this reason for delay — Question of delay was considered and excused in appeal.)

(’30) 17 AIR 1930 Lah 1068 (1069): 122 Ind Cas 575, *Muhammad Ibqal v. Labha Mal*. (No proper thought given by the lower Court to the cause of presenting appeal out of time — High Court interfered with discretion and extended time.)

(’33) 20 AIR 1933 Lah 260 (261) : 145 Ind Cas 153, *Dhara Singh v. Abdullah*. (Failing to consider plea of extension of time is material irregularity.)

4. (’89) 12 All 57 (60) : 1889 All W N 197 (DB), *Munro v. The Cawnpore Municipal Board*.

5. See cases in foot-note (1).

6. (’47) 34 AIR 1947 Lah 76 (78) : 225 Ind Cas 231, *Arura v. Karam Din*.

(’42) 29 AIR 1942 Lah 94 (95) : 199 Ind Cas 851, *Kishan Chaud v. Md. Husain*

(’32) 19 AIR 1932 Lah 183 (185) : 135 Ind Cas 221, *Kanshi Ram Munshi Ram v. Raman Mal Govind Ram*.

that the appeal was not really time-barred.¹ When an order has been passed by the lower Court in exercise of its discretion allowing or refusing an application to extend time, it cannot be interfered with in revision.² But where the Court has come to its conclusion on no evidence and has omitted to consider whether there was sufficient cause for delay in presentation, it acts with material irregularity in the exercise of its jurisdiction and the High Court will interfere.³ So also where the Court rejects the appeal as beyond time without investigating the matter as to the allegation of illness set up by the appellant as the reason why the appeal had not been preferred within time, i.e., without regard to S. 5 at all, it is a wrong and illegal exercise of jurisdiction and the High Court will interfere in revision.⁴

It is not the practice of the Patna High Court to interfere in revision in the exercise of discretion by the lower Court under S. 5 even when the exercise of that discretion is founded on a mistaken view of the law.⁵

Section 5 — Note 39

1. ('14) 1 A I R 1914 Mad 149 (149) : 24 Ind Cas 872, *Thandayuthapani v. Chinnathal*.
2. ('50) I L R (1950) All 86 (90, 91) (DB), *Gajadhar v. Ram Bux*. (Application to amend by correcting valuation of appeal after expiry of limitation for appeal — Application allowed under S. 5, Limitation Act — High Court will not interfere in revision.)
- ('49) 36 AIR 1949 Mad 624 (624), *Ramalingam v. Koteswara*.
- ('42) 29 AIR 1942 Mad 604 (606): ILR (1942) Mad 868: 203 Ind Cas 5, *Kamaraju v. Saramma*.
- ('34) 35 Pun L R 374 (374), *Khazana Mal Bhagat Ram v. Mangat Ram*. (Lower appellate Court considering on merits that the review petition which the appellant had first made to the trial Court was not justified on the grounds on which it was based and refusing to excuse delay in filing the appeal — No sufficient ground for interference in revision.)
- ('36) 23 AIR 1936 Pesh 97 (99): 162 Ind Cas 416. *Bundhelkhand M. & C. Agency v. Peoples Bank of Northern India Ltd., Lahore*.
- ('22) 9 AIR 1922 Mad 193 (193): 68 I. C. 910, *Perumal Moopan v. Venkatachariar*.
- ('69) 11 Suth W R 56 (57) : 2 Beng L R (A C) 181 (DB), *Aujoonnissa Bibee v. Surjo Kant Acharjee*, (Revision under Cl. 15 of the Charter.)
- ('30) 17 AIR 1930 Cal 426 (427, 428): 126 Ind Cas 781 (DB), *Jnanada v. Falkner*.
- ('84) 7 Mad 584 (586) (DB), *Vasu Deva v. Chinnasami*.
- ('14) 1 AIR 1914 Mad 149 (149) : 24 I. C. 872, *Thandayuthpani v. Chinnathal*.
- ('14) 1 AIR 1914 Nag 60 (62) : 10 Nag L R 139: 26 I. C. 819, *Raghu v. Madhgia*.
- ('70) 13 Suth W R 439 (440) : 5 Beng L R 316 (DB), *Asrafannissa Begam v. Enayet Hossein*. (Revision under Cl. 15 of the Charter.)
- ('25) 12 AIR 1925 Oudh 148 (148) : 80 Ind Cas 617, *Bharat v. Basant*.
3. ('38) 25 AIR 1938 Pat 413 (417) : 17 Pat 507 : 177 I. C. 564 (DB), *Nrisingha Charan Nandy v. Trigunand*.
- ('14) 1 AIR 1914 Upp Bur 49 (51) : 27 I. C. 967, *Nag Po Kan v. Nga Shwe Dat*.
- ('23) 10 AIR 1923 Mad 503 (504) : 72 I. C. 137, *Gopalaswamy v. Ramachandra*.
- ('25) 12 AIR 1925 Mad 494 (496) : 86 I. C. 905, *Subbaraya v. Govindaswami*.
4. ('88) 1888 All W N 126 (126). *Narain Dai v. Shamli Prasad*.
[See also ('85) 7 All 345 (352, 353) : 1885 All W N 73 (DB), *Har Prasad v. Jafar Ali*.]
5. ('37) 24 AIR 1937 Pat 528(520):171 I.C. 700, *Thakur Singh v. Dinanath Sah*.

Section 5
Notes 40-43

40. Question of exercising discretion, when arises.—The question of extending time under this section arises only when the appeal or application in respect of which the delay is to be excused is filed. The parties are not entitled to invite the Court to decide the question of limitation before they actually file their proceeding.¹ Similarly, the question will not arise until the period of limitation has actually expired,² or until the computation of time has been made.³ Where a motion to present an appeal in *forma pauperis* was rejected on the ground of limitation and thereafter an application for extending time under section 5 was presented, it was held that as there was no application for leave to appeal pending, the application under S. 5 could not lie.⁴

41. Order under section 5 must give reasons.—A Court passing an order on an application for extending time under S. 5 must give its reasons for the conclusion, so as to enable an Appellate Court to see whether it has properly arrived at its conclusions.¹ In the under-mentioned case,² where the lower Court had accepted a copy of the decree after the expiry of the prescribed period, being satisfied on an affidavit by the party as to the delay in filing it, it was held that the Court must be taken to have exercised its discretion under this section and excused the delay.

42. Valuation of application under section 5. — Under the Allahabad High Court Rules, an application under S. 5 should be specifically valued and if such valuation is less than Rs. 200, a single Judge can hear the application.¹

43. Formal application, if necessary.—Where the appellant did not implead certain persons not mentioned in the decree as parties, but on the decree being subsequently amended by the addition of new persons the appellant got them added in the appeal, but after the

Section 5 — Note 40

1. ('26) 13 AIR 1926 All 555 (557) : 95 Ind Cas 959 (DB), *Ram Sughar Rai v. Dharam Raj Singh*.
2. ('34) 21 AIR 1934 Nag 145 (146) : 30 Nag L R 294 : 149 Ind Cas 956, *Model Mills Ltd. v. Hiralal Ram Gopal*.
3. ('90) 12 All 461 (491) : 1890 All W N 149 (FB), *Bechi v. Ahsan-ullah Khan*.
4. ('33) 20 AIR 1933 All 308 (309) : 144 I. C. 79, *Mt. Shahzadi Begam v. Alakh*.

Section 5 — Note 41

1. ('29) 16 AIR 1929 All 101 (101):112 Ind Cas 246, *Gaya Prasad v. Ram Sarup*. ('83) 1883 Pun Re No. 4, *Sardarni Raj v. Nahal*. (Appeal presented after time — Reason for allowing extension on ground of sufficient cause should be recorded.) ('72 92) 1872-92 Low Bur Rul 500 (501), *Maung Kyauk Lon v. Maung Shwe*. ('26) 13 AIR 1926 Cal 1105 (1106) : 98 I. C. 748 (DB), *Adarpriya v. Ramprotap*. ('20) 7 AIR 1920 Pat 280 (281) : 54 I. C. 36, *Chaturbhuj v. Muhammad Habib*. [See ('32) 19 AIR 1932 Cal 482 (484) : 59 Cal 388 : 138 Ind Cas 643 (DB), *Jnanadasundari Shaha v. Madhabchandra Mala*.]
2. ('97) 1897 All W N 15 (16), *Wahid Nur Khan v. Haqdad Khan*.

Section 5 — Note 42

1. ('36) 23 AIR 1936 All 139 (140) : 160 Ind Cas 876 (DB), *Durga v. Lakhpai Rai*. (Office cannot assume that valuation of application cannot exceed valuation of appeal.)

expiry of the limitation from the date of the original decree, and the appeal was dismissed by the District Judge on the ground that no formal application under S. 5 was made for excusing the delay, it was held by the High Court of Allahabad that the District Judge should not have dismissed the appeal.¹ In the undermentioned case² it was held that where a petition was filed out of time, it must show on the face of it the reason for the delay and there must further be an *express* prayer for condonation of the delay under S. 5.

Where the appellant was misled by the practice of the High Court in computing the period of limitation it was held that formal application under S. 5 was not necessary.³

44. Order under section 5, if "judgment" within the meaning of the Letters Patent. — Where the Court allows the appeal or application to be filed beyond time, as a matter of concession or indulgence, it is not really deciding the rights of the parties nor adjudicating upon their rights and liabilities. It is therefore not a 'judgment' within the meaning of the Letters Patent.¹ But it has been held by a Full Bench of the Bombay High Court that an order passed by a Division Court rejecting an application to excuse the delay in presenting an application for leave to appeal to the Privy Council is a 'judgment' within the meaning of clause 15 of the Letters Patent.²

45. Order under section 5, whether one "passed on appeal." — An order dismissing an appeal as barred after refusing an application to extend time under S. 5 is an order "passed on appeal" within S. 109 (a) of the Civil Procedure Code.¹ An order *extending* the

Section 5 — Note 43

1. ('36) 23 AIR 1936 All 666 (667, 668): 164 Ind Cas 1066 (DB), *Mt. Kulsoomun nissa v. Noor Mohammad*.
[See however ('38) 25 AIR 1938 Nag 233 (235): 176 Ind Cas 33, *Chetanlal Purshottam v. G. S. Gupta*. (Power of High Court to apply S. 5 to appeal in lower appellate Court — It is doubtful if High Court has such power in absence of an application in lower appellate Court.)]
2. ('26) 13 AIR 1926 Pat 73 (75); 4 Pat 766: 92 Ind Cas 179, *Laurentius Ekka v. Dukhi Koeri*.
3. ('50) 37 AIR 1950 Assam 83 (Pr 7) (DB), *G.-G. in Council v. Jesraj Tilakchand*.

Section 5 — Note 44

1. ('35) 22 AIR 1935 All 620 (624): 57 All 983: 157 Ind Cas 347 (FB), *Mt. Shahzadi Begam v. Alakh Nath*. (Clause 10 of Letters Patent, Allahabad.)
(('29) 16 AIR 1929 Cal 214 (216): 56 Cal 135: 114 Ind Cas 88 (FB), *Brojo Gopal Ray v. Amar Chandra*. (Clause 15 of Letters Patent, Calcutta.)
(('36) 23 AIR 1936 Mad 387 (388): 59 Mad 656: 161 Ind Cas 416 (DB), *Ananthanarayana Iyer v. Rarichan*. (Orders excusing delay and admitting appeal — As orders did not end any proceeding no appeal lies therefrom.)
2. ('24) 11 AIR 1924 Bom 399 (403): 40 Bom 442: 80 Ind Cas 862 (SB), *Nagindas Motilal v. Nilaji Moroba*.

Section 5 — Note 45

1. ('21) 8 AIR 1921 Cal 415 (415, 416): 62 I. C. 216 (DB), *Framoth Nath v. W. A. Lee*.
(('12) 16 Ind Cas 486 (486) (Mad) (DB), *Krishnasami v. Ramasami*. (Assumed.)
(('26) 13 AIR 1926 Pat 102 (102): 90 Ind Cas 723 (DB), *Pereira v. East Indian Railway*.

Section 5 Notes 45-47

time under S. 5 and admitting the appeal is not a "final order" within the meaning of S. 109 of the Civil Procedure Code.² An order admitting an appeal by excusing delay is not adjudicating an 'appeal'.³

An order dismissing an appeal as too late is a decree open to appeal,⁴ But an order refusing to excuse delay in filing the appeal is not open to appeal.⁵

46. Section 5 and Madras High Court Original Side Rules, Rule 356. — A single Judge of the High Court sitting in the admission Court is competent to excuse delay in the presentation of an appeal under S. 5, whether the appeal is against a decree passed on the Original Side or is from the decree of a mofussil Court.¹

47. Appeal on behalf of or against dead person.—Where an appeal was filed on behalf of a dead person and subsequently his legal representatives applied to continue the appeal, the Court treated the application as an appeal by the representatives themselves and excused the delay under this section.¹ Where an appeal is filed against a dead person under a *bona fide* mistake and if the time expires before the representatives are brought on record, the time may be extended under section 5.²

5A. [Expired.]—The Negotiable Instruments Act and the Indian Limitation Act (Temporary Amendment) Ordinance, 1947 (Ord. No. 31 of 1947) was promulgated on 27-12-1947 by the then Governor-General in exercise of the powers conferred by S. 42 of the Govt. of India Act 1935 as adapted by India (Provisional Constitution) Order, 1947. Section 3 of this Ordinance runs as follows : —

"3. After S. 5 of the Indian Limitation Act, 1908, the following section shall be inserted, namely :—

5A. Extension of period in cases of riots. — Any suit which could not be instituted on and after the 1st day of August 1947 or cannot be instituted after the coming into force of this

[But see ('08) 32 Bom 108 (109, 110) : 9 Bom L R 566 (DB), *Karsandas Dharmsay v. Gangabai*. (Case under the old Code of Civil Procedure—Such an order is not one "passed on appeal" within S. 595 of the Code of 1882.)

('36) 23 AIR 1936 Oudh 110 (112) : 11 Luck 599 : 159 Ind Cas 483 (DB), *Mt. Karim Jehan Begam v. Girdhari Lal*.]

2. ('26) 13 AIR 1926 Pat 102 (102) : 90 I. C. 723 (DB), *Pereira v. E. I. Railway*.

3. ('13) 21 Ind Cas 96 (98) (Mad) (DB), *Ruthna Gramany v. Veerabudra Iyer*.

4. ('85) 9 Bom 452 (453) (DB), *Raghunath Gopal v. Nilu Nathaji*.

5. ('42) 29 AIR 1942 Mad 604 (606) : I L R (1942) Mad 868 : 203 Ind Cas 5, *Kamaraju v. Saramma*.

Section 5 — Note 46

1. ('13) 21 Ind Cas 96 (98) (DB) (Mad), *Ruthna Gramany v. Veerabudra Iyer*.

Section 5 — Note 47

1. ('08) 18 Mad L Jour 461 (461) (DB), *Subbarayudu v. Lingayya*.

2. ('50) 37 AIR 1950 Mad 52 (52), *Krishnaiya Chetty v. Dr. Varadachari*. (Delay in applying, to set aside abatement of appeal due to appellants' ignorance of death — Legal representative of deceased party not instructing advocate of deceased party about death—Sufficient cause for excusing delay.)

('48) ILR (1948) 1 Cal 25 (27) (DB), *Santi Prasanna v. Harendra Nath*.

('36) 23 AIR 1936 Pesh 192 (193) : 165 I. C. 201, *Mubarak Shah v. Acharaj Ram*

Ordinance within the period of limitation on account of the prevalence of the riots or other disturbances may be admitted after the period of limitation prescribed therefor when the plaintiff satisfies the Court that he was unable to institute the suit within such period owing to the prevalence of riots or other disturbance."

This Ordinance expired on 27-6-1948.

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Note 47

***6.* (1)** Where a person entitled to institute a suit or Legal disability. make an application for the execution of a decree is, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period after the

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* Act of 1877 : S. 7.

7. If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, *Legal Disability.* a minor, or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.

When he is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or when, before his disability has ceased, he is affected by another disability, he may *Double and successive disabilities.* institute the suit or make the application within the same period after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.

When his disability continues up to his death, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

Disability of representative. When such representative is at the date of the death affected by any such disability, the rules contained in the first two paragraphs of this section shall apply.

Illustrations.

(a) The right to sue for the hire of a boat accrues to A during his minority. He attains majority four years after such accrual. He may institute his suit at any time within three years from the date of his attaining majority.

(c) A right to sue accrues to Z during his minority. After the accrual, but while Z is still a minor, he becomes insane. Time runs against Z from the date when his insanity and minority cease.

(d) A right to sue accrues to X during his minority. X dies before attaining majority and is succeeded by Y, his minor son. Time runs against Y from the date of his attaining majority.

Act of 1871 : S. 7.

Legal disability. 7. If a person entitled to sue be, at the time the right to sue accrued, a minor, or insane, or an idiot, he may institute the suit within the same period after the disability has ceased, or (when he is at the time of the accrual affected by two disabilities) after both disabilities have ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.

When this disability continues up to his death, his representative in interest may institute the suit within the same period after the death as would otherwise have been allowed from the time prescribed therefor in the third column of the same schedule.

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disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule.

(2) Where such person is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period, after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.

(3) Where the disability continues up to the death of such person, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

(4) Where such representative is at the date of the death affected by any such disability, the rules contained in subsections (1) and (2) shall apply.

Illustrations.

(a) The right to sue for the hire of a boat accrues to A during his minority. He attains majority four years after such accrual. He may institute his suit at any time within three years from the date of his attaining majority.

(b) A right to sue accrues to Z during his minority. After the accrual, but while Z is still a minor, he becomes insane. Time runs against Z from the date when his insanity and minority cease.

(c) A right to sue accrues to X during his minority. X dies before attaining majority, and is succeeded by Y, his minor son. Time runs against Y from the date of his attaining majority.

a. Section 6 has been declared not to apply to suits, appeals or applications under the Bengal Public Demands Recovery Act, 1913 (Beng. Act III of 1913); see S. 56 of that Act.

Illustrations.

(a) The right to sue for the hire of a boat accrues to A during his minority. He comes of age four years after the accrual of the right. He may institute his suit at any time within three years from the date of his coming of age.

* * * * *

Act of 1859 : Ss. 11 and 12.

11. If, at the time when the right to bring an action first accrues, the person to whom the right accrues is under a legal disability, the *Computation of period of limitation in case of legal disability.* action may be brought by such person or his representative within the same time after the disability shall have ceased as would otherwise have been allowed from the time when the cause of action accrued, unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time when the disability ceased; but if, at the time when the cause of action accrues to any person, he is not under a legal disability, no time shall be allowed on account of any subsequent disability of such person or of the legal disability of any person claiming through him.

What persons to be deemed to be under legal disability.

12. The following persons shall be deemed to be under legal disability within the meaning of the last preceding section—Married women in cases to be decided by English law, minors, idiots, and lunatics.

*Synopsis***Section 6**

1. Legislative changes.
2. Scope of the section.
3. Relative scope of sections 6 and 17.
4. Retrospective effect of section.
5. "Person." See Notes 6 to 8.
6. Suit by corporation — Disability of members — Effect.
7. Joint right of suit vested in several persons — Applicability of section.
8. "Person entitled to institute a suit or make an application."
9. "Suit," meaning of. See S. 2, clause 10.
10. "Disability." See Notes 3, 23, 24, 27 and 28.
11. Disability and incapacity. See Note 3.
12. "Reckoned."
13. Proceedings to which section applies.
14. Section applies only to the person entitled to sue or apply for execution at the commencement of limitation.
15. Disability must exist at the time from which period of limitation is to be reckoned.
16. Suit by after-born member of Hindu joint family to set aside alienation of joint family property.
17. Suit by Hindu reversioner to set aside alienation or adoption by widow.
18. Suit by reversioner under Punjab Customary Law to set aside alienation of ancestral property by collateral.
19. Suit by reversioner or adopted son succeeding to an estate after a Hindu widow.
20. Applicability of the section to periods fixed by special or local Acts.
21. Applicability of the section to period of twelve years fixed by Section 48, Civil Procedure Code.
22. Period fixed by Court cannot be extended under this section.
23. Disabilities to which section applies.
24. Minor.
25. Section, whether applies to child in womb.
26. Whether minority negatives knowledge.
- 26a. Whether there can be adverse possession against a minor or other person under disability. See Note 24 under Articles 142 and 144.
27. "Insane."
28. "Idiot"
29. Onus of proof and evidence as to disability.
30. Suit on behalf of Hindu idol.
31. "Within the same period after disability has ceased."
32. Section does not prevent running of limitation against person under disability.
33. Privilege under section is not confined to proceedings instituted after the cessation of disability.
34. Acquisition of prescriptive title against person under disability.
35. Effect of existence of guardian for person under disability.
36. Estate of minor under management of Court of Wards.
37. Appointment of administrator to estate of person under disability. See Note 3.
38. Estate of minor in hands of executor.
39. Appointment of receiver to estate of person under disability.
40. Whether extension of time under the section can be claimed by assignee from person under disability.
41. Whether period extended under this section is "period prescribed" for suit or application.
42. Clause (3): Death of person under disability.
43. "Legal representative."
44. Clause (4): Minority or other disability of legal representative.

TOPIC INDICATOR

Accrual of cause of action. See Notes 14 and 15.

Acknowledgment when creditor is minor. See Notes 14 and 15.

Age — Determination of. See Notes 24 and 25.

Computation of period. See Note 31.

Section 6 Note 1

Disability – Whether confers exemption apart from statute. See Note 20.

Litigant should plead disability. See Note 29.

Mental weakness on account of injuries is not insanity. See Note 27.

Privilege under section is personal. See Notes 2, 16, 32 and 40.

Restitution application – Section applicable. See Note 13.

Section does not apply to appeals. See Note 13.

Section not applicable to persons collectively. See Notes 7 and 8.

Sections 6 to 8 – Supplementary to each other and not mutually exclusive. See Note 2.

Section 8, an exception to Ss. 6 and 7. See Note 2.

Suit during disability not barred. See Note 3.

1. Legislative changes. — This section corresponds to S. 7 in the Acts of 1877 and 1871 and to Ss. 11 and 12 in the Act of 1859. The changes made in the section in the various Acts may be reviewed under the following heads :

1. Who are to be treated as persons under legal disability :

Under the Act of 1859 (S. 12), married women, in cases to be decided under the English law, were also persons under legal disability in addition to minors, lunatics and idiots. Married women were removed from the category of persons under disability in the later Acts. (See Note 23.)

2. Point of time at which disability should exist :

Under the present section and the corresponding section (S. 7) of the Act of 1877, the point of time at which the disability should exist is the time from which the period of limitation is to be reckoned. But, under the Acts of 1859 and 1871, it was the time when the right to sue accrued. (See Note 15.)

3. Proceedings to which section applies :

The Acts of 1859 and 1871 applied only to *suits*. The Act of 1877 applied to suits as well as applications. But the present section applies to suits and applications for *execution*. (See Note 13.)

4. Applicability to suits for pre-emption :

The Acts of 1859 and 1871 applied to suits for pre-emption as well as to other suits. Such suits were excluded from the operation of the section in the later Acts. (See Note 13 and section 8.)

5. Death before cessation of disability :

The provision as to the death of the person under disability before the cessation of his disability did not occur in the Act of 1859.

6. Simultaneous and successive disabilities :

The provisions as to these did not occur in the Act of 1859. The Act of 1871 introduced the provision as to *simultaneous* disabilities. It was the Act of 1877 that first provided for *successive* disabilities as well.

7. Disability of legal representative in case of death of person under disability before the cessation of disability :

The Acts of 1859 and 1871 did not contain any provision as to this. In fact, the Act of 1859 did not provide for the contingency of a person dying before cessation of his disability. (See Note 44.)

8. *Definition of minority :*

The Act of 1871 contained a definition of minority. It said that a minor was a person who had not completed his eighteenth year.

This definition was omitted in the later Acts. (See Note 24.)

9. *Extended period, whether applicable to suit by legal representative of person under disability :*

Under the Act of 1859, it was provided that in case of the disability of the person entitled to sue, he or his representative might sue within the extended period. In the later Acts, this privilege is confined to the person under disability. (See Note 40.)

2. Scope of the section. — The scheme of the Act is that, as a general rule, suits and other proceedings instituted after the lapse of the period prescribed by the first schedule should be barred. But, this general rule is subject to the exception that, under certain special circumstances, which have been defined in the body of the Act, a suit or other proceeding though instituted after the lapse of the period so prescribed should not be time-barred.¹ The provisions of the Act, which are, thus, exceptions to the general rule and enable proceedings to be instituted after the lapse of the period prescribed by the first schedule, may be classified as follows :

- (1) Where the prescribed period of limitation is not affected but the delay in the institution of the proceeding is condoned. (S. 4.)
- (2) Where the prescribed period of limitation is not affected but the Court is given the *discretion* to excuse the delay in the institution of the proceeding. (S. 5.)
- (3) Where the period of limitation is *extended*, i. e., an additional period is given to the litigant. (Ss. 6, 7, 19, 20 and 23.)
- (4) Where an absolute exemption from the law of limitation is given. (S. 10.)
- (5) Where a certain period is directed to be excluded in computing the period of limitation. (Ss. 12 to 16.)
- (6) Where the starting point of limitation is postponed. (Ss. 17, 18 and 24.)
- (7) Where the running of limitation is *suspended* for a certain period. (S. 9, Proviso.)

This section is one of the provisions which *extend* the period of limitation laid down by the first schedule. (See Notes 31 to 33.)

The ground on which the extension is given is the *disability* of the person entitled to sue or apply. But the section does not contain the entire law on the subject. It enumerates the kinds of disabilities on account of which limitation will be extended. But, the *circumstances*, under which and the *extent* to which, limitation will be extended on such ground are dealt with not only in this section but also in Ss. 7 and 8. Thus the three sections together constitute one

Section 6 Notes 2-3

unit and are supplementary to each other and not mutually exclusive.²

The scheme of the sections is this. Section 6 lays down the *general* rule in accordance with which the question of limitation must be determined in cases where the person entitled to sue or apply is under a disability. Section 7 provides a special rule for *some* of these cases and, consequently, if a case falls within the provisions of S. 7, the question of limitation must be determined in accordance with them and not in accordance with S. 6.³ Section 8 serves as an exception to both sections 6 and 7 in two respects :

- (1) It exempts suits for pre-emption from the operation of both the sections.
- (2) It provides that sections 6 and 7 cannot operate so as to extend the ordinary period of limitation applicable to a case for more than three years from the cessation of disability or the death of the person affected thereby.

The conditions for the applicability of S. 6 are as follows :

- (1) The person entitled to sue or apply must be under a disability.
- (2) The disability must be of a person entitled to sue or apply *at the time from which limitation is to be reckoned*. (See Note 14.)
- (3) The disability must exist *at the time from which the period of limitation is to be reckoned*. (See Note 15.)
- (4) The disability must be of the kind specified in the section viz., minority, insanity or idiocy. (See Note 23.)
- (5) The proceeding in question must be a suit⁴ or an application for the execution of a decree. (See Note 13.)
- (6) The period of limitation for the proceeding must be fixed by the first schedule. (See Notes 20 to 22.)

The privilege under the section is not confined to proceedings instituted *after* the cessation of disability. (See Note 33.) It extends also to proceedings instituted on behalf of the person under disability during the continuance of the disability. But, the privilege is *personal* and does not apply to an assignee from the person under disability. (See Note 40.) As to whether minority is a general principle of exemption from limitation, apart from this section, see Note 20.

3. Relative scope of Sections 6 and 17.— This section refers to cases where a person is under a *disability* to sue while S. 17 refers to cases where there is no person in existence *capable of suing*. Where a cause of action *accrues in favour of a person* but he is, at the time

2. ('19) 6 AIR 1919 All 209 (210) : 41 All 435 : 49 I. C. 990 (DB), *Rati Ram v. Nadar*.

3. ('19) 6 AIR 1919 All 209 (210) : 41 All 435 : 49 Ind Cas 990 (DB), *Rati Ram v. Nadar*. (Proceeding barred under S. 7 even as against person under disability on the ground that a discharge could have been given without his concurrence — It cannot be contended that under S. 6 the person under disability is entitled to extension of time so far as he is concerned.)

4. Suits for pre-emption are exempt from the application of the Section — See S. 8.

of such accrual, a minor, or insane or an idiot, there is a *disability* to sue. Where a right to sue accrues to the *estate* of a deceased person, but there is no person who is entitled to institute a suit in respect of such right to sue, it is a case of there being no person *capable of suing*. In such cases, limitation *does not begin to run at all* until there is a person who is capable of suing.¹ This is the principle on which S. 17 is based.

Illustrations.

1. *A* owes *B* money under a bond. The money is payable on 10th January 1935. *B* dies in December 1934 leaving as his legal representative *C* who, however, is an alien enemy residing in foreign territory at the time the right to sue accrues. Under S. 83 of the Civil Procedure Code, *C* cannot institute a suit in the British Indian Courts and is, thus, *incapable of suing*. Where, however, the incapacity is removed, as for instance, by *C* coming and residing in British India with the permission of the Governor-General in Council, limitation will begin to run under S. 17 from the date when the incapacity is removed.

2. *A* owes money to *B* under a bond under which the money is payable in January 1935. *B* dies intestate in December 1934 and is governed for the purposes of succession by the provisions of sub-s. (1) of S. 212 of the Succession Act, 1925. Under that section, "no right to any part of the property of a person can be established in a Court of Justice unless letters of administration have first been granted by a Court of competent jurisdiction." Unless, therefore, such letters have first been granted to the estate of *B*, there will be no legal representative capable of suing on the debt. Limitation will, under S. 17, begin to run only when such letters are granted to any person.

It follows from the above that a *disability* to sue is, in law, a very different thing from an *incapacity* to sue.^{1a} In the former case, the starting point of limitation is not postponed but an *extended period* is given on personal grounds. In the latter case, the starting point of limitation is itself *postponed*, until there is a person in existence capable of suing. It is, therefore, clear that a person under *disability* cannot, on that ground alone, be considered as being *incapable* of instituting a suit within the meaning of S. 17, though it is possible to conceive of a case where a person is incapable of suing and is also under a disability, as where a legal representative is an alien enemy, as well as a minor.

In *Rivett-Carnac v. Goculdas*,² the High Court of Bombay, however, expressed the view that a minor legal representative of a deceased person must, by virtue of his minority, be considered a person *incapable* of instituting a suit. The facts of the case were as follows: A partner in a firm, who was a Hindu, died intestate leaving a minor heir. Four years later, letters of administration to the estate of the deceased were granted to the Administrator-General of Bombay. Within three years thereafter, the latter filed a suit against the other partners of the deceased for an account of the profits of the partnership and for the share of the deceased in such profits. It was contended

Section 6 — Note 3

1. Halsbury's Laws of England, Vol. 19 pages 53 and 56.

1a. ('41) 28 AIR 1941 Mad 449 (466) : I L R (1941) Mad 599 : 199 Ind Cas 225 (FB), *Venkateswara Sarma v. Venkatesa Ayyar*. (See the observations of Abdur Rahman J., at page 466.)

2. ('96) 20 Bom 15 (40, 41, 42, 44) (DB).

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that under Art. 106 of the Limitation Act, the suit was time-barred as it was brought more than three years from the date of the dissolution of the partnership, which took place on the death of the partner for whose estate letters of administration had been granted. The contention was overruled and it was held that as the minor was not capable of suing within the meaning of S. 17, time must be computed under that section from the date on which the letters of administration were granted to the Administrator-General, inasmuch as only then, there came into existence a legal representative capable of instituting a suit. The case went up on appeal to the Privy Council, *Bhagwandas v. Rivett-Carnac*.³ Their Lordships of the Privy Council confirmed the decision of the High Court that the suit was not barred by limitation, on the ground that the Administrator-General must be *deemed to be suing on behalf of the minor heir*. No reference was made to S. 17 or to the views of the High Court on the interpretation of that section. If the suit was *on behalf of the minor*, there was clearly no question of its being barred during his minority. The reasoning on which the Privy Council judgment is based is really inconsistent with the reasoning of the High Court, although the actual decision was confirmed.

It was, however, held in the undermentioned case⁴ of the Calcutta High Court by Mr. Justice Sale sitting as a single Judge, that in view of the confirmation of the decision of the High Court by the Privy Council in the case referred to above, their Lordships must be deemed to have upheld the view of the High Court that a minor is a person who is incapable of instituting a suit within the meaning of S. 17. It is submitted that, in view of the discussion above, this decision cannot be accepted as correct. The effect of holding that a person under disability is necessarily a person incapable of instituting a suit within the meaning of S. 17, will be to nullify the provisions of S. 6 and S. 8 and of making limitation begin to run only from the date when the disability ceases. The decision is also inconsistent with several cases, where suits were brought on a cause of action which had accrued to the estate of deceased persons, who had died intestate, leaving minor heirs and in which the question of limitation was determined purely by reference to Ss. 6 and 7 and not to section 17.⁵

4. Retrospective effect of section. — The corresponding section of the Act of 1877 (S. 7) applied to *all* applications, whereas

3. ('99) 23 Bom 544 (549, 550) : 26 Ind App 32 : 3 Cal W N 186 : 7 Sar 451 (PC).

4. ('05) 9 Cal W N 537 (541, 542), *Mohit Lal Dutt v. Raj Narain Dutt*.

5. ('02) 25 Mad 26 (36, 40) (DB), *Ahnsa Bibi v. Abdur Kader Saheb*. (Suit for account of dissolved partnership by heirs of deceased partner — Section 7 applied.) ('17) 4 AIR 1917 Mad 197 (198) : 33 Ind Cas 504 (DB), *Bavachutty v. Kunhi Pathumma*. (Do.)

('19) 6 AIR 1919 Bom 78 (78, 79) : 51 Ind Cas 79 : 43 Bom 487 (DB), *Ghulam Gous Mia Khat v. Shriram Pandurang*. (Mortgage by deceased — Suit for redemption by his legal representatives — Section 7 applied.)

('29) 16 AIR 1929 All 142 (143, 144) : 116 Ind Cas 481 (DB), *Mohammad Zahur Ahsan v. Mt. Maimuma*. (Wife of Mahomedan pre-deceasing her husband — Suit by sons for share of her dower debt — Held S. 7 did not apply.)

the present section applies only to applications *for execution*. Hence where a right to make an application (other than an application for execution) had arisen prior to the coming into force of the new Act and had not become time-barred under the provisions of the old Act due to the operation of S. 7 of that Act, the question would arise as to the retrospective effect of the amendment of the section in the new Act. In other words, the question would be whether limitation for the application should be calculated according to the amended section or according to the old section. The calculation of limitation according to the amended section, in such cases, may lead to either of two results —

(a) It may cut short the period within which the application can be brought.

(b) It may make the application time-barred.

In the first case, the effect of the amendment would not be to destroy any vested right, the principle being that there is no vested right in a period of limitation. Hence, under the principle discussed in the Preamble Note 15, the period of limitation should be calculated only in accordance with the amended section in such cases.¹

In the second class of cases, the effect of the amended section, if such section is applied, would be to destroy a right which is in existence and enforceable on the date of the coming into force of the new Act, but to such cases, the principle that where the Legislature has indicated its intention that the Act should be retrospective the Act should be construed retrospectively, will apply.

In the case of the Limitation Act of 1908, there are at least two indications showing that the Act is intended to operate retrospectively. The first is that though the Act is passed on the 7th August 1908, its commencement is postponed to the 1st January 1909, thus giving ample notice to those who would be affected by the changes made by it, to seek their remedies under the old law.^{1a} The other indication is that, by S. 30 (now repealed), the Act provided a special period of two years from the commencement of the Act in the case of suits for which a shorter period has been fixed under the new Act than under the old one.

Hence, even in the case of applications that would be time-barred on the date of the coming into force of the new Act, if the provisions of such Act were applied, it is only such provisions that should be applied and not the provisions of the old Act.² In this view, the

Section 6 — Note 4

1. ('30) 17 A I R 1930 Cal 34 (35, 36, 37) : 56 Cal 1117 : 122 Ind Cas 201 (DB), *Khondkar Mahomed Saleh v. Chandra Kumar Mukerji*.

1a. ('10) 8 Ind Cas 543 (544) : 35 Mad 678 (DB), *Chidambaram Chetty v. Karuppan Chetty*. (Following 5 Ind Cas 420 (DB), *Arayil Kali Amma v. Pelappakkara*.)

2. ('10) 8 Ind Cas 543 (543, 544) : 35 Mad 678 (DB), *Chidambaram Chetty v. Karuppan Chetty*. (Application to set aside *ex parte* decree.)

('17) 4 AIR 1917 Lah 144 (146, 147) : 1916 Pun Re No. 101 : 37 Ind Cas 292 (DB), *Manohar Lal v. Mt. Sadiqa Begam*. (Do.)

('18) 5 AIR 1918 Oudh 379 (385) : 48 Ind Cas 39 (DB), *Kaniz Mehdi Begam v. Rasul Beg*. (Application to set aside execution sale.)

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undermentioned decision³ is, it is submitted, not correct.

Where an Act is passed, which removes from the applicability of this section, any class of suits in respect of which, up to the time of the coming into force of such Act, the beneficial provisions of this section would be applicable, the question would arise as to the applicability of the new Act to cases where the right to sue has already accrued before the coming into force of the new Act. In such cases also, if the application of the new Act does not altogether destroy the right of suit that is available on the date of the coming into force of the Act, the provisions of the Act must be applied, though their effect will be to curtail the period of limitation that would have applied otherwise. But if the effect of applying the new Act is to *destroy* the right existing on the date of the coming into force of the new Act, by making it time-barred, then it must be held that the new Act does not apply on the principle that statutes should not be construed retrospectively so as to affect or destroy vested rights.⁴ But even vested rights can be extinguished by an Act of the Legislature and if the intention of the Legislature is clear, the rights existing under the old law should be put an end to, on the coming into force of a new law, effect must be given to such intention.⁵

Where a right has already become barred by limitation under the existing law, the coming into force, subsequently, of an enactment, which provides a longer period of limitation for similar cases, cannot revive the barred right. Thus, where a right accruing to a minor becomes time-barred under a law, which makes no provision for extension of limitation in the case of minors, the coming into force, later on, of a statute, which confers such extended period in the case of minors, will not revive the barred right.⁶

5. "Person" — See Notes 6 to 8.

3. ('11) 11 Ind Cas 401 (402, 403) (DB) (Cal), *Fazil Karim v. Ananda Mohan Ray*. (Application to set aside execution sale)

4. ('16) 3 AIR 1916 Mad 912 (913, 914, 916) : 30 Ind Cas 94 : 39 Mad 645 (DB), *Rajah of Pittapur v. Venkata Subba Row*. (Letters Patent Appeal from AIR 1915 Mad 1211 : 39 Mad 646n, *Raja of Pittapore v. Venkatasubba Rao*—Right to sue for rent not affected by provisions of Madras Act, I of 1908, making disability provisions of Limitation Act not applicable to such suits — Seshagiri Iyer, J., *contra*.)

5. ('11) 11 Ind Cas 912 (914) : 7 Nag L R 125, *Shankargir v. Ramachandra*. (C. P. Tenancy Act of 1898, S. 94 (3) providing that S. 7 of Limitation Act should not apply to suits for rent — Suits for rent accrued due prior to coming into force of the Act, whether affected by provisions — *Held* that they were affected — The general scope and purview of the Act must be taken into consideration if the statute is retrospective — *Held* in this case that the intention to make the Act retrospective was clear — Moreover, the right to sue for rent accrued under the Contract Act and not the Tenancy Act and so the provisions of the General Clauses Act, S. 6, cl. (c), are no bar to holding that the provision is retrospective — With reference to cl. (e) of the said section, the intention to make the provision retrospective is clear.)

6. ('74) 22 Suth W R 17 (21) : 13 Beng L R 445 (DB), *Thakur Kopilnauth Sahi Deo v. The Government*. (*Held* that the right to bring the suit having been extinguished by S. 9 of Act XXV of 1857 was not revived by repeal of the Act.)

6. Suit by Corporation—Disability of members—Effect.—

An incorporated body has a *distinct* existence in the eye of the law apart from the persons who constitute the body.¹ Hence, the section will not apply to cases where the right to sue or apply for execution is vested in an incorporated body *as distinct* from the individuals who are its members, although such individuals may themselves be affected by the disabilities mentioned in the section.

7. Joint right of suit vested in several persons — Applicability of section. — The limitation applicable in such cases is provided for in S. 7 and this section does not apply to them.

In the undermentioned case,¹ the view was expressed by Bhashyam Aiyengar, J., that in such cases, the time when the last of the persons under disability ceases to be under disability, should be taken as the time when the disability of the persons entitled to sue comes to an end. It is submitted that this view is not correct and a similar argument with reference to another provision of the Limitation Act was rejected by the Madras High Court itself in the undermentioned case.² In that case the argument was with reference to Art. 44, which provides a period of three years' limitation for a suit by a ward on attaining majority to set aside an alienation of property by his guardian, the starting point of limitation being specified as the time at which the ward attains majority. There were two wards who constituted a joint Hindu family and their property had been alienated by their mother acting as their guardian. The elder brother failed to sue within three years from the date of his attaining majority. A suit was brought afterwards but before the expiry of three years from the attainment of majority by the younger ward. It was contended that the suit was time-barred. In reply to this, it was argued that under the article it was the date on which the younger ward attained majority that must be taken as the date on which the "ward" attained majority in the case, as the right to sue to set aside the alienation was vested in both the wards. But the argument was repelled. As pointed out in that case, it is difficult to see how a date on which one person attains majority can be treated as the date on which another person also attains majority when such other person really attains majority on some other date.

8. "Person entitled to institute a suit or make an application." — Section 7 of the Act of 1877, corresponding to this

Section 6 — Note 6

1. See Salmond's Jurisprudence, 8th Edition, page 340.

Section 6 — Note 7

1. ('02) 25 Mad 26 (37) (DB), *Ahinsa Bibi v. Abdul Kader Saheb*. (According to the learned Judge, the latter part of S. 7 applies to cases where all the persons entitled to sue or apply are under a disability — But for this provision, he says, time will begin to run under S. 6, not from the time when one of them ceases to be under disability and becomes capable of giving a discharge without the concurrence of the others, but only from the time when the last of such persons has ceased to be under disability.)
2. ('15) 2 AIR 1915 Mad 1201 (1201, 1202, 1203) : 21 Ind Cas 410 (411) : 38 Mad 118 (DB), *Doraisamy v. Nondisami*.

Section 6 Note 8

section, applied to cases where "a person entitled to institute a suit or make an application" was under disability at the time from which the period of limitation was to be reckoned. Section 8 of the Act, corresponding to the present S. 7, applied to certain cases where one of "several joint creditors or claimants" was under a disability. The latter section was, however, held inapplicable to certain cases such as applications for execution by execution creditors,¹ and suits where one only of the plaintiffs was under a disability and the others could not give a valid discharge without his concurrence.² In such cases the applicability of S. 7 came to be considered and the question had to be decided on an interpretation of the words "person entitled to institute a suit or make an application." According to the High Court of Madras, these words meant, where several persons were jointly entitled to make an application or to sue on a single cause of action, *all* such persons and not any single one of them, so that, it was held that unless all such persons were under disability at the time from which the period of limitation was to be reckoned, the section was inapplicable.³ These decisions followed the English case of *Perry v. Jackson*,⁴ which was a case bearing on the interpretation of the proviso to S. 7 of 21 Jac 1, c. 16 corresponding to the present section but with this difference that it expressly referred to "person or persons." According to the High Court of Madras, the word "person" included "persons" by virtue of cl. 39

Section 6 — Note 8

1. ('02) 25 Mad 431 (441): 12 Mad L Jour 166 (FB), *Periasami v. Krishna Ayyan*. ('90) 13 Mad 236 (239, 240) (DB), *Seshan v. Rajagopala*. (*Held*, S. 8, Limitation Act, 1877, applied only to those cases in which the act of the adult joint creditor was *per se* a valid discharge.)
(1900) 22 All 199 (203, 204): 1900 All W N 8 (FB), *Zamir Hasan v. Sunder* (Do.)
(1906) 20 Bom 383 (385) (DB), *Govindram v. Tatia*. (Do.)
(1904) 1 All L Jour 408n (408n) (DB), *Liladhar v. Chaturbhuj*. (Assumed.)
(1904) 27 All 67 (68): 1904 All W N 163: 1 All L Jour 407, *Jiwan Ram v. Ram Sarup Ram*. (Do.)
(1901) 28 Cal 465 (468, 469, 470): 5 Cal W N 767 (DB), *Surja Kumar Dutt v. Arunchander Roy*.
(1907) 14 Cal 50 (54): 11 Ind Jur 143 (DB), *Anando Kishore v. Anando Kishore*.
2. ('93) 16 Mad 436 (438, 439): 3 Mad L Jour 216 (DB), *Vigneswara v. Bapayya*. (One of several persons jointly entitled to sue being minor — Others not able to give discharge — Latter part of S. 8 of Act of 1877 does not apply.)
(1902) 25 Mad 26 (36, 38) (DB), *Ahinsa Bibi v. Abdul Kader Saheb*.
3. ('02) 25 Mad 26 (36) (DB), *Ahinsa Bibi v. Abdul Kader Saheb*.
(1902) 25 Mad 431 (435, 444, 445, 446): 12 M L J 166 (FB), *Periasamy v. Krishna*.
(1900) 13 Mad 236 (240, 241) (DB), *Seshan v. Rajagopala*.
(1903) 16 Mad 436 (439): 3 Mad L Jour 216 (DB), *Vigneswara v. Bapayya*.
(1905) 28 Mad 359 (360) (DB), *Paru v. Raman Menon*, (Application for substitution of legal representatives.)
(1905) 28 Mad 479 (484, 485): 15 Mad L Jour 333 (DB), *Johnson v. Madras Railway Company*. (Suit for compensation under Act XIII of 1855 for death of relative caused by railway accident.)
(1905) 18 Mad 38 (39, 40) (DB), *Moidin Kutty v. Beevi Kutty Ummah*.
(1913) 19 Ind Cas 12 (15): 36 Mad 544 (FB), *Annapurnamma v. Akkayya*.
[See ('94) 4 Mad L Jour 50(50, 51) (Journal) Critical Note on (1893) 16 Mad 436.]
(1904) 17 Mad 189 (192, 193): 4 Mad L Jour 79 (DB), *Narayana v. Damodaran*.]
4. (1792) 4 Term Rep 516 (519): 2 R R 452: 100 E R 1150.

of s. 3 of the General Clauses Act, 1897, and that the principle of the decision in *Perry v. Jackson*⁴ would therefore apply in interpreting s. 7 of the Act of 1877.⁵ The other High Courts differed on this point and adopted the view that even where several persons were entitled to sue or apply jointly, any one of them must be held to be a person entitled to institute a suit or make an application within the meaning of s. 7, and that consequently in cases not governed by s. 8, s. 7 would be applicable where such person was under a disability at the time from which the period of limitation was to be reckoned.⁶

It was also held by the High Court of Madras that the word 'entitled' in s. 7 meant "entitled as of right" and that it did not include a right to apply with the permission of the Court, as in the case of an application for execution under O. 21, R. 15 of the Civil Procedure Code.⁷ The other High Courts did not follow this view.⁸

See also S. 7 Note 6.

The abovementioned conflict of views does not appear to be of any importance now in view of the present wording of ss. 6 and 7. The latter section now provides for *all* cases where one of several persons jointly entitled to institute a suit or make an application is under a disability and there is no room for the applicability of section 6. The reason is, as has been seen in Note 2, that where a case falls within s. 7, it must be determined with reference to that section and not with reference to this.

5. ('02) 25 Mad 431 (444, 445): 12 Mad L Jour 166 (FB), *Periasamy v. Krishna Ayyan*. (28 Cal 465 (DB), *Surja Kumar v. Arunchander*, dissented from.)

6 ('01) 28 Cal 465 (468, 469, 470) : 5 Cal W N 767 (DB), *Surja Kumar Dutt v. Arunchander Roy*.

('07) 7 Cal L Jour 308 (309) (DB), *Sheikh Jamir v. Srimati Lal Bibi*.

('87) 14 Cal 50 (54) : 11 Ind Jour 143 (DB), *Anando Kishore v. Anando Kishore*.

('06) 9 Oudh Cas 269 (270) (DB), *Nawab Ibn Husain Khan v. Munir Ahmea*.

('96) 20 Bom 383 (384, 385) (DB), *Govindram v. Tatia*.

('04) 6 Bom L R 647 (648) (DB), *Ganpat v. Seshagiri*.

(1900) 3 Oudh Cas 316 (319, 320) (DB), *Lachmi Narain v. Ram Prasad*. (Review application.)

(1900) 22 All 190 (204): 1900 All W N 8 (FB), *Zamir Hasan v. Sundar*.

('04) 1 All L Jour 408n (408n) (DB), *Liladhar v. Chaturbhuj*.

('05) 27 All 67 (68) : 1904 All W N 163 : 1 All L Jour 407 (DB), *Jiwan Ram v. Ram Sarup*.

('98) 2 Cal W N cvi (cvi, cvii) (DB), *Manmotho v. Monahur*. (Application for substitution as legal representatives of deceased person.)

('96) 23 Cal 374 (388) (DB), *Norendra Nath v. Bhupendra Narain*.

('93) 20 Cal 714 (716) (DB), *Lolit Mohun Misser v. Janoki Nath Roy*.

[But see ('09) 31 All 156 (159) : 1 Ind Cas 824 (825) (DB), *Ganga Dayal v. Mani Ram*. (25 Mad 431 (FB), *Periaswamy v. Krishna* followed.)]

7. ('02) 25 Mad 431 (436, 446): 12 Mad L Jour 166 (FB), *Periaswamy v. Krishna*.

8. (1900) 22 All 199 (204) : 1900 All W N 8 (FB), *Zamir Hasan v. Sundar*.

('07) 7 Cal L Jour 308 (309) (DB), *Sheikh Jamir v. Srimati Lal Bibi*.

('04) 1 All L Jour 408n (408n) (DB), *Liladhar v. Chaturbhuj*.

('05) 27 All 67 (68) : 1 All L Jour 407 : 1904 All W N 163 (DB), *Jiwan Ram v. Ram Sarup Ram*.

('01) 28 Cal 465 (468, 469, 470) : 5 Cal W N 767 (DB), *Surja Kumar Dutt v. Arunchander Roy*.

Section 6 Notes 8-13

It has, however, been held by the High Court of Calcutta, in a case arising under the present Act, that S. 6 contemplates cases where there is only one person entitled to sue or apply, and he is under disability, or where *all* the persons entitled to sue or apply are under a disability.⁹ The observation was really *obiter* inasmuch as it was held that S. 7 applied to the case. It is submitted that the observation is not correct. As has been seen in Note 7 above, an unincorporated body of individuals *collectively* cannot be a minor or insane or an idiot.

The section applies only to cases in which a person, who is entitled in his *own right* to institute a suit or make an application, is under a disability.¹⁰ It does not apply where such person is not under any disability, even though the suit or the application is for the benefit of another person who is under disability.¹¹ On the other hand, where such person is under a disability, the section does not become inapplicable merely because the suit would be for the benefit of a person not under disability.¹²

9. "Suit," meaning of. — See Section 2 clause (10).

10. "Disability." — See Notes 3, 23, 24, 27 and 28.

11. Disability and incapacity. — See Note 3 above.

12. "Reckoned." — The word "reckon" would seem to have the same meaning as the word "compute"¹ used in other sections, e. g., sections 5 and 17.

13. Proceedings to which section applies. — The section only applies to suits¹ (other than suits for pre-emption : See S. 8) and applications for the execution of decrees.² It does not apply to any

(196) 20 Bom 383 (385) (DB), *Govindram v. Tatia*.

(1904) 6 Bom L R 647 (648) (DB), *Ganpat v. Seshagiri*.

9. (1935) 22 AIR 1935 Cal 631 (631) : 158 Ind Cas 567 : 63 Cal 92 (DB), *Abd Hossain v. Abdul Rahman*.

10. (1905) 28 Mad 479 (485) : 15 Mad L Jour 363 (DB), *Johnson v. Madras Railway Company*.

11. See Notes 35 and 38.

[See also (1941) 28 AIR 1941 PC 6(9) : 67 Ind App 416 : I L R (1941) Kar (PC) 11 : 193 Ind Cas 225 : I L R (1941) Bom 202 (PC), *General A. F. and L. Assurance Corp'n. v. Janmahomed*. (Letters of administration granted to A in respect of estate in which B was beneficially interested — Administration bond executed by A in favour of officer of Court — Suit on bond — The fact that B was a minor at the time when the bond was broken i.e., the time from which limitation runs, does not make S. 6 applicable.)]

12. See Note 30.

Section 6 — Note 12

1. Concise Oxford Dictionary.

Section 6 — Note 13

1. See (1905) 28 Mad 479 (486) : 15 Mad L Jour 363 (DB), *Johnson v. Madras Railway Company*. (Sections 6 to 8 apply to suits under Article 21—Suits for compensation under Fatal Accidents Act, XIII of 1855.)

2. (1918) 5 AIR 1918 Oudh 379 (385) : 48 Ind Cas 39 (DB), *Kaniz Mehdi Begam v. Rasul Beg*.

(1924) 11 AIR 1924 Oudh 31 (31) : 26 Oudh Cas 206 : 80 Ind Cas 775, *Akhtar Hus-sain v. Qudrat Ali*. (An application for the continuance or revival of a previous execution proceeding struck off or suspended for no act or default of the decree-

other proceeding.^{2a} Thus, it does not apply to appeals,³ or to the following proceedings :

- (1) Application for final decree in mortgage suit.⁴
- (2) Application for personal decree against mortgagor under O. 34 R. 6, Civil Procedure Code.⁵
- (3) Application for restoration of suit or appeal dismissed for default.⁶
- (4) Application to set aside *ex parte* decree.⁷
- (5) Application for setting aside execution sale.⁸

holder is substantially an application for the execution of a decree within the meaning of S. 6 of the Limitation Act.)

[But see ('12) 15 Ind Cas 366 (367):6 Low Bur Rul 52 (DB), *Ma Sein Hnyin v. Lutchman Chetty*. (By virtue of S. 6 (1) of the Limitation Act, an application by a minor to be substituted as legal representative of a deceased party is valid if made during the period of minority—Submitted decision is not correct.)]

See also Section 5 Note 16.

2a. ('44) 31 AIR 1944 Lah 190 (196) : ILR (1945) Lah 8 : 213 Ind Cas 121 (FB), *Ram Singh v. Dhayan Singh*. (The Legislature appears to have intentionally confined the scope of S. 6 within narrow limits and made it applicable only to suits and applications for the execution of decrees. In several important matters which do not fall either under one heading or the other, minors have no privileges whatever.)

3. ('90) 12 All 461(480, 486):1890 All W N 149(FB), *Bechi v. Ahsan Ullah Khan*. ('96) 1896 All W N 128 (128) (DB), *In the matter of Brij Mohan Lal*.

('02) 12 Mad L Jour 385 (386) (DB), *Ramamurthy Iyer v. Subramaniya Iyer*.

('09) 4 Ind Cas 1002 (1003)(DB)(Lah), *Seva Datt Pershad v. Collector of Lahore*. (Section 7 of the old Act does not apply to application for pauper appeal made in name of minor by his next friend.)

('95) 18 Mad 484 (485, 486) (DB), *Thurai Rajah v. Jainilabdeen Rowthan*. (Application for admission of appeal to Privy Council.)

[See also (10) 7 Ind Cas 944 (944) : 34 Bom 589 (DB), *Chintaman Vyankat Rao v. Ramchandra Vyankat Rao*. (Section 7 of the Act of 1877 will not apply to an application to appeal in *forma pauperis* if it be treated as an appeal.)]

4. ('41) 28 A I R 1941 Bom 203(203): ILR (1941) Bom 435: 197 Ind Cas 30 (DB), *Govindnaik v. Basawannea*.

('33) 20 AIR 1933 All Cal 508 (508, 509) : 144 Ind Cas 768 (DB), *Pulin Chandra Sen v. Muzaffar Ahmad*.

('18) 5 A I R 1918 All 76 (77) : 40 All 203 : 43 Ind Cas 870 (DB), *Nairamuddin Shah v. Bohra Bhim Sen*.

('18) 5 A I R 1918 Nag 63 (63, 64) : 15 Nag L R 36 : 48 Ind Cas 934, *Vinayak Rao v. Baijanath*. (Section 6 of the Limitation Act is not applicable to an application to make a decree absolute which is governed by Article 181.)

5. ('30) 17 AIR 1930 Cal 34 (35) : 122 Ind Cas 201 : 56 Cal 1117 (DB), *Khondkar Mahomed Saleh v. Chandra Kumar Mukerjee*.

6. ('21) 8 A I R 1921 Bom 20 (20) : 45 Bom 648 : 60 I. C. 919 (DB), *Sonubai v. Shivaji Rao*. (Application for the re-admission of an appeal under O. 41 R. 19, C. P. C.)

See also Article 168 Note 8.

7. ('17) 4 AIR 1917 Lah 144 (146) : 1916 Pun Re No. 101 : 37 Ind Cas 292 (DB), *Manohar Lal v. Mt. Sadiqa Begam*.

('10) 8 Ind Cas 543 (543, 544) : 35 Mad 678 (DB), *Chidambaram v. Karuppan*.

('21) 8 A I R 1921 Pat 69 (71, 72) : 5 Pat L Jour 460 : 57 Ind Cas 333 (DB), *Harihar Prasad Singh v. Edul Singh*.

See also Article 164 Note 9.

8. ('43) 30 A I R 1943 Mad 55 (56) : 205 Ind Cas 596 (DB), *Govinda Krishna v. Sankaralinga*.

Section 6
Note 13

(6) Application for bringing on record legal representatives.⁹

(7) Application for leave to appeal.¹⁰

But an application for restitution is an application for execution of a decree within the meaning of this section and the provisions of the section apply to such applications.¹¹

An application to file an award is not a suit though it may be required to be numbered and registered as a plaint. Hence, the section does not apply to such an application.¹² However, now see S. 37 of the Arbitration Act, 1940.

The corresponding provisions in the Acts of 1859 and 1871 applied only to *suits*. Hence, it was held under those Acts that persons applying for the execution of decrees were not entitled to any extension of time on account of their minority or other disability.¹³ These decisions are no longer law in view of the express provisions of the section.

The corresponding provisions of the Acts of 1859 and 1871 applied also to suits for *pre-emption*. The present section does not apply to such suits. (See S. 8.)

The corresponding section in the Act of 1877 governed *all* applications and not merely applications for the *execution* of decrees,¹⁴

(135) 22 AIR 1935 Pat 450 (450): 159 Ind Cas 253 (DB), *Bholanath v. Mt. Sayed-atunnissa Begum*.

See also Article 166 Note 17.

9. (17) 4 AIR 1917 Low Bur 132 (133): 35 Ind Cas 438, *Ma Min Thin v. Maung Po Win*. (Application under O. 22 R. 2, C. P. C., to bring on record legal representatives of deceased appellant.)

(97) 1897 All W N 42 (42) (DB), *Lachmi v. Raghu*. (Application by guardian of minor appellant to bring on record representatives of deceased respondent.)

See also Article 176 Note 6 and Article 177 Note 7.

10. (18) 5 A I R 1918 Oudh 163 (165, 166): 46 Ind Cas 68 (DB), *Narendra Bahadur Singh v. Oudh Commercial Bank of Fyzabad*.

See also Article 179 Note 4.

11. (17) 4 AIR 1917 Bom 210 (211): 41 Bom 625: 41 Ind Cas 238 (DB), *Kurgodigauda Lingangauda v. Ningangauda Ningangauda*. (Section 6 is an enabling section and should be construed liberally.)

(26) 13 A I R 1926 Oudh 199 (199, 200): 92 Ind Cas 24:1 Luck 40 (DB), *Sant Sahai v. Chhutai Kurmi*.

12. (23) 10 A I R 1923 Rang 226 (226): 1 Rang 256: 76 Ind Cas 493 (DB), *Ma Thein Tin v. Maung Ba Than*.

(36) 23 AIR 1936 Pat 161 (162): 14 Pat 855: 161 I. C. 691 (DB), *Panchi v. Gena*. See also Article 178 Note 5.

13. (67) 8 Suth W R 137 (137) (DB), *Tarucknath v. Purno Chunder*.

(73) 20 Suth W R 53 (53) (DB), *Muthora Doss v. Shumboo Dutt*.

(66) 5 Suth W R Misc 10 (10) (DB), *Rotty Rumun v. Chunder Binode*.

[But see (84) 10 Cal 748 (755, 756): 8 Ind Jur 643 (DB), *Jugmohun Mahto v. Luchmeshur*. (Held suit included execution proceedings — 9 Suth W R 402 (FB), *Hurro Chunder v. Shoorodhonee*, followed)]

14. (98) 3 Cal W N 24 (25) (DB), *Maharaj Kumar Ganeshwar Singh v. Jagatadri Persad Narain Singh*. (Applications in pending suits.)

(87) 9 All 411 (413): 1887 All W N 58 (DB), *Baldeo Singh v. Kishon Lal*. (Application to set aside execution sale.)

(10) 6 Ind Cas 488 (488, 489) (Lah), *Gujjar Mal v. Sita Ram*. (Do.)

(98) 21 Mad 494 (495, 496): 8 Mad L Jour 75 (DB), *Ratna Iyer v. Krishna Dass Vithal Doss*. (Application by person dispossessed in execution.)

while this section, as already said, does not apply to any application other than one for the execution of a decree.

Section 6
Notes 13-14

14. Section applies only to the person entitled to sue or apply for execution at the commencement of limitation.—It is only the person who has a right to sue or make an application for execution at the time from which the period of limitation is to be reckoned, that can take advantage of the section. In other words, the section applies only to a person who is entitled to sue or apply for execution at the commencement of limitation. It does not apply to a person who is not entitled to sue or apply at the commencement of limitation but becomes entitled to do so *subsequently*.¹

Illustration.

A right to sue accrues to A in 1910 and limitation for the suit commences to run against A from that date. At that time, A has a minor son B. A does not sue during his lifetime. After A's death, B sues on the right to sue derived by him from A. B cannot claim any extension of time under this section on the ground of his minority in 1910 when the period of limitation began to run. The reason is that, at that time, B was not a person entitled to sue.

('87) 11 Bom 473 (474, 475) (DB), *Vinayakarao Amrit v. Devrao Govind*. (Application by execution purchaser for removal of obstruction to delivery of possession. Overruled in A I R 1933 Bom 457 (FB), *Mukund v. Tanu*, on another point.)

('81) 1881 Pun Re No. 103, *Mt. Sarwar Jan v. Dina*. (Application by the minor heirs of a deceased appellant for substitution of their names on the record.)

('85) 1885 Pun Re No. 91 (FB), *Rihana v. Harditta*. (Do.)

('86) 10 Bom 220 (221, 223) (DB), *Bhikaji Chandra v. Purushotam*. (Do.)

[But see ('97) 1897 All W N 42 (42) (DB), *Lachmi Prasad v. Raghu Prasad*. (Section 7, Indian Limitation Act, 1877, will not apply to an application made by a guardian of minors, who are parties to an appeal, to bring on the record of the appeal the representative of a deceased respondent.)]

Section 6 — Note 14

1. ('41) 28 A I R 1941 P C 6 (9) : 67 Ind App 416 : I L R (1941) Bom 202 : 193 Ind Cas 225: ILR (1941) Kar (PC) 11(PC), *General A. F. & L. Assurance Corpn. v. Janmahomed*. (Suit on administration bond given to officer of Court—Person beneficially entitled to estate, a minor at time of breach of bond—Bond subsequently assigned to him—S. 6 does not apply.)

('42) 29 A I R 1942 Pat 99 (101) : 20 Pat 727 : 199 Ind Cas 408 (DB), *Bhagwat Prasad v. Debichand Dogra*.

('25) 12 AIR 1925 P C 33 (34) : 52 Ind App 69 : 47 All 165 : 27 Oudh Cas 343 : 86 I. C. 249 (PC), *Rano Dip Singh v. Parameshwar Pershad*. (Alienation by Hindu coparcener—Subsequent birth of coparcener does not give fresh starting point.)

('41) 28 A I R 1941 Mad 449 (461, 474) : I L R (1941) Mad 599 : 199 Ind Cas 225 (FB), *Venkateswara Sarma v. Venkatesa Iyer*. (Alienation for valuable consideration of mutt properties by manager of mutt—Suit for recovery of such properties by successor—Limitation under Art. 134B runs from date of death of previous manager—Successor appointed to his office subsequently cannot claim benefit of S. 6 because of his minority at time of death of previous manager—His appointment does not date back to death of previous manager. Per Abdur Rahman, J.—The appointment dates back to death of previous manager, by virtue of doctrine of continuous representation of the mutt by its managers and the successor can claim benefit of S. 6 if he was a minor at the death of previous manager though he was appointed to his office later.)

See also the further portion of the Note and the cases cited thereunder.

Section 6
Note 14

It will be seen that in the above illustration, as B sues on the same cause of action as A had in his lifetime, there is no fresh starting point of limitation when B becomes entitled to sue on A's death. Hence, even if B should be a minor *at A's death*, this section will not apply to him. In other words, where limitation begins to run against one person and thereafter another person becomes entitled to sue on the *same* cause of action, there is no fresh starting point of limitation and the disability of such person at the time of his so becoming entitled to sue is no ground for the extension of limitation under this section.²

Illustrations.

1. B is in adverse possession against A from 1910. A dies in 1915 without having brought any suit for possession against B. A leaves a son, C, who is a minor at the time of his father's death. C is not entitled to any extension of time under this section.³

2. B owes money to A on a bond which falls due in 1910. A dies in 1911 without having brought any suit and is succeeded by C, his minor son. C is not entitled to any extension of time on account of his minority.⁴

3. B is an agent under A in respect of a certain transaction. The agency terminates on the completion of the transaction in 1910 and limitation for a suit by A against B for moveable property received by the latter as agent commences to run in that year. A dies in 1911 without having brought any suit against B. A is

2. ('46) 1946 J L R 136 (139) (DB), *Ramsahai v. Ishwar Saran*. (Alienation by Hindu father — Suit to set aside — Major son alive at date of alienation — Son subsequently born during limitation is not entitled to benefit of this section.)

('45) 32 A I R 1945 Bom 63 (65) : 219 Ind Cas 166, *Rachappa v. Madivalawa*. (Person not in existence at such time is not entitled to 3 years' extension.)

('68) 3 Agra 389 (389) (DB), *Mukootnath v. Jugwunt Lall*.

('13) 18 Ind Cas 306 (307) (Oudh) (DB), *Khanjan Singh v. Bhikan Singh*.

('12) 15 Ind Cas 679 (681) (Cal), *Benode Behari Bhadra v. Ram Sarup*.

(1900) 27 Cal 379 (403) (DB), *Harnabh Pershad v. Mandil Dass*.

('82) 8 Cal 788 (798) : 11 Cal L R 370 : 7 Ind Jur 17, *Hemangini Dasi v. Nobin Chand*.

('68) 9 Suth W R 251 (252) (DB), *Bhiloo Mundul v. Motee Lall*.

('35) 22 AIR 1935 Lah 144 (144), *Firm Duni Chand Panna Lal v. Kuldip Singh*.

('10) 8 Ind Cas 318 (318) : 1910 Pun Re No. 92, *Behari Lal v. Kalu*.

(1865) 2 Mad H C R 340 (340) (DB), *Vira Pillai v. Muruga Muttayan*.

('17) 4 AIR 1917 Low Bur 100 (102) : 42 I. C. 809 (DB), *Maung Poka v. Ma Ku*.

[See also ('09) 1 Ind Cas 759 (759) (All), *Ram Charan v. Ram Das*. (Acknowledgment of liability made during lifetime of A — A dying subsequently and B, his minor son, succeeding — B is not entitled to benefit of section.)]

3. ('20) 7 AIR 920 Lah 209 (210) : 55 Ind Cas 335 (DB), *Ghulam Muhammad v. Ahmad Khan*. (Adverse possession against *ala lambardar* — Son as succeeding *lambardar* must sue within twelve years of cause of action.)

('69) 12 Suth W R 1 (2) : 3 Beng L R App 80, *Mohabut Ali v. Ali Mahommed Kulal*. (Son's suit for ejectment brought more than twelve years from the date of dispossession barred by limitation.)

('05) 7 Bom L R 135 (137), *Rama v. Shamrao Ganesh*. (Vatandar.)

('88) 15 Cal 703 (706) (DB), *Chintamani Mahapatro v. Sarup Se*. (Assignee for valuable consideration of debutter property.)

[But see ('68) 1 Beng L R (SN) 18 (b), *Nur Mohammed v. Thakoor Bibi*. (If the full period had not elapsed before the death of the predecessor, the successor, if he is a minor at the time, may sue at any time within three years of his attaining majority.)]

4. ('66) 5 Suth W R 169 (169) (DB), *Nusheeram Roy v. Shushee Bhooshun Roy*.

('73) 20 Suth W R 2 (2) (DB), *Taruck Chunder Sen v. Doorga Churn Sen*.

succeeded by his minor son C. C cannot have any extension of time on the ground of his minority.⁵

4. A, the father of a joint Hindu family, alienates in 1910 joint family property under circumstances which make it liable to be set aside at the instance of other members of the coparcenary. At the time of the alienation there are in existence B and C, two sons of A. In 1912, D, another son, is born to A. D is also entitled to sue to set aside the alienation according to the law applicable in certain Provinces. D is not entitled to any extension of limitation on the ground of his minority. The reason is that he was not in existence in 1910 and consequently, was not entitled to sue in that year. See Note 16.

5. A, a Hindu widow, alienates in 1910 certain property belonging to her husband's estate under circumstances making the alienation not binding on the reversioners. At that time, the next reversioner is B. B does not bring any suit to have the alienation declared void beyond the lifetime of the widow. B dies in 1915. Upon B's death, C, a reversioner of the next degree, becomes entitled to sue for a declaration. At that time he is a minor; but his minority does not entitle him to the benefit of this section. The reason is that he was not entitled to sue in 1910 and there is not a fresh start of limitation in 1915 when he becomes entitled to sue, the principle being that there is a single cause of action for all the reversioners in such cases. See Note 17.

6. Limitation for executing a decree starts against A, the decree-holder, in 1910. A dies in 1911 without having applied for execution within the period of limitation, and is succeeded by his son, B, who is a minor at the time. B is not entitled to any extension of time on the ground of his minority.⁶

7. Letters of administration are granted to A in respect of a certain estate in which B is beneficially interested. A executes in favour of an officer of the Court an administration bond for the due administration of the estate. After a breach of the bond takes place, the bond is assigned to B who institutes a suit on it. The fact that B was a minor at the time of the breach of the bond when limitation began to run does not make this section applicable.^{6a}

But, where after limitation begins to run against A, a *distinct* cause of action accrues to B to sue the same defendant in respect of the same matter, there will be at the time of the accrual of such cause of action a fresh starting point of limitation and if B is under any disability at such time, he will be entitled to the benefit of this section.

Illustrations.

1. In 1910, A dispossesses a Hindu widow of certain land of which she is in possession as a Hindu widow. The widow dies in 1915. Upon her death, she is

5. ('29) 16 AIR 1929 Lah 883 (884) : 123 Ind Cas 878, *Ramji Mal v. Gulzara*.

6. ('12) 15 Ind Cas 829 (829, 830) : 36 Bom 498 (DB), *Bhagwant Ramchandra v. Kaji Mahamad Abbas*. (Application to set aside execution sale.)

('05) 1 Nag L R 180 (182), *Sitaram v. Tukaram*.

('86) 1886 All W N 49 (49) (DB), *Lachman Prasad v. Bhagwan Singh*.

('05) 27 All 704 (705) : 2 All L Jour 453 : 1905 All W N 163 (DB), *Bhagat Bihari Lal v. Ram Nath*.

('05) 29 Bom 68 (70) : 6 Bom L R 639 (DB), *Jivraj v. Babaji*. (20 Cal 714, distinguished.)

(1865) 4 Suth W R Misc 21 (21) : 1 Ind Jur (NS) 31, *Anundee Koonwar v. Thakoor Panday*.

[See also ('44) 31 AIR 1944 Lah 106 (110) : 1 L R (1944) Lah 592 : 217 Ind Cas 119 (DB), *Zaheer-ud-Din v. Amtur*. (Decree—Execution—Assignment of decree in favour of minor—Assignment does not create a fresh cause of action—Minor not entitled to benefit of S. 6, even if S. 6 were held applicable.)]

6a. ('41) 28 AIR 1941 PC 6 (9) : 67 Ind App 416 : ILR (1941) Kar (PC) 11 : 193 Ind Cas 225: ILR (1941) Bom 202 (PC), *General A. F. and L. Assurance Corp'n. v. Janmahomed*.

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Note 14

succeeded by *B*, the next reversioner to her husband's estate, who is a minor at the time. He can bring his suit at any time within three years of his attaining majority. The reason is that *B* has an independent cause of action to sue for possession on the widow's death and there is a fresh start of limitation on his succeeding to the estate. See Note 19.

2. A Hindu widow adopts a son *B* who is a minor at the time of the adoption. Prior to the adoption, *C*, a stranger, has been in adverse possession against the widow of a portion of the estate. *B* is entitled to the benefit of this section, the reason being that as in the case of the reversioner, so in the case of a son adopted by a Hindu widow, there is a fresh starting point of limitation on the adoption and the adopted son is not affected by the limitation that has run against the widow. See Note 19.

It has already been seen that where a cause of action accruing to *A* is derived thereafter by *B*, the latter is not entitled to the benefit of this section by reason of his disability at the time when limitation originally began to run or at the time when he became entitled to sue on the cause of action. But, if for any special reason there is a *fresh* start of limitation in favour of the person deriving his right to sue from another, his disability at the time from which such fresh period of limitation begins to run will entitle him to the benefit of this section. Thus, where after the death of the original creditor but before the expiry of the period of limitation, there is an acknowledgment of liability by the debtor in favour of the original creditor's legal representative, such acknowledgment operates, under the provisions of section 19, as a fresh starting point of limitation, and if the legal representative is under any disability at the time of the acknowledgment, he can take advantage of this section.⁷ Similarly, where a decree-holder dies leaving a minor son and an application for execution is made on behalf of the minor but is dismissed, the minor gets a fresh start of limitation from the date of such dismissal (see Art. 182), and he is entitled to the benefit of this section.⁸

7. ('45) 32 AIR 1945 Mad 149 (149), *Somalinga v. Muthulakshmi*.

('42) 29 AIR 1942 Bom 248 (250, 251) : ILR (1942) Bom 574 : 202 Ind Cas 196, *Shantaram v. Chintamanrao*.

('90) 13 Mad 135 (138) (DB), *Venkataramayyar v. Kothandaramayyar*. (Entirely new period runs from date of acknowledgment.)

('33) 20 AIR 1933 All 100 (101) : 54 All 1019 : 142 Ind Cas 794 (DB), *Chandrabhan v. Raj Kumar*.

('19) 6 AIR 1919 Lah 177 (178) : 52 Ind Cas 115, *Ramji Lal v. Manya*.

('12) 14 Ind Cas 694 (698) (Cal) (DB), *Sarat Chandra Singh v. Sudhan Hari Mukerjee*. (Per Bret J.)

See also Section 19 Note 37.

8. ('35) 22 AIR 1935 Lah 144 (144), *Duni Chand Panna Lal v. Kuldip Singh*.

('07) 29 All 279 (280, 281) : 4 All L Jour 145 : 1907 All W N 45 (DB), *Sri Ram v. Het Ram*. (Minor entitled to benefit of section, if he was entitled to apply at date of step-in aid of execution.)

('02) 25 Mad 431 (436, 437) : 12 Mad L Jour 166 (FB), *Periaswamy v. Krishna Ayyan*. (For purposes of S. 7 the time from which the period of limitation is to be reckoned should be the latest (applicable to the case) of the various dates referred to in the clauses of Art. 179 of the Act of 1877 (now Art. 182).)

('93) 20 Cal 714 (716) (DB), *Lolit Mohun Misser v. Janakynath Roy*. (Minority at any one of the points mentioned in Art. 182, which may apply to the particular case is sufficient to attract the operation of this section.)

('96) 23 Cal 374 (388) (DB), *Norendra Nath v. Bhupendra Narain Roy*. (Do.)

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15. Disability must exist at the time from which period of limitation is to be reckoned. — The section applies only where the disability referred to therein exists at the time from which the period of limitation is to be reckoned.¹ Hence, a disability which supervenes after the commencement of limitation is no ground for extension of limitation under this section. Thus, where a decree-holder becomes insane *after* the decree is passed (the date from which limitation is to be reckoned), he is not entitled to the benefit of this section.²

Similarly, where after limitation commences to run against A, B becomes entitled to sue on the *same* cause of action, the disability of B at the time of his so becoming entitled to sue is no ground for extending limitation under this section. The reason is that in such cases there is no fresh starting point of limitation at the time when B becomes entitled to sue and therefore the disability is not one existent at the time from which the period of limitation is to be reckoned. See Note 14.

But, where B's right is based on a *distinct* cause of action, he will have a fresh starting point of limitation, and if he is under any disability at the time from which there is thus a fresh start of limitation, he will be entitled to the benefit of this section. See Note 14.

Further (even in cases where there is no fresh cause of action), if under any special provision of law the person entitled to sue gets a fresh starting point of limitation, his disability at the time from which there is thus a fresh start of limitation will entitle him to the benefit of this section. Thus, where there is an acknowledgment of liability by the debtor under s. 19, a fresh period of limitation is to be computed from the date of such acknowledgment. Hence, if the creditor is under a disability at the date of such acknowledgment, he will be entitled to the benefit of this section. (See Note 14.) Similarly, Article 182 provides for various starting points of limitation for an application for execution. The disability of the decree-holder at any of these points (which may

(1900) 22 All 199 (204) : 1900 All W N 8 (FB), *Zamir Hasan v. Sundar*. (First application on behalf of minors dismissed — Second application made when they were still minors — Held this section applied.)

('96) 20 Bom 383 (386) (DB), *Govindram v. Tatya*.

[See also ('07) 11 Cal W N 831 (832) (DB), *Sheikh Abdul Latif v. Rajani Mohun Roy*. (Execution proceedings — Death of decree-holder pending stay of execution — Right of minor to revive proceedings — Minor entitled to extension of time under this section.)]

Section 6 — Note 15

1. ('18) 5 AIR 1918 All 183 (184) : 40 All 630 : 46 Ind Cas 584 (FB), *Kalika Baksh Singh v. Ram Charan*.

('47) 52 Mys HOR 332 (333) (DB), *Muminagappa v. Syed Hyder Sab*. (Holder of decree dying two years after decree — Some heirs minors at that time — Execution application after attainment of majority of all — Minors not entitled to benefit of this section.)

('93 1900) 1893-1900 Low Bur Rul 530 (532), *Ma Nyein Aung v. Ma So*.

('92) 20 Ind App 38 (46) : 20 Cal 560 : 6 Sar 283 : 17 Ind Jur 226 (PC), *Syed Ashgar Reza v. Syed Mehdi Hossein Khan*.

('05) 27 All 704 (705) : 2 All L Jour 453 (DB), *Bhagat Bihari Lal v. Ram Nath*.

2. ('06) 1906 Pun L R No. 72, page 218 (219), *Aya Singh v. Gurdial*.

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apply in the particular case) will entitle him to the benefit of this section. See Note 14.

16. Suit by after-born member of Hindu joint family to set aside alienation of joint family property. — A, the father of a Mitakshara joint family alienates family property without any legal necessity in 1910. The alienee takes possession of the property immediately. At the time of the alienation, A has a son B who is an *adult*. The alienation is made without B's consent. Under these circumstances, B is entitled to sue to set aside the alienation. The limitation for such a suit is twelve years from the date on which the alienee takes possession of the property (Art. 126) and hence expires in 1922. Subsequent to the alienation, C, another son, is born to A in 1912, i. e. before the expiry of limitation against B. According to certain schools of the Mitakshara law, C, the after-born coparcener, is also entitled to sue to set aside the alienation under such circumstances.¹ C sues to set aside the alienation in 1931 within three years of his attaining majority (claiming to be entitled under this section read with S. 8 to an extension of limitation for three years from the time of his attaining majority). Is the suit in time? No. As C was not in existence in 1910 at the commencement of limitation, he was not a person entitled to sue "at the time from which the period of limitation is to be reckoned" within this section, and hence, he is not entitled to any extension of time under this section on the ground of his minority. See Note 14.

But the question may be asked whether on his birth in 1912, C does not get a *new* cause of action so as to be entitled to a fresh starting point of limitation in that year (in which case s. 6 will apply to him—see Note 14). On this question, it is established that C does *not* get a new cause of action on his birth and that there is no fresh starting point of limitation at his birth. The cause of action arising in favour of B, the existing coparcener in 1910, arises in a representative capacity for the benefit of himself and other coparceners that may be born subsequently. Hence, the right of C, the subsequently born son, is based on the same cause of action as that of B and limitation does not start afresh on his birth.²

Section 6 — Note 16

1. ('40) 27 AIR 1940 Nag 94 (95) : 185 Ind Cas 881, *Nandlal v. Deorao Marut Rao*.

See Mulla's Hindu Law, 8th Edition, page 318.

2. ('46) 1946 J L R 136 (139) (DB), *Ramsahai v. Ishwar Saran*. (Alienation by Hindu father—Suit to set aside—At the date of alienation, major son in existence—An after-born son cannot avail himself of the provisions of Ss. 6 and 7 and therefore can file suit only within 12 years of the date of transfer.)

('45) 32 AIR 1945 Bom 63 (65) : 219 Ind Cas 166, *Rachappa v. Madivalawa*.

('25) 12 AIR 1925 PC 33 (34) : 86 Ind Cas 249 : 52 Ind App 69 : 47 All 165 : 27 Oudh Cas 343 (PC), *Ranodip Singh v. Parmeshwar Pershad*.

('27) 14 AIR 1927 All 54 (54) : 97 Ind Cas 591, *Deonandan v. Musafir*.

('26) 94 Ind Cas 180 (181) (All) (DB), *Bohra Natha Mal v. Jhunai Lal*.

('25) 12 AIR 1925 All 563 (564) : 87 Ind Cas 662, *Thakur v. Gulab*.

('25) 12 AIR 1925 All 247 (247) : 86 Ind Cas 704, *Ram Kishen v. Baldeo*.

In view of the principle abovementioned, viz., that the after-born son does not get a fresh cause of action on his birth, such son is not entitled to a fresh starting point of limitation on his birth even in cases which do not fall within the purview of Article 126. Thus the principle will be applicable where the alienation is not by the father but by some other coparcener,³ or where the alienee does not take possession of the property alienated.⁴

Hence, whether the suit of the after-born coparcener falls under Art. 126 or any other article, he is not entitled to any benefit under this section so far as any disability of *his own* is concerned.

Suppose, however, an alienation of joint family property is made by A, the father, in 1910. At that time he has a *minor* son, B, five years old. Another son, C, is born in 1912. It has been seen above that C will not be entitled to any extension of time under this section on account of any disability of his own, so that limitation for a suit by him to set aside the alienation will expire under Art. 126 in 1922 (unless he is entitled to an extension of time on any other ground). But, B, being in existence at the time of the alienation and being a minor at such time, he (B) is entitled to bring his suit at any time within three years of his attaining majority under this section read with S. 8. So, in the case of B, limitation will expire only in 1926. The question arises whether C can sue at any time within 1926. On this question there is a conflict of decisions. One view is that as C's right is not an independent one but is only derived from B, C is entitled to sue at any time within the period that would have applied to a suit by B

('25) 12 AIR 1925 All 54 (55) : 82 Ind Cas 307, *Sikandar Singh v. Bachchu*.

('24) 11 AIR 1924 All 912 (914) : 79 Ind Cas 1019, *Dhanraj v. Ram Naresh*.

('24) 11 A I R 1924 All 798 (799) : 46 All 882 : 83 I C 1052 (DB), *Sita Ram v. Cheddi*.

('24) 11 A I R 1924 All 677 (678) : 79 Ind Cas 1010, *Sankat Narain v. Ram Bharos*.

('35) 22 AIR 1935 Mad 431 (431, 432) : 156 Ind Cas 83, *Udayamuthiar v. Shanmugam Chettiar*.

('21) 8 AIR 1921 Oudh 229 (229) : 65 Ind Cas 404, *Sheoambur v. Ratipal*.

('21) 8 AIR 1921 Oudh 196 (199) : 24 Oudh Cas 330 : 64 I C 757, *Chokhey v. Hardeo*.

('21) 8 A I R 1921 Oudh 127 (128) : 61 Ind Cas 801, *Oudh Behari v. Suraj Bali*.

('89) 2 C P L R 141 (144, 145), *Sardar Singh v. Ajit Singh*.

[See ('20) 7 AIR 1920 Lah 39 (40) : 1 Lah 558 : 59 Ind Cas 678 (DB), *Lachman Das v. Sundar Das*.]

See also Article 126 Note 5.

3. ('40) 27 AIR 1940 Nag 94 (95) : 185 Ind Cas 881, *Nandlal Rampratap v. Deorao Marut Rao*.

[See ('09) 1 Ind Cas 670 (674) (Cal), *Banwari Lal v. Sheo Shankar Misser*.

('15) 2 AIR 1915 Nag 52 (55) : 32 Ind Cas 242 : 12 Nag L R 12, *Asaram v. Ratan-singh*.]

4. See ('28) 15 AIR 1928 Bom 383 (383, 384) : 113 Ind Cas 378 (DB), *Chintaman Balwant v. Bhagwan Ganpati*. (Suit under Art. 120.)

('27) 14 AIR 1927 All 702 (702, 703) : 50 All 163 : 106 Ind Cas 377 (DB), *Bindeshri Upadhya v. Sital Upadhya*. (Do.)

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himself.⁵ The other view is that C is not entitled to take advantage of the extension of limitation in B's favour.⁶ It is submitted that the former view does not seem to be correct. It proceeds on the footing that a person deriving his right to sue from a minor is entitled to the extension of limitation applicable to the minor himself under this section. Such a view is not correct, the right under this section being in the nature of a *personal* privilege which is not transmissible to others. See Note 40. Further, it is not correct to say that C *derives* his right to sue from B. C's right is *independent*.^{6a}

But, at the same time, if B sues and succeeds in such suit, C will be entitled to share in the relief, though at the date of the suit a suit by C himself would have been time-barred.⁷ The reason is that B's suit is in vindication of a right common to himself and C.

It must also be noted that the fact that the suit is barred by limitation as against C, the after-born son, does not make it time-barred as against B, the pre-existing son who is entitled to an extension of limitation under this section.⁸ This shows that the principle that when two persons are entitled to sue on a cause of action, the expiry of limitation as against one will make the suit time-barred as against the other also, does not apply to cases where one of the persons is entitled to the special privilege of an extension of limitation under this section.

Another feature is that the suit by B after the expiry of limitation as against C is not also liable to be dismissed for want of necessary parties on the ground that limitation having expired as against C, he cannot be joined as a party to the suit by B. The reason is that C is not a necessary party to the suit, the rule being that *any* coparcener

5. ('43) 30 AIR 1943 Mad 378 (380) : 210 Ind Cas 297, *Srinivasalu v. Munisami*. (AIR 1937 Lah 420 : ILR 1937 Lah 395 (DB) and AIR 1920 All 912, *Gobind v. Ram Lal*. Rel. on.)

('32) 19 AIR 1932 Lah 605 (605) : 13 Lah 520 : 140 Ind Cas 375 (DB), *Jorala Singh v. Sant Singh*.

('23) 10 AIR 1923 Oudh 52 (53) : 66 I C 938 (DB), *Ranodip Singh v. Rameshar Pd.*

('25) 12 AIR 1925 All 54 (55) : 82 I C 307, *Sikandar Singh v. Bachchu Pande*.

('24) 11 AIR 1924 All 912 (914) : 79 Ind Cas 1019, *Dhanraj Rai v. Ram Naresh Rai*. (Pre-existing coparcener dying minor—After-born coparcener can sue within three years from the date on which the deceased would have attained majority if he had lived.)

6. ('20) 7 AIR 1920 Lah 39 (40) : 1 Lah 558 : 59 Ind Cas 678 (DB), *Lachman Das v. Sundar Das*.

('22) 9 AIR 1922 Lah 275 (277) : 3 Lah 99 : 63 Ind Cas 760 (DB), *Ber Singh v. Hazara Singh*.

6a. ('40) 27 AIR 1940 Nag 94 (95) : 185 Ind Cas 881, *Nandlal Rampratap v. Deorao Marut Rao*. (After-born sons are entitled to avoid alienation of joint family property, not as the representatives of their father but in their own right.)

7. ('13) 20 Ind Cas 958 (965) : 40 Cal 966 : 40 Ind App 213 : 10 Nag L R 1 (PC), *Ramkishore Kedarnath v. Jainarayan Ramrachpal*.

8. See ('13) 20 Ind Cas 958 (965) : 40 Cal 966 : 40 Ind App 213 : 10 Nag L R 1 (PC), *Ramkishore Kedarnath v. Jainarayan Ramrachpal*.

can sue to set aside an unauthorised alienation of family property on behalf of all the coparceners.⁹

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Notes 16-17

Where the pre-existing coparcener who is under a disability at the time of the alienation dies before the cessation of the disability the after-born coparcener cannot be treated as the legal representative of the deceased so as to entitle him to sue within the extended period of limitation conferred by clause 3 of this section.¹⁰

The above are cases in which the after-born coparcener comes into existence *before* the expiry of limitation as against the pre-existing coparcener. Suppose, the after-born coparcener comes into existence *after* the expiry of limitation as against the pre-existing coparcener. In such a case, the after-born coparcener will not be entitled to sue at all (apart from the question of limitation), the reason being that the failure of the pre-existing coparcener to sue within the period of limitation extinguishes the right of the family to the property and thus the very basis for a suit by the after-born coparcener is destroyed.¹¹

17. Suit by Hindu reversioner to set aside alienation or adoption by widow. — Before the Privy Council decisions in *Venkatanarayana Pillai v. Subbammal*¹ and *Janaki Ammal v. Narayanaswamy Iyer*,² there was a conflict of decisions as to the question whether a suit by a reversioner questioning an alienation or an adoption by a Hindu widow was a representative suit on behalf of the entire reversionary body or not. One view was that such a suit was a representative one.³ The other view was that it was not a

9. ('22) 9 AIR 1922 Bom 319 (320) : 46 Bom 535 : 64 IC 972 (DB), *Bai Keval v. Madhu Kala*. (Suit brought three years after attaining majority of elder brother but within three years of attaining majority by younger brother not barred.)

('93) 16 Mad 436 (439) : 3 Mad L Jour 216 (DB), *Vigneswara v. Bappayya*.

('09) 1 Ind Cas 530 (532) (Cal), *Dursan Singh v. Durbejoy Singh*.

10. ('35) 22 AIR 1935 Mad 431 (432) : 156 Ind Cas 83, *Udayamuthier v. Shunmugam Chettiar*.

11. ('16) 3 AIR 1916 All 356 (357) : 33 Ind Cas 913 : 38 All 126 (DB), *Lachmi Narain Pershad v. Kishan Kishorechand*. (('11) 33 All 654 (DB), *Tulshi Ram v. Babu*, distinguished.)

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1. ('15) 2 AIR 1915 P C 124 (125, 126) : 38 Mad 406 : 42 Ind App 125 : 29 Ind Cas 298 (PC).

2. ('16) 3 AIR 1916 P C 117 (118) : 39 Mad 634 : 43 Ind App 207 : 37 Ind Cas 161 (PC).

3. ('90) 14 Bom 512 (515) (DB), *Chhaganram v. Bai Motigavri*. (Sale of property in execution of decree against widow — Suit by reversioner for declaration that sale does not affect reversionary interest — Cause of action is common to all reversioners.)

('01) 24 Mad 405 (407), *Aiyadorai v. Solai Ammal*. (Suit to set aside adoption.)

('02) 4 Bom L R 893 (903), *Jamnabai v. Dharsey Takersey*. (Do.)

('81) 1881 All W N 83 (83), *Gopi Nath v. Sri Narain*. (Do.)

[See ('75) 23 Suth W R 285 (286) : 15 Beng L R 9 (Note) (DB), *Siddessur Dutt v. Sham Chand Nundun*. (Suit to set aside adoption.)

('06) 29 Mad 390 (411) : 1 Mad L Tim 183 : 16 Mad L Jour 307 (FB), *Chiruvolu Punnamma v. Chiruvolu Perrazu*. (It was held in this case that in view of certain dicta of the Privy Council, the presumptive reversioner cannot be held to represent the remote reversioner in suits relating to alienations by qualified

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Note 17

representative one and that the decision in a suit by one reversioner did not bind the other reversioners.⁴ According to this view, each reversioner in such cases has an independent cause of action and consequently an independent starting point of limitation from the moment of his becoming entitled to sue.⁵ The above Privy Council cases clearly established that a suit by a reversioner in such circumstances was a representative suit based on the *same cause of action* with reference to all the reversioners. After this, the question again came up before a Full Bench of the Madras High Court in *Varamma v. Gopaladasayya*⁶ with reference to the point of limitation. It was decided by the Full Bench that the effect of the said Privy Council decisions was that even with reference to the question of limitation, the reversioner entitled to sue at the time of the alienation or adoption must be held to represent the entire reversionary estate. Hence, there is only one starting point of limitation in the case of all reversioners and not a fresh start of limitation as each successive reversioner becomes entitled to sue.⁷ The representative character of a suit by

owners, but in suits to set aside an adoption the presumptive reversioner ought, on principle, to be held to represent the remote reversioner — It was further held that an unauthorized alienation gives rise to a cause of action for a declaratory suit from the date of the alienation to all the reversioners.))]

[See also ('73) 10 Bom H C R 351 (352) (DB), *Bhikaji v. Jagannath*. (Distant reversioner can sue when nearer one has waived his rights.)]

4. ('04) 27 Mad 588 (590), *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib*. (Overruled in A I R 1915 P C 124 : 38 Mad 406 : 42 Ind App 125 (PC), *Venkatanarayana v. Subbammal*.)

('99) 22 All 33 (46, 47) : 1899 All W N 159 (FB), *Bhagwanta v. Sukhi*.

('05) 32 Cal 62 (71) : 9 Cal W N 25 (DB), *Abinash Chandra Mazumdar v. Hari Nath Shaha*. (28 Mad 57 relied on.)

('05) 2 Cal L Jour 87 (95) : 9 Cal W N 795, *Harek Chand v. Bejoy Chand*.

('02) 4 Bom L R 140 (145) (DB), *Manjunath v. Kaveribai*.

('69) 11 Suth W R 468 (472) : 3 Beng L R (A C) 145 (DB), *Tarinee Churn v. Saroda Soonduree*.

('17) 4 AIR 1917 Mad 30 (34) : 38 Ind Cas 270 (DB), *Venkatarow v. Tulja Ram*. (Overruled in AIR 1919 Mad 911 (FB), *Varamma v. Gopaladasayya*.)

('15) 2 AIR 1915 Mad 800 (802, 803) : 20 I. C. 625 : 38 Mad 396 (DB), *Narayana Iyer v. Rama Iyer*. (Do.)

('12) 16 Ind Cas 839 (842) : 36 Mad 570 (DB), *Veerayya v. Ganamma*. (Do.)

('05) 28 Mad 57 (60, 61) : 14 Mad L Jour 209 (DB), *Govinda v. Thayammal*. (Do.)

5. See cases cited in foot note (4).

6. ('19) 6 AIR 1919 Mad 911 (917, 920, 921) (FB), *Varamma v. Gopaladasayya*. (Overruling 28 Mad 57 (DB); *Govinda v. Thayammal*; 16 Ind Cas 839 : 36 Mad 570 (DB), *Gazzala Veerayya v. Gazzala Ganamma*; AIR 1915 Mad 800 (DB), *Narayana v. Rama* and ('17) AIR 1917 Mad 30 (DB), *Venkata Row v. Tulja-ram*.)

7. ('41) 28 AIR 1941 Bom 197 (198), *Annu Bajaba v. Dadu Tukaram*. (Where the right of a prior adopted son to set aside alienation made by his widow mother is barred, no further right to sue accrues to a subsequently adopted son.) ('19) 6 AIR 1919 Mad 911 (917, 920, 921) : 41 Mad 659 : 46 Ind Cas 202 (FB), *Varamma v. Gopaladasayya*. (Failure of declaratory suit in widow's lifetime by reversioner precludes suit for possession by actual reversioner after widow's death.)

('25) 12 AIR 1925 Mad 86 (86, 87) : 83 Ind Cas 140 (DB), *Hussain v. Venkata*.

('27) 14 AIR 1927 Mad 216 (217) : 99 I. C. 668, *Neelakantamier v. Chinnu Ammal*.

the reversioner in such circumstances has again been affirmed by a Full Bench of the Allahabad High Court.⁸ But the High Courts of Calcutta⁹ and Patna¹⁰ and the Lahore High Court¹¹ have held that the bar of limitation against one reversioner does not affect the rights of other reversioners. It is submitted that such a view cannot be supported in view of the clear pronouncements of the Privy Council already referred to. See also Article 120 Note 34 and Article 125 Note 7.

From the above, it is clear that where at the time of the alienation or adoption by a Hindu widow, there is a reversioner competent to sue and limitation begins to run against him, a reversioner who *subsequently becomes entitled to sue* does not get a fresh starting point of limitation and hence, he is entitled to the benefit of this section by reason of any disability of his at the time of his becoming entitled to sue.¹²

Suppose that at the time of the alienation by a widow, there are two persons A and B, who are reversioners of the same decree and constitute the next reversioners. Suppose A is a minor and B is an adult at the time. The right of action arises simultaneously in favour of both A and B. As has been said, the cause of action of both is the same, so that they may be said to be "jointly entitled" to sue within the meaning of S. 7. As to whether A will be entitled to sue at any time within three years of his attaining majority, see Notes to section 7.

18. Suit by reversioner under Punjab Customary Law to set aside alienation of ancestral property by collateral.— The right of a reversioner under Punjab Customary Law to challenge the alienation of ancestral property by a collateral is based on a cause

(25) 12 AIR 1925 Lah 654 (655, 656): 6 Lah 405: 90 Ind Cas 1022 (DB), *Chiragh Din v. Abdullah*. (('99) 22 All 33 (FB), *Bhagwanta v. Sukhi*, dissented.)

(07) 1907 Pun Re No. 22 : 1907 Pun W R No. 89 : 1908 Pun L R No. 27, *Umra v. Ghulam*. (After born reversioner.)

See also cases cited in foot-note (3).

8. ('22) 9 AIR 1922 All 301 (308, 309) : 44 All 19 : 64 I. C. 248 (FB), *Kesho Pershad v. Shiva Pershad*. (Decree against one reversioner binds other reversioners.)

9. ('24) 11 AIR 1924 Cal 481 (482) : 51 Cal 101 : 81 Ind Cas 522 (DB), *Das Ram Choudhury v. Tirtha Nath*. (Suit under Art. 120.)

10. ('35) 22 AIR 1935 Pat 256 (260): 155 Ind Cas 244 (DB), *Sital Raut v. Adalat Raut*. (Suit under Art. 120.)

11. ('44) 31 AIR 1944 Lah 409 (413) : I L R (1945) Lah 231 : 216 Ind Cas 10 (FB), *Ilahi Bakhsh v. Umar Bakhsh*. (AIR 1933 Lah 524 (527) (DB), *Gajindar v. Balwant*, overruled. *Note*: — Cases of the Lahore High Court cited under foot-note (7) must be considered no longer good law in view of this Full Bench decision)

(32) 19 AIR 1932 Lah 39 (40) : 132 Ind Cas 665 (DB), *Wali Chand v. Punjab Singh*. (The reasoning was that valid discharge under S. 7 could not be given by those who were not under disability.)

[See also ('34) 21 AIR 1934 Lah 968 (969) : 154 Ind Cas 675 (DB), *Hari Ram v. Sali*. (Reversioner and his minor sons alive—Reversioner's right to set aside adoption being barred does not bar son's right.)]

12. See cases cited in foot-note (7).

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of action which is common to the entire reversionary body. In other words, each reversioner has not an independent right to sue to set aside such alienation. Hence, if limitation begins to run against a reversioner who is competent to sue at the time of the alienation, it begins to run as against the entire reversionary body and any reversioner who may subsequently become entitled to question the alienation will not have a fresh start of limitation from the time of his becoming so entitled. Thus, a reversioner born subsequent to the alienation does not get a fresh starting point of limitation.¹ Hence, the benefit of this section cannot be claimed by any reversioner not competent to sue at the time when limitation originally starts to run. In the undermentioned cases² it was held that though the after-born reversioner cannot claim the benefit of this section in his own right, still he cannot be deprived of the extended period claimable by the minor reversioner in existence at the time of alienation. As has been seen in Note 16 this view does not seem to be correct.

But, where the *next* reversioner is under a disability such as minority at the time of the alienation, he is entitled to the benefit of this section, notwithstanding the presence of *remote* reversioners who are under no such disability, but who do not sue to set aside the alienation. The reason is that the remote reversioners cannot have sued in the presence of the nearer reversioner and the principle that the failure of one reversioner to sue within limitation bars all the other reversioners applies only where the former was *competent* to sue.³

Section 6 — Note 18

1. ('49) 36 AIR 1949 Lah 88 (91) : Pak L R (1948) Lah 181 (FB), *Rana v. Mohd. Afzal Khan*. (Per Division Bench.)
- ('20) 7 AIR 1920 Lah 39 (40) : 1 Lah 558 : 59 Ind Cas 678 (DB), *Lachman Das v. Sundar Das*.
- ('34) 21 AIR 1934 Lah 290 (291) : 154 I. C. 592, *Arjan Singh v. Waryam Singh*.
- ('20) 7 AIR 1920 Lah 220 (220) : 54 I. C. 838 (DB), *Miran Datta v. Bihari Lal*.
- ('25) 12 AIR 1925 Lah 24 (25) : 5 Lah 389 : 82 Ind Cas 626 (DB), *Dad v. Lal*.
- ('11) 10 Ind Cas 725 (726, 727) (Lah), *Bhana Ram v. Hakim Singh*.
- ('12) 14 Ind Cas 60 (61) (Lah), *Kehar Singh v. Hazara Singh*.
- ('07) 1907 Pun W R No. 21, page 45, *Mohan Singh v. Dewa Singh*.
- ('27) 14 AIR 1927 Lah 97 (97) : 97 I. C. 435 : 8 Lah. 19 (DB), *Shahamad v. Salabat*.
- ('07) 1907 Pun Re No. 108 : 1907 Pun W R No. 193, *Inayat Khan v. Shabu*.
- ('37) 24 AIR 1937 Lah 420 (424, 425) : I L R (1937) Lah 395 : 172 Ind Cas 341 (LB), *Gobind v. Ram Lal*.
- [See ('15) 2 AIR 1915 Lah 169 (170) : 29 Ind Cas 761 (DB), *Chanda Singh v. Mukand Singh*.]
- [But see ('33) 20 AIR 1933 Lah 866 (867) : 147 Ind Cas 399, *Khushi Ram v. Nand Lal*.]
2. ('38) 25 AIR 1938 Lah 1 (3) : I L R (1937) Lah 769 : 175 Ind Cas 824 (DB), *Harnam Singh v. Aziz*.
- ('37) 24 AIR 1937 Lah 420 (425) : I L R (1937) Lah 395 : 172 Ind Cas 341 (DB), *Gobind v. Ram Lal*.
3. ('37) 24 AIR 1937 Lah 653 (655) : 172 Ind Cas 218 (DB), *Jati Khubi v. Matu*. (Reversing A I R 1937 Lah 485, *Matu v. Jati*; A I R 1933 Lah 524 (DB), *Gajindar v. Balwant*, dissented.)

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Note 19

19. Suit by reversioner or adopted son succeeding to an estate after a Hindu widow. — It is now established that for purposes of limitation the Hindu widow does not represent the estate so as to bind the reversioners. Hence, where adverse possession commences against a widow during her lifetime and a reversioner succeeds to the estate thereafter, the reversioner has an independent cause of action to sue for possession and such cause of action accrues to the reversioner on his succeeding to the estate on the widow's death.¹ Similarly, where a widow adopts a son and the latter succeeds to the estate he gets a fresh start of limitation from the date of his adoption even in regard to matters that have arisen before the adoption.² The contrary view, viz., that the reversioner or the adopted son is bound by the limitation that has run against the widow³ is no longer law. Hence, if the reversioner or the adopted son is a minor or is under any other disability referred to in this section at the time of his succeeding to the estate, he will be entitled to the benefit of this section.⁴

Section 6 — Note 19

1. ('99) 23 Bom 725 (736) : 26 Ind App 71 : 1 Bom L R 607 : 3 Cal W N 621 7 Sar 543 (PC), *Runchordas Vandravandas v. Parvatibai*.
 ('29) 16 AIR 1929 P C 166 (170) : 51 All 439 : 56 Ind App 267 : 117 Ind Cas 498 (PC), *Mt. Jaggobai v. Utsavalal*. (Provided there is no decree against widow in her life-time depriving reversioner's right.)
 ('28) 15 AIR 1928 All 561 (567) : 112 Ind Cas 801 : 51 All 188 (FB), *Bankey Lal v. Raghunath*. (Boys, J. — The question whether adverse possession against widow bars reversioners must be decided as in case of decree on facts of particular case.)
 ('92) 14 All 156 (159) : 1892 All W N 22 (FB), *Ram Kali v. Kedar Nath*.
 ('83) 9 Cal 934 (937) : 13 Cal L R 372 (FB), *Srinath Kur v. Prosunno Kumar*. See also Article 141 Note 13.
2. ('95) 19 Bom 809 (815, 816) (DB), *Moro Narayan Joshi v. Balaji Raghunath*. (His rights come into existence from the moment of his adoption.)
 ('15) 2 AIR 1915 Mad 539 (540, 541) : 25 Ind Cas 692 (DB), *Kancharla Venkataratnam v. Kogantu Venkataramiah*. (It is unjustifiable to place an adopted son in worse position than that of reversioner.)
 ('05) 2 Cal L Jour 87 (95) : 9 Cal W N 795 (DB), *Harek Chand v. Bejoy Chand*. (1900) 2 Bom L R 411 (414) (DB), *Hari v. Waman*.
3. ('66) 7 Suth W R 134 (135), *Gobind Csomar Choudhry v. Huro Chunder Chowdhry*. (The reasoning was that there is only one cause of action to the family on date of dispossession.)
 ('09) 1 Ind Cas 49 (50) : 36 Cal 394 (DB), *Girindra Mohan Roy v. Bocha Das*. (Suit to recover instalments due under instalment bond.)
 ('35) 22 AIR 1935 Bom 420 (421) : 159 Ind Cas 272, *Mariyayya Sidramayya v. Chanvirangouda*. (In this case, it was assumed that an adopted son suing for arrears of rent accumulated prior to adoption sues on the same cause of action as would have applied to the widow and it was held that the suit was time-barred. The assumption is not correct. In such cases, the cause of action will not pass to the adopted son at all, the right to the rent being the widow's personal right. The suit is liable to be dismissed on the ground that the adopted son cannot sue for the rent, at any rate, during the widow's life-time.)
4. ('79) 4 Cal 523 (526) : 3 Cal L R 391 (DB), *Prosonna Nath Roy Chowdry v. Afzolonnessa Begum*.
 ('05) 9 Cal W N 795 (801, 802) : 2 Cal L Jour 87 (DB), *Harek Chand Babu v. Bejoy Chand Mahatab*.

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But, if the adverse possession had commenced in the lifetime of the last full owner, the reversioner or adopted son succeeding to the estate will not have a fresh cause of action but will be bound by the limitation that has run before he succeeds to the estate.⁵ The reason is that in such cases the cause of action accrues in favour of the last full owner from whom it is derived by the reversioner or adopted son.

20. Applicability of the section to periods fixed by special or local Acts. — This section is one of the sections as to which it is provided in S. 29, sub-s. (2), cl. (b) that they will not apply to the determination of the period of limitation prescribed for a suit or other proceeding by any special or local law. The language of this section also shows that it only applies to cases in which a period of limitation is laid down in the first schedule to this Act.¹ Hence, it does not apply to cases where a period of limitation is provided for by any special or local law.² It will, however, apply where the special or

5. ('22) 9 AIR 1922 Mad 12 (15, 16) : 45 Mad 361 : 70 Ind Cas 678 (DB), *Seeta-ramaraju v. Subbaraju*.

('21) 8 AIR 1921 Mad 272 (276) : 44 Mad 951 : 68 Ind Cas 734, *Narayanasamy Naicker v. Periasamy Oddyar*. (Article 141 does not cover cases where cause of action includes something more beyond death of female.)

[See ('23) 10 AIR 1923 Lah 103 (106, 107) : 68 Ind Cas 177, *Chanan Singh v. Salig Ram*. (Unless defendant shows that cause of action arose in lifetime of last male owner suit by reversioner will be governed by Art. 141.)]

[But see ('67) 7 Suth W R 453 (454), *Ram Doollub Sandyal v. Ram Narain Moiter*. (Submitted not correct.)]

See also Section 9 Note 10 and Article 141 Note 14.

Section 6 — Note 20

1. ('13) 18 Ind Cas 306 (307) (Oudh) (DB), *Khanjan Singh v. Bhikan Singh*. (Section will apply to the two years' period under S. 31 of the Limitation Act only if it can be treated as an amendment of Art. 132 of the first schedule.)

2. ('41) 28 AIR 1941 Mad 693 (694) : 200 Ind Cas 38 (DB), *Krishna v. Peda Satyam*. (Madras Hereditary Village Offices Act (III of 1895), S. 14 (1)).

('74) 1 Ind App 167 (176) : 13 Beng L R 292 : 21 Suth W R 318 : 3 Sar 363 (PC), *Mohummud Buhadoor Khan v. The Collector of Bareilly*. (Clause 20 of Act IX of 1859.)

('02) 29 Cal 813 (822) (DB), *Akhoy Kumar v. Bejoy Chand Mohatap*. (Section 167 of the Benal Tenancy Act.)

('14) 1 AIR 1914 Lah 85 (86) : 1914 Pun Re No. 64 : 25 Ind Cas 448 (DB), *Secretary of State v. Hakim*. (Section 18 of the Land Acquisition Act.)

('15) 2 AIR 1915 Cal 541 (543) : 28 Ind Cas 241 (DB), *Shankar Prosad Jha v. Babu Lal Jha*. (Sonthal Parganas Regulation, III of 1872.)

('18) 5 AIR 1918 Nag 247 (247) : 46 Ind Cas 879, *Balkrishna Laxman v. Bala*. (Section 60, sub-section 4 (1) of the C. P. Land Revenue Act.)

('95) 18 Mad 99 (103) (F B), *Veeramma v. Abbiah*. (Section 77, Registration Act.)

('90) 17 Cal 263 (267) (DB), *Girja Nath Boy Bahadur v. Patani Bibee*. (Section 29 of the Bengal Act, VIII of 1869.)

('97) 1897 Pun Re No. 69, *Jan v. Ala Baksh*. (Section 40 (2) of Punjab Courts Act, 1884.)

('09) 4 Ind Cas 70 (71) (Cal), *Panch Kouri Ghosh v. Pran Gopal*. (Section 33, Bengal Revenue Sale Law, Act XI of 1859.)

('66) 5 Suth W R Act X Rule 41 (41, 42) (DB), *Dinonath Pandey v. Raghoonath Pandey*. (Bengal Act X of 1859.)

[But see (23) 10 AIR 1923 Nag 164 (166): 71 I. C. 140, *Shankargir v. Chinnuji*. (Submitted not correct.)]

local law itself provides that it should apply to any period of limitation prescribed by such special or local law.³ See also S. 29 Note 5.

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Notes 20-21

The Civil Procedure Code has been held to be not a special or local law,⁴ and hence the prohibition contained in S. 29, sub-s. (2), cl. (b) above referred to will not apply to periods of limitation fixed by the Civil Procedure Code. But, in view of the express language of this section which makes it applicable only to cases in which a period of limitation has been fixed by the first schedule to this Act, this section will not apply to such periods.⁵

As regards the question whether minority or other disability can confer an exemption from the law of limitation on *general* principles of equity, even in the absence of express provisions granting such exemption, the point was raised before the Privy Council in *Mohumud Buhadoor Khan v. The Collector of Bareilly*.⁶ Their Lordships rejected the contention that exemption could be pleaded in such cases and in doing so, observed as follows :

"Their Lordships however think it is impossible that any Court can add to the statute that which the Legislature has not done Where such enlargements have been intended, they are found in the Acts containing the limitation, as in the general Act. This Act⁷ contains no such saving, and their Lordships would be legislating and not interpreting the statute if they were to introduce it."

It is submitted that the view of the Bombay High Court⁸ that minority affords a general ground of exemption from the law of limitation *apart* from the statute is therefore open to question in the light of the above pronouncement of the Privy Council.

21. Applicability of the section to period of twelve years fixed by Section 48, Civil Procedure Code. — It will follow from what has been stated in Note 20, that the minority or

3. ('26) 13 AIR 1926 Nag 236 (237) : 91 I. C. 563, *Madho Rao Ghatate v. Balaji Narayan*. (Under the provisions of S. 160 of the C. P. Land Revenue Act, S. 6 of the Limitation Act applies to a suit for the recovery of a share of proprietary profits by a minor plaintiff.)

('94) 9 C P L R 1 (2), *Daola v. Chitoo*. (Section 81, C. P. Tenancy Act.)

('08) 11 Oudh Cas 118 (119) (DB), *Gur Pershad v. Gokaran Nath*. (Section 129, Oudh Rent Act.)

('29) 16 AIR 1929 Lah 819 (819, 820): 125 Ind Cas 178, *Sultan Bakhsh v. Painsa Khan*. (Punjab Limitation (Custom) Act, I of 1920.)

('26) 13 AIR 1926 Lah 188 (189) : 92 I. C. 294, *Md. Ghaus v. Md. Ali Shah*. (Do.) [See also ('14) 1 AIR 1914 Lah 87 (88): 22 Ind Cas 637, *Natha Singh v. Kishen Singh*. (The Punjab Limitation (Ancestral Land Alienation) Act of 1900.)]

4. ('12) 16 Ind Cas 149 (151) : 34 All 496, *Dropadi v. Hira Lal*.

[See also ('75) 1 Cal 226 (242) : 3 Ind App 7 : 25 Suth W R 285 : 3 Sar 573 : 3 Suther 236 (P C), *Phoolbas Koonwur v. Lalla Jogeshur*.]

For a fuller discussion of the subject, see Section 29 Note 6.

5. ('09) 1 Ind Cas 178 (179) : 5 Nag L R 1, *Hirasa v. Jodhraj*. (Section does not apply to period of thirty days fixed by O. 21, R. 92 of the C. P. C., as the period is fixed by the Code and not this Act—It is also doubtful whether the period of thirty days mentioned in O. 21, R. 92 is a period of limitation at all.)

6. ('74) 1 Ind App 167 (176): 13 Beng L R 292: 21 Suth W R 318: 3 Sar 363 (PC).

7. Section 20 of Act IX of 1859.

8. ('92) 16 Bom 536 (537), *Moro Sadashiv v. Visaji Raghunath*.

Section 6
Note 21

other disability of the decree-holder will not be a ground for extending the period of twelve years fixed by S. 48, Civil Procedure Code. There is, however, a conflict of decisions on this point. On the one hand, it has been held by the High Courts of Allahabad,¹ Calcutta,^{1a} Madras,² Nagpur^{2a} and Patna^{2b} and Lahore³ that such period cannot be extended on the above ground. On the other hand, the Bombay High Court⁴ has held that the period can be extended under such circumstances. The former view is based on the fact that the language of the section shows that it only applies to periods of limitation prescribed by the first schedule of this Act. The Bombay High Court also agrees that this section does not in terms apply to the period of twelve years under S. 48, Civil Procedure Code; but holds that on *general principles*, minority is a ground for exemption from limitation. The view of the Bombay High Court is open to question in view of the Privy Council decision in *Mohummud Buhadoor v. The Collector or Bareilly*.^{4a} (See Note 20.)

But, in the Madras High Court itself, in the undermentioned case,⁵ Sadasiva Iyer, J. following the decision of the Privy Council in

Section 6 — Note 21

1. ('15) 2 AIR 1915 All 349 (350) : 37 All 638 : 30 Ind Cas 521 (DB), *Ramnath Tewari v. Chatarpal Man Tewari*.
- 1a. ('38) 25 AIR 1938 Cal 25 (30) : I L R (1937) 2 Cal 373 : 176 Ind Cas 212 (DB), *Kartic Chandra v. Bata Krishna Roy*.
2. ('14) 1 AIR 1914 Mad 526 (527, 530) : 18 Ind Cas 586 (587) : 37 Mad 186 (DB), *Rebala Ramana Reddi v. Rebala Babu Reddi*.
[See also ('29) 16 AIR 1929 Mad 394 (396): 119 Ind Cas 39 (DB), *Mannarswamy Iyer v. Ramasamy Naicken*. (As regards S. 48, C. P. C., the question of minority is wholly irrelevant.)]
- 2a. ('39) 26 AIR 1939 Nag 245 (247) : I L R (1939) Nag 559 : 184 Ind Cas 72 (DB), *Yadora Wasudeorao v. Govindrao Ramji*.
- 2b. ('41) 28 AIR 1941 Pat 45 (47, 48) : 20 Pat 1 : 190 Ind Cas 369 (DB), *Mt. Zalikhan Bibi v. Rama Prasad*. (Section 48, C. P. C., overrides Ss. 6 and 7, Limitation Act and not vice versa.)
3. ('44) 31 AIR 1944 Lah 68 (68) : I L R (1945) Lah 448 : 212 Ind Cas 228 (DB), *Nathu Mal v. Jaikaran*. (The minor cannot also derive benefit from Art. 182, read with S. 6 for Art. 182 only applies in cases not covered by S. 48, Civil P.C.)
- ('44) 31 AIR 1944 Lah 106 (110) : I L R (1944) Lah 592 : 217 Ind Cas 119 (DB), *Zaheer-ud-Din v. Amtul Rasheed*.
- ('44) 46 Pun L R 25 (25, 26) (DB), *Ahmad v. Haji Khan*. (Further the minor cannot derive any benefit from Art. 182 read with S. 6, for Art. 182 only applies in cases not covered by S. 48.)
- ('94) 1894 Pun Re No. 128, *Jhandu v. Mohan Lal*.
4. ('92) 16 Bom 536 (537) (DB), *Moro Sadashiv v. Visaji Raghunath*.
- ('83) 7 Bom 179 (180) (DB), *Jagjivan v. Hasan Abraham*.
- ('30) 17 AIR 1930 Bom 508 (509) : 54 Bom 776 : 128 I. C. 428 (DB), *Ramkrishna v. Ramchandra*.
- 4a. ('74) 1 Ind App 167 (176): 13 Beng L R 292: 21 Suth W R 318: 3 Sar 363 (PC).
5. ('15) 2 AIR 1915 Mad 449 (451) : 24 Ind Cas 195, *Venkata Perumal Raja v. Velayudha Reddi*.
[See also (1865) 3 Suth W R 8 (9) (DB), *Huro Soonduree Chowdhraim v. Anund Nath Roy Chowdhry*.
('70) 14 Suth W R 339 (347, 348) (DB), *Sudaburt Pershad v. Lotf Ali Khan*.]

Phoolbas Koonwur v. Lalla Jogeshur,⁶ expressed the view that the Civil Procedure Code is not a "special statute" but is a general law of procedure and that the provisions of the Limitation Act relating to exclusion of time govern also the twelve years' period of limitation under section 48, Civil Procedure Code.

The Privy Council decision referred to above was one bearing on S. 11, Limitation Act of 1859, which did not contain any words showing that it applied only to cases in which the period of limitation was laid down by the Limitation Act itself. Under these circumstances, it was held by the Privy Council that the rule as to extension of limitation on the ground of minority contained in the above section also applied to a period of limitation fixed by the Civil Procedure Code itself. But, in view of the language of the present section which shows that it is only applicable to periods fixed by the first schedule to this Act, it is doubtful whether the principle laid down in the above Privy Council decision can be applied to the present section.

22. Period fixed by Court cannot be extended under this section. — The section refers to the extension of a period fixed by law. Hence, it does not apply to a period fixed by the Court.¹

23. Disabilities to which section applies. — Extension of limitation can be claimed only on grounds which are expressly provided for by the Limitation Act.¹ The only grounds on which limitation can be served under this section are *minority*, *lunacy* and *idiocy* of the person entitled to sue or make the application for execution.² Under the Act of 1859 (S. 12), married women (in cases to which the English law would apply) were included in the definition of persons under "legal disability" within the meaning of that Act. But under the later enactments married women are not regarded as persons under legal disability for purposes of limitation.

The fact that the plaintiff is a disqualified proprietor whose estate is under the management of the Court of Wards will not save limitation under this section.³ Similarly, the plaintiff's absence from the

6. ('75) 1 Cal 226 (242, 243) (P C) 3 Ind App 7 (PC) 25 Suth W R 285: 3 Sar 573: 3 Suther 236 (PC).

Section 6 — Note 22

1. ('84) 1884 Pun Re No. 31, *Prema v. Jawahir Dass*.

Section 6 — Note 23

1. ('26) 13 AIR 1926 Cal 65 (66, 73): 89 Ind Cas 1000 (DB), *Sarat Kamini Dasi v. Nagendra Nath Pal*.

('16) 3 AIR 1916 Cal 164 (165): 28 I. C. 818 (DB), *Kuarmani Singha v. Wasif Ali*. (1864) 1864 Suth W R Gap 290 (291) (DB), *Ram Kishore Achraj Chowdhry v. Lukhee De'bee Chowdhraia*.

2. ('18) 5 AIR 1918 P C 180 (181): 46 Cal 691: 50 Ind Cas 202: 46 Ind App 60 (PC), *Srimati Rani Kuar Mani Singh v. Nawab Bahadur of Murshidabad*.

('16) 3 AIR 1916 Cal 164 (165): 28 I. C. 818 (DB), *Kuarmani Singha v. Wasif Ali*. (1864) 1864 Suth W R Gap 290 (291) (DB), *Ram Kishore Achraj Chowdhry v. Lukhee Debee Chowdhraia*.

3. ('46) 33 AIR 1946 Pat 154 (157): 226 Ind Cas 97 (DB), *Kamakshya Narain Singh v. Bhuramull*.

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country,⁴ or the fact that there has been a dispute or litigation as to his title to the right in virtue of which the suit is brought does not entitle him to an extended period of limitation under this section.⁵

Ignorance of the accrual of the cause of action would, if brought about by the fraud of the defendant, entitle the plaintiff to an extension of limitation under s. 18. But in the absence of such fraud, such ignorance is no ground for extending limitation.⁶

24. Minor. — Section 3 of the Limitation Act of 1871 defined a minor as “a person who has not completed his age of eighteen years.” This definition applied to every person, whatever his domicile might have been.¹

The Acts of 1877 and 1908 omitted this definition. Under these Acts, the question as to when a person attains majority is governed by the provisions of the Majority Act of 1875. Under this Act, the age of majority is attained by a person ordinarily in all cases on his completing the eighteenth year. There are two exceptions to this rule —

- (1) Where a guardian has been appointed for the person or property of a minor or the Court of Wards has assumed superintendence over the property of a minor, he will be deemed to have attained his age of majority on completing the age of twenty-one years. Hence, in such cases, the person under disability is entitled to have the fresh period of limitation under this section calculated

(’18) 5 AIR 1918 P C 180 (181) : 46 Cal 694 : 50 Ind Cas 202 : 46 Ind App 60 (PC), *Srimati Rani Kuar Mani Singh v. Nawab Bahadur of Murshidabad*.

(’31) 18 AIR 1931 Oudh 177 (225) : 136 Ind Cas 642, *Mahomed Azim Khan v. Mohamed Saadat Ali Khan*.

(’16) 3 AIR 1916 Cal 164 (165) : 28 I. C. 818 (DB), *Kuarmoni Singha v. Wasif Ali*.

(’17) 4 AIR 1917 Cal 745 (746) : 34 I. C. 86 (DB), *Umakanta Sen Chowdhury v. Hira Lal Roy*. (This was a case under the Bengal Court of Wards Act, IX of 1879.)

4. (1864) 2 Mad H C R 113 (113) (DB), *Venkatasubba Pattar v. Giri Ammal*. (Voluntary absence abroad.)

(’68) 10 Suth W R 253 (253) : 1 Beng L R (SN) 25 (DB), *Domun v. Shubal Koolall*. (Involuntary absence due to transportation.)

5. (’69) 12 Suth W R P C 6 (20, 21) : 12 Moo Ind App 275 : 2 Beng L R P C 111 : 2 Suther 222 : 2 Sar 429 (PC), *Rajah Saheb Perhlad Sein v. Baboo Bulhoo Singh*. (Pendency of appeal to Privy Council does not put party, who subject to the appeal is the owner of an estate, under a legal disability for bringing suit in that character against third parties.)

(’66) 5 Suth W R 295 (296) (DB), *Mudhun Mohun Tewaree v. Nund Kishore Doss*. (Adopted son, after he attains majority, is under no legal ‘disability’ although his title as adopted son may be disputed and has not been finally established.)

(’66) 5 Suth W R 32 (33), *Kishen Mohan Koond v. Mudhun Mohun Tewaree*. (Do.)

6. (’69) 1869 Pun Re No. 29, *Mt. Maeea Davee v. Sukh Dyal*.

(’73) 19 Suth W R 269 (270) (DB), *Reaz Ali Khan v. Government of India*. (Ignorance due to absence from country.)

(’70) 2 N W P H C R 173 (175), *Mahomed Muszeh-ood-deen v. Clara Jane Museeh-ood-deen*. (Ignorance of defendant’s residence is not a ground of exemption.)

Section 6 — Note 24

1. (’79) 5 Cal L R 543 (544) (FB), *Rainey v. Nobo Coomar Mookerji*.

from the date on which he commences his twenty-second year.² (Section 3, Majority Act.)

- (2) In regard to the capacity to act in matters of marriage, dower, divorce and adoption, the provisions of the Act do not apply (S. 2, Majority Act). Thus, it has been held that a Parsi woman suing for divorce must be deemed to be "acting" in the matter of divorce and hence is not governed by the Majority Act : so that she is entitled under the Parsi Marriage and Divorce Act of 1865, to be deemed to be a minor till the completion of her twenty-first year.³

The age of a person must be calculated from the date of his *birth* and not from the date of his *conception*.⁴ (See S. 4, Majority Act.)

25. Section, whether applies to child in womb. — Can a child who is in the womb at the time from which limitation is to be reckoned be regarded as being under the disability of minority at such time within the meaning of this section ? On this question, there is a conflict of decisions. On the one hand, it has been held by the Madras¹ and Bombay^{1a} High Courts that such a person should be held to be entitled to sue or apply for execution at the time from which limitation is to be computed and that he should be regarded as being under the disability of minority at such time. According to these Courts, though for purposes of determining when a person attains majority the age of the person must be calculated from the birth of the person, yet, there is nothing to preclude his being treated as a person in existence

2. ('07) 31 Bom 80 (85) : 8 Bom L R 897 (DB), *Shivram Kondo Kulkarni v. Krishnabai*. (Where a person obtains an order for a certificate of guardianship under the provisions of Act XX of 1864, the minor is deemed to have attained his majority when he shall have completed his age of twenty-one years by virtue of S 3. Indian Majority Act (IX of 1875) — It is not necessary for the purposes of the section that any formal certificate of guardianship in pursuance of such order should actually be obtained.)

('90) 17 Cal 347 (360) : 16 Ind App 195 (202) : 5 Sar 463 (PC), *Mungniram v. Gursahai Nund*.

('06) 10 Oudh Cas 247 (250, 251) (DB), *Maulvi Saiyad Ahmad v. Maulvi Saiyad Muhammad*.

('07) 10 Oudh Cas 1 (4) (DB), *Saidh Gopal v. Mohammad Nazir*.

('89) 13 Bom 285 (289), *Yeknath v. Warubai*.

[See ('27) 14 AIR 1927 Mad 36 (37) : 49 Mad 809 : 99 Ind Cas 213 (FB), *In the matter of Venkatesa Perumal*. (Order appointing guardian made dependent on prior furnishing of security — Security not furnished — There is no order of appointment of guardian — Minor attains majority on completing 18 years.)]

3. ('98) 22 Bom 430 (435, 436) (DB), *Bai Shirinbai v. Khurshedji Nasarvanji*. ('94) 18 Bom 366 (367), *Sorabji Cawasji v. Buchoobai*.

4. ('35) 22 AIR 1935 Mad 839 (841, 842) : 58 Mad 886 : 159 Ind Cas 1 (FB), *Ranganatha Reddi v. Ramaswami Mudali*. (AIR 1929 Lah 254 : 10 Lah 713 (DB), *Muhammad v. Ahmad* dissented from.)

Section 6 — Note 25

1. ('35) 22 AIR 1935 Mad 839 (841, 842) : 58 Mad 886 : 159 Ind Cas 1 (FB), *Ranganatha Reddi v. Ramaswami Mudali*. (Overruling AIR 1931 Mad 456, *Venkatarama v. Mirthinjaya*.)

1a. ('48) 35 AIR 1948 Bom 150 (152) : ILR (1947) Bom 750 (DB), *Basayya v. Baslingayya*.

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and as a minor from the time of his being a child in his mother's womb. But, a contrary view has been taken by the Lahore High Court according to which this section does not apply to a child in the womb.² See also Article 126 Note 5.

26. Whether minority negatives knowledge.— Where the starting point of limitation depends on the *knowledge* of the plaintiff, the minority of the plaintiff does not in itself negative such knowledge.¹

26a. Whether there can be adverse possession against a minor or other person under disability — See Note 24 under Articles 142 and 144.

27. "Insane." — The word "insane" means "mad."¹ A state of mental weakness on account of injuries sustained is not insanity within the meaning of this section.²

28. "Idiot." — An idiot is a person so deficient in mind as to be *permanently* incapable of rational conduct.¹

Hence, it is apprehended that where the person entitled to sue or apply for execution is an idiot at the commencement of limitation, there is no question of the *cessation* of his disability. In such cases, it is conceived that cls. 3 and 4 of the section providing for cases where the person under disability dies during the continuance of the disability will come into play.

29. Onus of proof and evidence as to disability. — Section 3 provides that subject to the provisions of Ss. 4 to 25, every suit or other proceeding instituted after the period prescribed in the first schedule should be dismissed. This shows that the provisions of

2. ('39) 26 AIR 1939 Lah 290 (292): 183 Ind Cas 451 (DB), *Firm Chuni Lal-Rali Ram v. Altaf-ul Rahman*. (Person being in mother's womb on date of alienation of ancestral property cannot while challenging alienation claim extension of time under Section 6.)

('29) 16 AIR 1929 Lah 254 (255, 256): 10 Lah 713 : 116 Ind Oas 545 (DB), *Mahomed Khan v. Ahmad Khan*.

('30) 17 AIR 1930 Lah 394 (396): 127 I.C. 708 (DB), *Madho Ram v. Dharam Singh*.

('20) 7 AIR 1920 Lah 220 (220): 54 Ind Cas 838 (DB), *Miran Ditta v. Bihari Lal*.

('12) 14 Ind Cas 60 (61) Lah, *Kehar Singh v. Hazarana Singh*. (28 Mad 57 (DB), *Govinda v. Thayammal* dissented from.)

Section 6 — Note 26

1. ('20) 7 AIR 1920 Mad 793 (798, 800): 52 Ind Cas 725 (DB), *Narasimha v. Krishna Chandra*.

[See however ('41) 28 AIR 1941 Sind 50 (62): I L R (1940) Kar 534 : 194 Ind Cas 137, *Khemchand Dayaram v. Dayaram Jessomal*. (There can be no adverse possession against a minor because he is not in a position to know of or resist acts of ouster—Note: For a fuller discussion of the question whether there can be adverse possession against a minor see Note 24 under Articles 142 and 144.)] See also Articles 142 and 144 Note 77.

Section 6 — Note 27

1. See Concise Oxford Dictionary.

2. ('24) 11 AIR 1924 Bom 290 (292, 294): 84 Ind Cas 796 (DB), *Abdul Muham-mad v. Abdulla M. Zulaikhi*.

Section 6 — Note 28

1. See Concise Oxford Dictionary.

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Note 29

ss. 4 to 25 are in the nature of *exceptions* to the general rules of limitation contained in the first schedule. It is a general principle that the burden of proving that a case falls within an exception and not the general rule, lies on the person who relies on the exception. (See Evidence Act, ss. 103, 105 and 106). Hence, where a suit or other proceeding is *prima facie* barred by limitation under the first schedule, the burden of proving that by reason of any of the exceptions contained in ss. 4 to 25 the suit or proceeding is saved from the bar of limitation is on the person who pleads such exception.¹ This principle is applicable to cases under this section also. Hence, the burden of proving that a suit or application for execution is saved from the bar of limitation by virtue of the provisions of this section is on the person who relies on such provisions.²

Further, under O. 7, R. 6, Civil Procedure Code, when a suit is instituted after the expiration of the period prescribed by the law of limitation, the *plaint* must show the ground on which exemption from such law is claimed. Hence, where a plaintiff relies on this section as saving his suit from the bar of limitation, such fact must be clear from the *plaint* itself.³ But the exemption need not be pleaded expressly and in so many words. It is enough if the fact of reliance on the saving provisions of this section is somehow apparent on the face of the *plaint*.⁴

As to the kind of evidence requisite to prove age and minority under this section, see the undermentioned cases.⁵

Section 6 — Note 29

1. See Notes under Section 3.
2. ('10) 7 Ind Cas 505 (518) (DB), (Lah) *Husaina v. Sahib Nur*.
(24) 11 AIR 1924 Cal 420 (422) : 81 Ind Cas 680 (DB), *Prohlad Chandra Chowdhury v. Ramsaran Chowdhury*.
(30) 17 AIR 1930 Oudh 97 (100) : 121 Ind Cas 277 : 5 Luck 658 (DB), *Mehdi Ali v. Walayat Husain Khan*.
(02) 6 Cal W N 601 (612, 613) (DB), *Lalla Kanhoo Lal v. Mt. Manki Bibi*.
(14) 1 AIR 1914 Lah 142 (142, 143) : 23 Ind Cas 462 (DB), *Charanjit Singh v. Bishen Singh*.
(28) 15 AIR 1928 Lah 763 (764) : 109 I. C. 331, *Jagadish Ram v. Mukand Lal*.
(13) 18 Ind Cas 391 (392) (DB) (Cal), *Panchu Mondal v. Isaf*. (Court not bound to raise point *suo motu*.)
(23) 10 AIR 1923 Lah 254 (254) : 70 Ind Cas 984, *Jagat Singh v. Balaga Singh*.
(23) 10 AIR 1923 Lah 41 (42) : 79 Ind Cas 211, *Prem Das v. Sarbaland*.
(17) 4 AIR 1917 Mad 930 (932, 935) : 33 Ind Cas 969 (DB), *Ramanathan Chetty v. Murugappa Chetty*.
3. ('13) 18 Ind Cas 391 (392) (DB) (Cal), *Panchu Mondul v. Isaf*.
4. ('09) 2 Ind Cas 77 (78) (Cal), *Gangadhar Sarkar v. Khaja Abdul Ajij*.
See also Section 3 Note 31.
5. ('28) 15 AIR 1928 Lah 250 (252, 253) : 113 Ind Cas 53 (DB), *Zinda v. Mt. Roshnai*. (Medical evidence is not of much help in determining age.)
(07) 29 All 29 (32) : 1 Mad L Tim 429 : 5 Cal L Jour 4 : 11 Cal W N 130 : 17 Mad L Jour 32 : 9 Bom L R 80 : 34 Ind App 1 (PC), *Shah Ara Begam v. Nanhi Begam*. (In India it is no doubt difficult to prove such facts as the date of birth, after a lapse of many years, and it would be unreasonable to require such a class of evidence as would justly be demanded in England. But the evidence must be such as to carry reasonable conviction to the mind.)

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Notes 30-31

30. Suit on behalf of Hindu idol. — A Hindu idol is recognized as a juridical person capable of holding property, though it is only in an ideal sense that property can be held by an idol. But the possession and management of dedicated property belong to the *shebait* and this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the *shebait* and not in the idol. Hence, where the *shebait* is a minor (or other person under disability) at the time from which the period of limitation is to be reckoned, he is entitled to the benefit of this section.¹

As the right to sue for the protection of dedicated property is vested in the *shebait* and not the idol, whatever disability the idol may be conceived of as labouring under, will not be the disability of a person *entitled to sue*. Hence, this section will not apply to such disability. Though, thus, the question as to the disability or otherwise of the idol is not material for the purposes of this section, it has been held that an idol is not a perpetual minor for purposes of limitation.² This only means that a suit in respect of property dedicated to an idol is as much subject to the law of limitation as any other suit and that no exemption from such law can be claimed on the ground that such suit is for the benefit of an idol which is incapable of looking after its own interests.

31. "Within the same period after the disability has ceased."—In cases coming within its scope, this section enables the person under disability to sue or apply for execution within the same time from the cessation of disability as would have otherwise been allowed from the time specified in the third column of the first schedule.^{1a} This provision is controlled by S. 8 which provides that the

(1907) 1907 Pun Re No. 29 p. 79 (80) : 1907 Pun W R No. 6, *Fatah Mohammad v. Foja*. (When the age of a minor is in dispute, preference is to be given to the weight of medical evidence in the absence of any clear proof to the contrary.)

Section 6 — Note 30

1. (1947) 51 Cal W N 383 (410), *Gopal v. Baldeo*. (Principle is same whether the suit is brought in his own name or as next friend of deity.)
- (1905) 32 Cal 129 (140, 141) : 31 Ind App 203 : 8 Cal W N 809 : 6 Bom L R 765 : 1 All L Jour 585 : 8 Sar 698 (PC), *Jagadindra Nath v. Hemanta Kumari Debi*.
2. (1949) 36 AIR 1949 Orissa 1 (Paras 14, 15) : 14 Cut L Tim 73 (DB), *Kadha-krishna Das v. Radharamana Swami*.
- (1927) 14 AIR 1927 Pat 49 (51) : 97 Ind Cas 657 (DB), *Gopalacharyya Gowsami v. Bhim Kali Chaudhury*.
- (1909) 3 Ind Cas 93 (96) (Cal), *Jnananjan Banerjee v. Adoremony Dassee*.
- (1930) 17 AIR 1930 Pat 455 (472) : 9 Pat 885 : 127 Ind Cas 817 (DB), *Naurangi Lal v. Ram Charan Das*.
- (1926) 13 AIR 1926 All 392 (393) : 48 All 348 : 93 Ind Cas 652 (DB), *Chitar Mal v. Panchu Lal*.
- [See also (1932) 19 AIR 1932 Mad 328 (333) : 137 Ind Cas 487, *Periyanan Chetty v. Govind Rao*.]

Section 6 — Note 31

- 1a. (1949) 36 AIR 1949 East Punj 20 (22) (DB), *Duni Chand v. Rom Ditta Mall*. (Suit by minor for setting aside decree and execution sale on ground of gross negligence of his guardian if brought more than one year after attaining majority is barred under Art. 12 read with S. 6.)

period of limitation cannot be extended under this section for more than three years from the cessation of the disability or the death of the person affected by it. For the combined effect of the two sections, see Notes under section 8.

The expression "after the disability has ceased" shows that in calculating extra period allowed under this section, the date on which the disability ceases must be excluded.¹

See also Notes 32 and 33 below.

32. Section does not prevent running of limitation against person under disability.—The provision that in cases coming under this section the suit or application may be filed within the same period *after* the disability has ceased as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule, does not mean that limitation does not run at all during the continuance of the disability. The provision only means that the person under disability is entitled to an *extension* of time till the expiry of the period mentioned in the first schedule calculated from the cessation of his disability (subject to the limits imposed by S. 8). Hence, when a person enters into possession in assertion of a title hostile to that of the person under disability, limitation begins to run from the date of his entering into possession and is not postponed till the cessation of disability.¹

Illustration.

V, a Hindu who was insane, was entitled to certain properties. B, his wife, acting as his guardian, transferred certain properties to C without any proper justification. V then died as an insane person and was succeeded by his widow B. After B's death, S, a reversioner of V, sued the transferee for the recovery of the properties. C asserted that the suit was barred by limitation as he had been in adverse possession from the date of the transfer and as more than twelve years had elapsed from such date. S contended that as V had been a lunatic, limitation could not have begun to run during his lifetime and as a reversioner he (S) was not bound by the limitation that might have run as against the widow. The contention was overruled and it was held that the lunacy of V did not prevent the running of limitation against him.²

1. ('84) 10 Cal 748 (751) : 8 Ind Jur 673 (DB), *Jugmohun Mahto v. Luchmeshur*

Section 6 — Note 32

1. ('41) 28 AIR 1941 Nag 357 (362) : ILR (1942) Nag 564 : 197 Ind Cas 612 (DB) *Narainbhai v. Narbada Prasad*.

('22) 9 AIR 1922 Mad 12 (15) : 45 Mad 361 : 70 Ind Cas 678 (DB), *Seetaramaraju v. Subbaraju*.

('03) 27 Bom 515 (534) : 5 Bom L R 274 (DB), *Thakore Fatesingji v. Bamanji*.

('20) 7 AIR 1920 Mad 793 (798, 800) : 52 Ind Cas 725 (DB). *Narasimha v. Krishnachandra*.

('09) 4 Ind Cas 854 (855) : 1909 Pun Re No. 100 (DB), *Shamier v. Ladha Singh*.

('28) 15 AIR 1928 Oudh 481 (482) : 113 Ind Cas 258, *Mt. Ram Dulari v. Sher Bahadur Singh*.

NOTE—There is, however, a conflict of views on the question whether there can be adverse possession against a minor or other person under disability—For this, see Note 24 under Arts. 142 and 144.

2. ('22) 9 AIR 1922 Mad 12 (15, 16) : 45 Mad 361 : 70 I. C. 678, *Seetaramaraju v. Subbaraju*.

[See also ('28) 15 AIR 1928 Oudh 481 (482) : 113 Ind Cas 258, *Mt. Ram Dulari v. Sher Bahadur Singh*.]

Section 6 Notes 32-33

It is apprehended that on the above principle, where a right to sue accrues to a person under disability in respect of a certain property and such property is afterwards transferred by him to another, limitation as against the assignee must be calculated not from the date of the assignment but from the date on which it would ordinarily have begun to run. (See Note 40.)

Suppose that a right to sue accrues to a minor in 1910 and that the ordinary period of limitation for the suit (six years) expires in 1916. The minor attains majority in 1918. Under this section read with s. 8, he has a period of three years from 1918 within which to bring his suit. But the minor dies in 1919. A suit by his legal representative brought subsequently will be time-barred, though three years may not have elapsed from 1918. The reason for this is that the extension of time under this section is a *personal privilege* conferred on the minor and is not available to person deriving their right to sue from the minor (see Note 42). But the example also shows that limitation begins to run even *before* the date of the attainment of majority by the minor. For, otherwise, a suit brought within the period of limitation calculated from the attainment of majority must be within time although brought by the legal representative and not by the minor himself.

33. Privilege under section is not confined to proceedings instituted after the cessation of disability. — This section provides that in cases coming under it, the suit or application may be filed within the same period *after* the disability has ceased as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule. This does not mean that a suit or application filed *before* the cessation of disability will be time-barred if filed after the expiry of the ordinary period of limitation. The provision simply means that limitation is extended till the expiry of the period mentioned in the first schedule calculated from the cessation of disability. Hence, a suit or application filed on behalf of a person under disability by his next friend during the continuance of the disability but after the expiry of the ordinary period of limitation will also be saved under the provisions of this section.¹

Section 6 — Note 33

1. ('39) 26 AIR 1939 Pat 33 (34, 35) : 177 Ind Cas 713 (DB), *Parmeshwari Singh v. Ranjit Singh* (1 Cal 226 followed.)
- ('75) 1 Cal 226 (243) : 3 Ind App 7 : 25 Suth W R 205 : 3 Sar 573 : 3 Suther 236 (PC), *Phoolbas Koonwar v. Lalla Jogeshur*.
- ('99) 23 Bom 544 (549) : 26 Ind App 32 : 3 Cal W N 186 : 7 Sar 451 (PC), *Bhagwandas Mittharam v. Rivett Carnac*. (Suit on behalf of minor heir by Administrator-General.)
- ('87) 9 All 411 (413) : 1887 All W N 58 (DB), *Baldeo Singh v. Kishan Lal*.
- ('83) 1883 All W N 63 (63) (DB), *Har Gobind v. Srikishen*.
- ('69) 1 N W P H C R 122 (123) (DB), *Ram Autar v. Dhunee Ram*,
- ('30) 17 AIR 1930 Bom 593 (593) : 128 Ind Cas 430, *Kashinath Rajaram Somani v. Govind Shankar Jinsiwalla*.
- ('93) 20 Cal 714 (716) (DB), *Lolit Mohun v. Janoky Nath*.
- ('83) 9 Cal 181 (182) : 11 Cal L R 34:5 Shome L R 135 (DB), *Mon Mohun Buksee v. Gunga Soondery Dabee*.

Section 6
Notes 34-35

34. Acquisition of prescriptive title against person under disability.— Under s. 28, it is provided that at the determination of the period limited to any person for bringing a suit for the possession of any property, his right to such property shall be extinguished. Where the person entitled to sue is under a disability mentioned in this section and is entitled to an *extension* of limitation under it, his right cannot be extinguished until the expiry of such *extended* period.¹

35. Effect of existence of guardian for person under disability. — The mere fact that there is a guardian for the person

- (‘84) 10 Cal 748 (756) : 8 Ind Jur 673 (DB), *Jagmohan Mahto v. Luchmeshur Singh*. (9 Cal 446 (DB), *Behary Lal v. Goberdhun Lall*, dissented from.)
 (1900) 22 All 199 (204) : 1900 All W N 8 (FB), *Zamir Hasan v. Sundar*.
 (‘81) 7 Cal 137 (139):8 Cal L R 306: 5 Ind Jur 644, *Khodabux v. Budree Narain*.
 (‘96) 23 Cal 374 (388) (DB), *Norendra v. Bhupendra*.
 (‘98) 3 Cal W N 24 (27, 28) (DB), *Guneshwar Singh v. Jagadhatrī Pershad*.
 (‘98) 2 Cal W N cvi (cvii) (DB), *Manmath v. Manohar Mukerjee*. (13 Mad 236 (DB), *Seshan v. Rajagopala* and 17 Mad 189 (DB). *Narayanan v. Damodaran* distinguished.)
 (‘03) 7 Cal W N 594 (595) (DB), *Shamachurn Hui v. Kanangai Chaitan Prosad*.
 (‘67) 7 Suth W R 161 (162) (DB), *Ram Chundra Roy v. Umbica Dossia*.
 (‘69) 11 Suth W R 468 (472) : 3 Beng L R (A C) 145 (DB), *Tarinee Churn Chowdhry v. Sharoda Sunduree Dossee*.
 (‘70) 14 Suth W R 429 (429) (DB), *Ram Ghose v. Greedhur Ghose*.
 (‘72) 17 Suth W R 419 (419) (DB). *Sreemutty Suffuronissa Bibee v. Moonshie Noorul Hossein*.
 (‘66) 6 Suth W R 19 (20)(DB), *Shahzada Woola Gawhur v. Mt. Shah Rukh Begum*.
 (‘34) 21 AIR 1934 Lah 908 (908) : 154 Ind Cas 603 (DB), *Sarwan Singh v. Mt. Basanti*.
 (‘29) 16 AIR 1929 Lah 661 (662) : 117 Ind Cas 909, *Padha Madho Pershad v. Ghanaya Lal*.
 (‘10) 6 Ind Cas 488 (489) (Lah), *Gujjar Mal v. Sita Ram*.
 (‘81) 1881 Pun Re No. 112, *Ganda v. Jawand Singh*. (Suit by minor to contest alienation assented to by mother as guardian.)
 (‘85) 1885 Pun Re No. 91 (FB), *Rihana v. Harditta*.
 (‘81) 1881 Pun Re No. 103, *Mt. Sarwar Jan v. Dina*.
 (‘29) 16 AIR 1929 Mad 394 (396) : 119 Ind Cas 39 (DB), *Mannarswamy Iyer v. Ramaswamy Naicken*.
 (‘94) 9 C P L R 9 (10), *Balakishen v. Khuman*.
 (‘88) 2 C P L R 184 (185), *Agarsingh v. Lakhi*.
 (‘12) 15 Ind Cas 366 (367) : 6 Low Bur Rul 52 (DB), *Ma Sein Hnyin v. C. S. Lutchman Chetty*. (Minor’s application asking to be brought on record as legal representative.)
 (‘36) 23 AIR 1936 Sind 84 (84, 85) : 30 Sind L R 30 : 163 Ind Cas 379 (DB), *Sainbux v. Alibux*. (Application for execution by Court of Wards.)
 (‘36) 23 AIR 1936 All 152 (153) : 161 Ind Cas 330, *Ramesh Chandra v. Firm Kashi Ram Bhajan Lal*.
 [But see (‘70) 14 Suth W R 339 (348) (DB), *Sudaburt Pershad Sahoo v. Lotf Ali Khan*. (Submitted not correct.)]

Section 6 — Note 34

1. (‘43) 30 AIR 1943 Oudh 296 (297) : 206 Ind Cas 274, *Hit Lal v. Ram Oudh*.
 (‘35) 22 AIR 1935 Lah 924 (925, 926) : 160 Ind Cas 557, *Nawab v. Lachhman Singh*. (Sale of minor’s property by unauthorized person — Minor can sue for possession within three years after attaining majority.)
 (‘01) 24 Mad 387 (395) : 28 Ind App 81 : 7 Sar 819 (PC), *Vasudeva Padhi v. Maguni Devan*.
 (‘10) 5 Ind Cas 84 (84, 85) : 33 Mad 366 (DB), *Annayyan v. Chinnan*.

Section 6 Note 35

under disability does not deprive such person of the indulgence granted by this section.¹ Nor is the extended period under the section inapplicable to a proceeding instituted by a *guardian* on behalf of a minor or other person under disability during the continuance of the disability.² But, where the person really entitled to sue or apply at the commencement of limitation is the guardian and not the minor (or other person under disability), the section will not apply merely because the suit or application would be for the benefit of the person under disability. Thus, where a document is executed in favour of a guardian in his own name, this section will not apply to a suit by the guardian on the document, although the party beneficially interested may be a minor or other person under disability.³ But, if a document

Section 6 — Note 35

1. ('38) 25 AIR 1938 Pat 92 (93) : 174 Ind Cas 193, *Satyendra Narain Sinha v. Pitamber Singh*. (Application by guardian of minor for execution of decree obtained on his behalf dismissed as time-barred — Minor is not precluded from applying for execution of decree within statutory period of three years from date of his attaining majority.)
- ('05) 32 Cal 129 (142) : 31 Ind App 203 : 6 Bom L R 765 : 8 Cal W N 809 : 1 All L Jour 585 : 8 Sar 698 (PC), *Jagadindra Nath Roy v. Hemantha Kumari Debi*.
- ('75) 1 Cal 226 (243) : 3 Ind App 7 : 25 Suth W R 285 : 3 Sar 573 : 3 Suther 236 (PC), *Phoolbas Koonwur v. Lalla Jogeshur*. (He need not wait till cessation of disability.)
- ('83) 9 Cal 181 (182, 183) : 11 Cal L R 34 : 5 Shome L R 135 (DB), *Mon Mohun Buksee v. Gunga Soondery*. (His disability does not cease because he makes application for execution through guardian.)
- ('07) 6 Cal L Jour 383 (394) (DB), *Harihar Pershad v. Bholi Pershad*.
- ('05) 1 Cal L Jour 96 (8 N), *Sawdagore Sahu v. Jagger Nath Pershad*.
- ('70) 14 Suth W R 339 (348) (DB), *Sadaburt Pershad Sahoo v. Lotf Ali Khan*. (But it was held that he cannot derive advantage from disability till he comes of age.)
- ('83) 7 Bom 179 (180) : 7 Ind Jur 373 (DB), *Jagjivan Amirchand v. Hasan*.
- ('66-67) 4 Bom H C R (A C) 199 (201), *Mahipatray Chandrarav v. Nensuk Anand-rav Shet Marvadi*.
- ('34) 21 AIR 1934 All 434 (435) : 148 Ind Cas 1166 (DB), *Musi Imran v. Collector of Bijnore*. (Lunatic is protected under S. 6 as long as he is under disability — Mere fact that there was guardian on his behalf, who could have sued earlier, will not deprive him of the protection.)
- ('81) 4 Mad 119 (120) (DB), *Anantharama Ayyan v. Karuppanan*. (Fact that minor has guardian does not remove his disability.)
- ('29) 16 AIR 1929 Lah 661 (662) : 117 Ind Cas 909, *Padha Madho Parshad v. Ghanaya Lal*.
- ('13) 21 I. C. 365 (367) : 16 Oudh Cas 206, *Jagat Narain v. Mt. Narbada Kunwar*.
- ('36) 23 AIR 1936 Pat 194 (196) : 158 Ind Cas 25, *Ram Das v. Ram Babu*. (Minor proprietor trading under trade-name through manager — Hundi in favour of proprietor in trade-name becoming payable during minority — Proprietor held entitled to benefit of S. 6, Limitation Act, though manager could sue.)
- ('92) 16 Bom 536 (537) (DB), *Moro Sadashiv v. Visaji Raghunath*.
- ('93) 20 Cal 714 (716) (DB), *Lolit Mohun v. Janoky Nath*.
- ('99) 3 Cal W N 24 (28) (DB), *Guneshwar Singh v. Jagdhatri Pershad*.
- ('96) 23 Cal 374 (388) (DB), *Norendra Nath v. Bhupendra Narain*.
2. See Note 33.
3. ('27) 14 AIR 1927 Bom 61 (63) : 50 Bom 831:100 I. C. 95 (DB), *Pandharinath Manikshet v. Ajankha*.
- ('86) 10 Bom 241 (242) (DB), *Yeknath Ramchandra v. Waman Brahmadev*. (If promissory note is taken in the name of minor alone, he would have three years from attaining his majority within which to sue.)

is executed in favour of a minor (or other person under disability) or in favour of a minor by his guardian, this section will apply to a suit by the minor on the document.⁴ See also Notes 36 to 39.

36. Estate of minor under management of Court of Wards. — Where the property of a minor is under the management of the Court of Wards, the person entitled to sue in regard to the property is the *minor* and not the manager of the Court of Wards, though the suit may be in the name of such manager. Hence, where a decree is passed in favour of minors whose property is under the management of the Court of Wards, the fact that the decree stands in the name of the manager of the Court of Wards is no ground for denying the minors the extension of limitation conferred by this section.¹ On the same principle, where a lease of the property is granted by the Court of Wards, the minor, on the release of the estate from the management of the Court of Wards, is entitled to sue on the lease and claim the extension of limitation under this section.²

37. Appointment of administrator to estate of person under disability
— See Note 3.

33. Estate of minor in hands of executor. — Where a testator has appointed an executor who is in charge of an estate and a right to sue accrues to the executor as such, the mere fact that the person beneficially entitled to the estate is a minor does not enlarge the period of limitation under this section. The reason is that the right of suit is vested in such cases in the executor and not the beneficiary and this section only applies to the disability of the person entitled to sue. Hence, if the executor fails to sue within the ordinary period of limitation, the minor beneficiary cannot subsequently do so,

('03) 7 Cal W N 594 (595) (DB), *Shamachurn Hui v. Kanangai Chaitan Prosad*. (Mortgage in favour of guardian acting for a minor — Suit by him, in same capacity, on mortgage—Section applies.)

('24) 11 AIR 1924 Bom 468 (468) : 80 Ind Cas 474, *Vishnu Narain v. Keshav Gajanan*. (Section does not apply to suit on promissory note taken by the guardian of minor who alone (and not the minor) can sue on it — Following 28 Mad 205.)

('36) 23 AIR 1936 Pat 194 (196) : 158 Ind Cas 25 (26, 27) (DB), *Ram Das v. Ram Babu*. (Held, that in the circumstances, the minors were the real parties to the suit transactions and that the section applied.)

('12) 14 Ind Cas 694 (697) (Cal), *Sarat Chandra v. Sudhan Hari*. (Do.)

('05) 28 Mad 205 (207) : 15 Mad L Jour 249 (DB), *Ramanuja v. Sadagopa*. (Held, in the circumstances the minor was not the holder or payee of the pro-note and hence section did not apply.)

4. See cases cited in foot-note 3.

Section 6 — Note 36

1. ('36) 23 AIR 1936 All 63 (64) : 160 Ind Cas 275, *L. Dina Nath v. Collector of Farrukabad*.

[See also ('36) 23 AIR 1936 Sind 84 (85) : 30 Sind L R 30 : 163 Ind Cas 379 (DB), *Sainbux v. Ali Bux*.]

2. ('48) 35 AIR 1948 Pat 313 (316):26 Pat 312 (DB), *Kamakshya Narayan Singh v. T. H. Burnett*. (Lease of coal mine by Court of Wards on behalf of minor proprietor.)

Section 6
Notes 38-39

claiming the benefit of this section.¹ See also Notes 35 and 39.

39. Appointment of receiver to estate of person under disability. — Suppose, after a cause of action in respect of an estate has accrued to a minor, a receiver is appointed to his estate. What is the period of limitation for a suit by the receiver? Is the receiver entitled to the extended period of limitation that would have applied to a suit by the minor himself? If the receiver fails to sue within the ordinary period of limitation, is the minor entitled to the extended period under this section in respect of a suit which he brings subsequently?

The question arose before the Calcutta High Court in *Raj Kumar Girija Nandan v. Kanhiya Prasad*.¹ In that case, it was held that if the receiver failed to sue within the *ordinary* period of limitation, the suit by the minor subsequently would also be barred though the extended period to which he was originally entitled under this section had not expired. The decision assumes that the limitation that would have applied to a suit by the receiver is the *ordinary* period. It is held that on the appointment of the receiver the right to sue becomes completely vested in the receiver, so that he can give a complete discharge to the debtor. If he fails to sue within the period of limitation, the suit becomes completely barred and the minor cannot afterwards sue, though the extended period to which he was originally entitled has not expired.

It is doubtful whether the above decision of the Calcutta High Court is correct in view of the decision of the Privy Council in *Bhagwandas v. Rivett-Carnac*.² In that case, a cause of action had accrued to the minor heir of a deceased person and thereafter an administrator was appointed to the estate of the deceased. In a suit by the administrator on behalf of the estate brought after the ordinary period of limitation, it was held by the Privy Council that the suit was not barred by limitation as it was a suit *on behalf of the minor heir*. It is apprehended that the principle of this decision is also applicable to the case of receivers. Hence, where a receiver is appointed to the estate of a minor, a suit by the receiver on a cause of action arisen before his appointment as receiver must, it is apprehended, be deemed as a suit *on behalf of the minor* and, as such, governed by the same period as would have been applicable to a suit by the minor himself. If so, the failure of the receiver to sue within the ordinary period of limitation would not bar a suit by the minor so long as the extended period of limitation under this section has not expired.

Section 6 — Note 38

1. ('24) 11 AIR 1924 Pat 721 (732) : 83 Ind Cas 812 : 3 Pat 880 (DB), *Kesho Pershad Singh v. Madho Prasad Singh*.

Section 6 — Note 39

1. ('14) 1 AIR 1914 Cal 35 (36) : 20 Ind Cas 701 (DB).
See also Section 7, Note 9.
2. ('99) 23 Bom 544 (549) : 26 Ind App 32 : 3 Cal W N 186 : 7 Sar 451 (PC).

Section 6
Note 40

40. Whether extension of time under the section can be claimed by assignee from person under disability. — The right to an extension of time under this section is a purely *personal* right which is confined to the person under disability. The right is not *attached to the cause of action* of the person under disability. Hence a person deriving his right to sue from the person under disability, like an assignee from him of the property which is the subject-matter of the suit, is not entitled to claim that, with reference to a suit or application by him, the extended period that would have applied to a suit by the person under disability himself should be applied.¹ Thus, suppose adverse possession commences against a minor in 1905, and in 1910 the minor transfers to another person his right to the property which is the subject-matter of the adverse possession. Limitation for a suit for possession by the transferee runs from 1905

Section 6 — Note 40

1. ('38) 25 AIR 1938 Bom 358 (359) : 177 Ind Cas 475, *Bandu Annaji v. Yeshwant Ram Rao*.

('83) 9 Cal 663 (666, 667) : 12 Cal L R 269 (FB), *Rudra Kant v. Nobo Kishore*.

('98) 25 Cal 409 (412) (DB), *Harakchand v. Deonath Sahay*.

('02) 26 Bom 730 (733) : 4 Bom L R 513 (DB), *Mahadeo v. Babi*.

('19) 6 AIR 1919 Cal 893 (894) : 46 Ind Cas 802 (DB), *Bhagaban Chandra v. Ishan Chandra Kaibarta Das*.

('18) 5 AIR 1918 Lah 374 (375) : 44 I. C. 890, *Hukam Singh v. Shahab Din*.

('35) 22 AIR 1935 Bom 420 (420, 421) : 159 Ind Cas 272, *Mariyayya Shidramayya v. Chanvirangouda*. (Suit for arrears of rent accumulated in favour of a minor Hindu widow — Suit brought by son adopted by her — Assuming he is entitled to sue, he *derives* his right to sue but is not entitled to extended period under this section which would have applied if the widow herself were suing. However, assumption that adopted son is entitled to sue and derives his right to sue from widow is not right — Rent being income from the estate, widow is absolutely entitled to it and right to rent is her personal right and is not annexed to the estate—Hence, adopted son on adoption does not get any right to sue for such rent.)

('19) 6 AIR 1919 Mad 317 (318, 320) : 42 Mad 637 : 50 Ind Cas 380, *Rangasamy Chetty v. Thangavelu Chetty*. (On principle *expressio unius personæ vel rei, est exclusio alterius*.)

('14) 1 AIR 1914 Oudh 339 (340) : 18 Oudh Cas 34 : 27 Ind Cas 118, *Imam Uddin v. Mt. Mumtazunnissa*. (But transferee can maintain suit if he brings it on date of transfer.)

('88) 1888 All W N 183 (183) (DB), *Kedar Nath v. Lachman Das*.

('01) 1901 All W N 12 (14), *Batuk Dayal Singh v. Basant Ram*.

('75) 24 Suth W R 181 (182) : 15 Beng L R 357 (DB), *Md. Arsad v. Eakoob Ali*.

('26) 13 AIR 1926 Oudh 20 (20) : 90 Ind Cas 741, *Sittle Bux v. Ram Newaz*.

('22) 9 AIR 1922 Oudh 31 (32, 33) : 60 Ind Cas 101 (DB), *Muhammad Nur Khan v. Lachmi Narayan*. (Obiter in AIR 1914 Oudh 339:18 Oudh Cas 34, that transferee can bring suit on date of transfer, dissented from.)

('02) 5 Oudh Cas 197 (200), *Mata Din v. Ali Mirza*.

[But see ('05) 2 Cal L Jour 87 (90) : 9 Cal W N 795 (DB), *Harek Chand Babu v. Maharaj Dhiraj Bijoy Chand Mahatab*. (Per Harrington, J. — Widow adopting son after commencement of adverse possession against her — Widow minor at time of commencement of adverse possession — Adopted son becomes clothed with all her rights and he can sue within the extended period that would have applied to her if she herself were suing — Submitted view is wrong on both points involved — Adopted son does not derive right to sue from widow and assuming he does so, he is not entitled to extended period applicable to widow.)]

Section 6
Notes 40-41

and he is not entitled to any extension of limitation on account of the minority of the transferor. See also Note 32.

Where, however, after a right to sue in respect of a property accrues to A, a minor, the property is transferred to B *in trust for A*, it is apprehended that B will be entitled to the benefit of the extended period of limitation that would have applied to a suit by A himself. See Notes 34 and 39.

Where A, a minor after attaining majority assigns his right to B to recover property transferred during his minority, a suit by B jointly with A within three years of A attaining majority will not be barred by limitation as the minor A does not lose his right to be joined as co-plaintiff in a suit to recover possession of the property even after the transfer.²

41. Whether period extended under this section is "period prescribed" for suit or application. — Various sections of the Act use the expression "period prescribed" for a suit or other proceeding. (See ss. 4, 9, 12 to 16, 19, 20 and 28.) The question arises whether the period extended under this section is a "period prescribed" for a suit or other proceeding within the meaning of such sections. Thus, S. 4 provides that when the period *prescribed* for a suit or other proceeding expires on a holiday, the suit or other proceeding may be filed on the next working day. Suppose, the period expiring on a holiday is not the period specified in the first schedule but the additional period to which the plaintiff or applicant is entitled under this section. The question arises whether S. 4 applies to such cases so as to entitle the plaintiff or applicant to file the proceeding on the next working day. Similarly, under S. 19, if, before the expiry of the period of limitation prescribed for a suit or application, the debtor acknowledges in writing his liability, the creditor will be entitled to a fresh starting point of limitation from the date of such acknowledgment. Suppose, the acknowledgment of liability is made *after* the expiry of the period mentioned in the first schedule but *before* the expiry of the extended period under this section. The question arises whether S. 19 will apply to such cases so as to give the plaintiff or applicant a fresh start of limitation from the date of the acknowledgment.

On this question, there is a conflict of decisions. One view is that the additional period to which the plaintiff or applicant is entitled under this section is a "period prescribed" for the suit or application.¹ Accordingly, under this view, the liberty of filing a suit or other proceeding on the next working day under S. 4 will apply not only to cases where the period *fixed in the schedule* expires on a holiday but

2. ('38) 25 AIR 1938 Bom 358 (360) : 177 I. C. 475, *Bandu Annaji v. Yeshwant Ram Rao*. (The principle of the decision in AIR 1925 Bom 292 : 49 Bom 309 (DB), *Hanmant v. Ramappa*, a case under Article 44, was applied.)

Section 6 — Note 41

1. See cases cited in foot-notes (2) and (3) below.

('50) 37 AIR 1950 Bom 94 (Para 13) : I L R (1949) Bom 741 (DB), *Udhavji v. Bapudas*. (Acknowledgment of liability.)

also to cases where the additional period under this section expires on a holiday.² Similarly (it is conceived), S. 19 will furnish a fresh starting point of limitation not only where the acknowledgment of liability by the debtor is made before the expiry of the period mentioned in the first schedule but also where such acknowledgment is made after the expiry of such period but before the expiry of the extended period under this section.³ The view proceeds on the reasoning that inasmuch as the period of limitation for a suit or other proceeding is determined not only with reference to the relevant article in the schedule but also with reference to the particular section of the Act that may apply to the case, the expression "period prescribed" for a suit or other proceeding must mean the period prescribed by the particular article in the schedule read with the sections of the Act. This view receives support from the Privy Council decision in *Maqbul Ahmad v. Onkar Pratap*⁴ in which it was held that the expiration of a period computed in accordance with S. 14 of the Act was the expiration of a "period prescribed" within the meaning of S. 4 of the Act.

According to the contrary view, the additional period to which a plaintiff or applicant may be entitled under this section is not a "period prescribed" for the suit or application.⁵ Thus, under this view, an acknowledgment of liability made after the expiry of the period fixed in the schedule but before the expiry of the extended period under this section will not furnish a fresh starting point of limitation under S. 19.⁶ Similarly, the extended period under this section will not be the "period prescribed" for a suit within S. 15 sub-s. (2).⁷ This view is based on the reasoning that "prescribed" means prescribed by the schedule and not otherwise. It is submitted that this view is no longer good law after the Privy Council decision referred to above.

2. ('24) 11 AIR 1924 Oudh 385 (387): 81 Ind Cas 484 (DB), *Bans Bahadur Singh v. Mt. Sakalraj Kuar*. ('Prescribed' means prescribed by Act and not merely by first schedule.)

('32) 19 AIR 1932 Mad 139 (141): 135 Ind Cas 587 : 55 Mad 286, *Naganna v. Krishnamurthy*. (Affirming on L. P. A. AIR 1928 Mad 1255, *Narasayya v. Krishnamurthy*.)

See also Section 4 Note 9.

3. See ('30) 17 AIR 1930 Mad 991 (994): 128 Ind Cas 867 : 54 Mad 445 (DB), *Somi Setti Seshayya Chetty v. Subbadu*. (Acknowledgment made after the original period but during the period of grace under S. 31 (now repealed) is sufficient.)

('27) 14 AIR 1927 All 114 (115): 98 Ind Cas 1005 : 49 All 67 (DB), *Sheo Pratab Singh v. Tajammal Hussain*. (Do.)

('30) 17 AIR 1930 Bom 187 (189): 124 Ind Cas 791 (DB), *Dunichand Bishandas v. Comptoir National D'Escompte D'Paris*. (Acknowledgment made after expiry of original period specified in schedule but during the period deductible under S. 14 is sufficient to give a fresh starting point of limitation under S. 19.)

See also Notes under Section 19.

4. ('35) 22 AIR 1935 P C 85(87,88): 155 I. C. 205: 62 Ind App 80: 57 All 242(PC).

5. See cases cited in foot-notes (6) and (7) below.

6. ('28) 15 AIR 1928 Bom 319 (320, 321): 52 Bom. 521 : 112 Ind Cas 24 (DB), *Maganlal Harjibhai v. Amichand Gulabji*.

7. ('20) 7 AIR 1920 Mad 793 (798, 799): 52 Ind Cas 725 (DB), *Narasimha Deo Garu v. Krishnachandradeo*.

Section 6
Note 42

42. Clause (3) : Death of person under disability. —

This clause provides that if the person under disability dies *before* the cessation of the disability, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time “prescribed therefor in the third column of the first schedule.” In other words, the legal representative will have a *fresh* start of limitation from the death of the person under disability.¹ Suppose, the person, (originally) under disability dies *after* the cessation of disability but before the expiry of the extended period to which he would have been entitled under this section. This clause will obviously not apply to such a case and the legal representative will not have a *fresh* start of limitation from the death of his predecessor. The question arises whether the legal representative can in such cases institute the suit or make the application within the extended period which would have applied to a suit or application by the deceased person himself. On this question there is a conflict of decisions. On the one hand, the Madras,² Calcutta³ and Nagpur^{3a} High Courts have expressed the view that the legal representative cannot avail himself of the extended period applicable to the deceased person. But the Bombay High Court has taken a contrary view, holding that the specific provision in this clause does not negative the right of the legal representative to stand in the shoes of the deceased person and sue within the extended period that would have applied to the deceased himself.⁴ It is submitted that this latter view is not correct. The right to an extended period of limitation under this section is, as has been already, a purely *personal* exemption and is *not attached to the cause of action* so as to be available to anyone who may become entitled to sue on the cause of action. See Note 40.

In this connexion it may be noted that the language of the corresponding section (S. 11) of the Act of 1859 was different. Under that section it was provided that in the case of the disability of the person entitled to sue, he *or his representative* might sue within the extended period allowed under the section. The language of cl. (1) of this section, on the other hand, confines the right of suing within the extended period to the person under disability.

Where a minor Hindu widow adopts a son and the adopted son succeeds to her estate, there is no *death* of the minor widow within

Section 6 — Note 42

1. ('45) 32 AIR 1945 Mad 149 (149), *Somalinga v. Muthulakshmi*.
- ('22) 9 AIR 1922 Mad 12 (15, 16): 45 Mad 361 : 70 Ind Cas 678 (DB), *Seetarama-raju v. Subbaraju*. (Fact that legal representative has only limited estate does not stop running of time.)
2. ('29) 16 AIR 1929 Mad 313 (320) : 118 Ind Cas 481 (DB), *Raja Ramasamy v. Govindammal*.
3. ('83) 9 Cal 663 (667) : 12 Cal L Rep 269 (FB), *Rudra Kant Surma v. Nobo Kishore Surma*. (Case of assignee.)
- 3a. ('43) 30 AIR 1943 Nag 284 (285) : I L R (1943) Nag 331 : 207 Ind Cas 338, *Dadara v. Jatanbai*.
4. ('16) 3 AIR 1916 Bom 107 (107) : 40 Bom 564 : 37 Ind Cas 221, *Arjun Ramji v. Ramabai Raoji Vithoba*.

the meaning of this clause and the adopted son (assuming that his cause of action is the same as that of the widow) is not entitled to a fresh period of limitation from the date of his adoption.⁵

Where, after the commencement of adverse possession against a lunatic, he dies as a lunatic, his widow as his legal representative will be entitled to sue within three years from the date of his death, under this section read with S. 8. But, if the widow fails to sue within the period of three years, the reversioner succeeding to the estate afterwards will not be entitled to a fresh start of limitation from the death of the widow.⁶

See also Section 8 Note 4.

43. "Legal representative." — The expression "legal representative" is not defined in the Act. Nor is it defined in the General Clauses Act. But the expression is defined in Civil Procedure Code, S. 2, sub-s. (11). It is apprehended that the two Acts being *in pari materia*, the definition in the Civil Procedure Code may be taken as applicable to this Act also.¹ The said definition runs as follows :

" 'Legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

The above definition must be taken as subject to the provisions of S. 211, Succession Act, 1925. That section reads as follows :

"(1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh, or Jaina or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person."

5. ('35) 22 AIR 1935 Bom 420 (421) : 159 Ind Cas 272, *Mariyayya Shidramayya v. Chanvirangouda*. (Suit for arrears of rent under lease by minor widow — Widow adopting plaintiff' — Suit by plaintiff for arrears — Plaintiff not entitled to sue within the extended period applicable to the widow — Submitted that the decision though correct, proceeds on incorrect reasoning — In such case the adopted son (or reversioner) would have no right to sue at all, the right to the rent being entirely the personal right of the widow which does not vest in the adopted son or reversioner — It is, therefore, not correct to treat the suit by the adopted son as based on the same cause of action — The proper ground for rejecting the suit is that the adopted son has no right to sue for the arrears during the widow's lifetime — In this view, the general principle that the adopted son gets an independent right to sue for the estate on the adoption is not affected.)

6. ('22) 9 AIR 1922 Mad 12 (16) : 45 Mad 361 : 70 Ind Cas 678 (DB), *Seetaramaraju v. Subbaraju*. (Fact that widow has only limited estate does not stop running of time.)

Section 6 — Note 43

1. See ('25) 12 AIR 1925 Pat 1 (8) : 3 Pat 371 : 78 Ind Cas 200 (FB), *Balmukund Marwari v. Basanta Kumari Dasi*. (The Code of Civil Procedure and the Limitation Act are the two great procedural Codes in India and they were amended in the same year and were to come into operation on the same day — They are statutes *in pari materia* and are to be taken together as forming one system and as interpreting and enforcing each other — Overruled in A I R 1934 Pat 246 : 13 Pat 411 (FB), *Bhaunath v. Kedar Nath* on another point.)

Section 6 Notes 43-44

The combined effect of the two provisions is that except in cases coming under sub-s. (2) of section 211 where there is an executor or administrator, such executor or administrator alone is the legal representative of the deceased. Where there is no executor or administrator as a general rule, the heir or legatee of the deceased will be the legal representative of the deceased in respect of the property got by him.² Where the executor refuses to accept office, the heir-at-law of the deceased will be the legal representative of the deceased and can sue on behalf of the estate.³

For other instances of provisions of the Act in which the expression "legal representative" occurs, reference may be made to Ss. 10 and 17 and Arts. 176 and 177. It may be noted that in S. 10 the expression is used as distinct from "assigns," showing that the term "legal representative" can properly apply only to those persons who represent the estate of a *deceased* person and will not apply to a transferee of property *inter vivos*.⁴

See also A. I. R. Commentaries on the Civil Procedure Code (5th (1950) Edition) O. 22 R. 3 Note 10.

44. Clause (4) : Minority or other disability of legal representative. — This clause applies to the same class of cases as is referred to in clause (3), viz., cases in which the person under disability dies *before* the cessation of the disability. In such cases, if the legal representative of the deceased is, at the date of the death, under any disability, he will be entitled to have the period of limitation computed from the cessation of his disability.¹ But the clause does not apply to cases where the death of the person originally entitled to sue or apply occurs *after* the cessation of the disability. Hence, the disability of the legal representative at the time of such death is no ground for extending in his favour the period of limitation.² Under the corres-

2. ('04) 8 Cal W N 843 (856) (DB), *Dinamoni v. Elaha Dut Khan*. (Heir.)
('93) 17 Bom 758 (770) (DB), *Mani Lal Rewadat v. Bai Rewa*. (Decree for maintenance obtained by wife against husband—Appeal by husband—Death of wife pending appeal—Daughter is her legal representative for purposes of appeal.)
[See ('23) 10 AIR 1923 Mad 237 (237) : 45 Mad 872 : 68 Ind Cas 942 (DB), *Subbarayudu v. Ramadasu*. (Legatee.)]

[But see ('38) 25 AIR 1938 Mad 157 (160) : I L R (1938) Mad 533 : 174 Ind Cas 638 (DB), *Sivasankara Mudaliar v. Amaravathi Ammal*. (A legatee does not represent the estate and he has no direct right of action against the person who is claiming adversely to the estate.)]

3. ('38) 25 AIR 1938 Mad 157 (160) : I L R (1938) Mad 533 : 174 Ind Cas 638 (DB), *Sivasankara Mudaliar v. Amaravathi Ammal*.

4. ('29) 16 AIR 1929 Oudh 353 (354) : 117 Ind Cas 452 (DB), *Bisheshur Dayal v. Bajrang Bahadur Singh*. (Auction-purchaser in execution of decree against under-proprietor is not his legal representative.)

('29) 16 AIR 1929 All 444 (446) : 121 Ind Cas 689 (DB), *Mithan Lal v. Maya Devi*.

Section 6 — Note 44

1. ('16) 3 AIR 1916 Pat 120 (121) : 39 I. C. 85 (DB), *Brij Behari v. Sheo Shankar*.

2. ('68) 10 Suth W R 285 (285) : 1 Beng L R (S N) 21 (a) (DB), *Obhoya Durga v. Hurry Kristo Gope*.

[But see ('75) 23 Suth W R 214 (216) : 2 Ind App 113 : 15 Beng L R 10 : 3 Sar 430 : 3 Suther 94 (P C), *Amirtlal Bose v. Rajonee Kant Mitter*. (Under the

pending section in the Act of 1871, the minority or other disability of the legal representative was not a ground for extension of limitation even in cases in which his predecessor had died during the continuance of his disability.³

Section 6
Note 44

***7.** *Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all : but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Section 7

Disability of one of several plaintiffs or applicants.

Illustrations.

(a) A incurs a debt to a firm of which B, C and D are partners. B is insane, and C is a minor. D can give a discharge of the debt without the concurrence of B and C. Time runs against B, C and D.

(b) A incurs a debt to a firm of which E, F and G are partners. E and F are insane, and G is a minor. Time will not run against any of them until either E or F becomes sane, or G attains majority.

a. Section 7 has been declared not to apply to suits, appeals or applications under the Bengal Public Demands Recovery Act, 1913 (Beng. Act III of 1913) ; see S. 56 of that Act.

* Act of 1877 : S. 8.

8. When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all; but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others.

Illustrations.

(a) A incurs a debt to a firm of which B, C and D are partners. B is insane and C is a minor. D can give a discharge of the debt without the concurrence of B and C. Time runs against B, C and D.

(b) A incurs a debt to a firm of which E, F and G are partners. E and F are insane, and G is a minor. Time will not run against any of them until either E or F becomes sane, or G attains majority.

Act of 1871 : S. 8.

8. When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all; but where no such discharge can be given, time will not run as against any of them until they all are free from disability.

Act of 1859.

No corresponding provision.

Regulation in force prior to the Act of 1859, period of disability of successor was also to be deducted in such cases.]]

3. ('75) 24 Suth W R 7 (8, 9), *Sookh Moyee Chowdhraïn v. Raghobendro Narain*.

Section 7
Note 1

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Where one of several persons."
4. "Jointly entitled."
5. Applicability of section to proceedings for execution.
- 5a. Applicability of the section to period of twelve years fixed by S. 48 of the Civil Procedure Code.
6. Disability of one of several joint decree-holders.
7. "Is under any such disability."
8. Applicability of the first part of the section.
9. "Discharge," meaning of.
10. In what cases discharge can be given by one joint claimant without the concurrence of others.
- 10a. "Time will run against them all." See Note 2.
11. "Where no such discharge can be given."●
12. "Time will not run."
- 12a. "As against any of them." See Note 2.
13. "Until one of them becomes capable of giving such discharge."
14. Whether the latter part of the section applies to cases in which one of the persons entitled to sue or apply is under a disability.
15. Competency of one joint decree-holder to give discharge on behalf of all.
16. Mitakshara joint family.
17. Suit to set aside alienation of joint family property — Manager's power to give discharge.
18. Suit by members of Mitakshara joint family for redemption of mortgaged property.
19. Suit by ward on attaining majority to set aside alienation by guardian.
20. Suit by members of Dayabhaga family.
21. Karnavan of Malabar Tarwad.
- 21a. Hindu reversioners challenging alienation by limited owner.
- 21b. Reversioners under Punjab Customary Law suing to set aside alienation by collateral.
22. Joint creditors.
23. Co-heirs.
24. Partners.
25. Joint trustees.
26. Joint executors or administrators.
27. Co-sharers entitled to sue for mesne profits.
28. Persons aggrieved by the same tortious act.
29. Effect of appointment of guardian for minor.

TOPIC INDICATOR.

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| Cause of action and not substantive right should be joint. See Note 4. | Mahomedan co-heirs — Decree in favour of — Power of one to give discharge. See Notes 15 and 23. |
| Civil Procedure Code, O. 21, Rr. 1 and 2 — 'Decree-holder,' meaning. See Note 15. | Power of eldest male member to give discharge. See Notes 16, 17 and 21b. |
| Co-mortgagees. See Notes 4 and 22. | Section not affected by Civil Procedure Code, O. 21, R. 15. See Note 15. |
| Co-mortgagors. See Notes 18 and 22. | Sections 6 and 7. See Notes 2, 5, 7 & 12. |
| Discharge by guardian. See Notes 9, 15 and 29. | Tenants-in-common. See Notes 4, 10, 20, 23, 24 and 27. |
| Discharge — Not confined to pecuniary liability. See Note 9. | Tort. See Notes 11 and 28. |
| Joint tenants. See Notes 16 and 25. | |

1. Legislative changes. — This section corresponds to S. 8 of the Acts of 1877 and 1871. There was no *special* provision in the Act of 1859 relating to cases where several persons were jointly entitled to sue and one or more of them were under a disability.

The changes made in the section since its introduction into the statute under the Act of 1871 may be noticed under the following heads:

1. Persons to whom the section applies :

The corresponding section in the Acts of 1871 and 1877 applied to "joint claimants or creditors." The present section applies to persons

jointly entitled to institute a suit or make an application for the execution of a decree. As to the effect of the change, see Notes 4 and 5.

Section 7
Notes 1-2

2. Continuation of time where discharge cannot be given without concurrence of person under disability :

- (a) Under the Act of 1871, it was provided that in such cases, time would not run as against any of the joint claimants until they all were free from disability.
- (b) Under the Act of 1877, the words "until one of them becomes capable of giving such discharge without the concurrence of the others" were substituted for the words "until they all are free from disability" which occurred in the older section.
- (c) Under the present section, the words substituted under the Act of 1877 are retained, but the words "or until the disability has ceased" have been added at the end of such words, thus adopting the language of both — the section in the Act of 1877 and that in the Act of 1871.

As to the effect of the changes, see Notes 11 and 14.

3. Illustrations to the section :

These were first introduced in the Act of 1877. (See Notes 3 and 14.)

2. Scope of the section — This is one of the provisions which *extend* the periods of limitation laid down by the first schedule. The ground on which such extension is allowed, is the *disability* of one or more of several persons jointly entitled to sue or apply for execution. The section serves as a proviso to S. 6 and lays down a *special* rule for some of the cases dealt with by S. 6.

The peculiar feature about the section is that limitation under it is extended or not with reference to the *entire* body of persons jointly entitled to sue or apply.¹ The extension of limitation does not take place with reference to the person under disability alone. The first part of the section provides that if a discharge *can* be given by the claimant who is free from disability without the concurrence of the claimants who are under disability, then, there is no extension of limitation, and the ordinary period of limitation alone applies to *all* the joint claimants including those who may be under disability. The second part of the section provides that if such a discharge *cannot* be given without the concurrence of the person under disability, then, limitation will be extended with reference to *all* the joint claimants and not only with reference to the person under disability.

In the above provision, the Legislature has given effect to the principle that where several persons are jointly entitled to sue on the same cause of action, such cause of action cannot be barred as to some of them and not barred as to the others.²

Section 7 — Note 2

1. See ('29) 16 A I R 1929 Mad 394 (395) : 119 Ind Cas 39 (DB), *Mannarswamy Iyer v. Ramaswamy Nayakkan*.

2. ('02) 25 Mad 26 (35, 36) (DB), *Ahinsa Bibi v. Abdul Kader Saheb*. (Cause of action being same for all the heirs it cannot be barred as to some of them and not barred as to the others — Sections 6 and 7 are based on this principle.)

Section 7
Notes 2-4

In *Varamma v. Gopaladasayya*,³ Seshagiri Iyer, J., of the Madras High Court observed as follows :

"The principle of that section (S. 7) is that if there are some persons in existence who are adults who could have *safeguarded* the common rights of themselves and of others similarly situated, the failure of the persons who are *sui juris* to litigate the right will start the cause of action not only against themselves but also against persons in similar circumstances."

Thus, his Lordship seems to consider that the capacity of some of the joint claimants to *sue* on the cause of action is the basis on which the section denies an extension of limitation in some cases notwithstanding the disability of some of the joint claimants. It is submitted that his Lordship's view does not seem to be correct. The test for determining whether there is to be an extension of limitation under the section or not is not whether one of the joint claimants can *sue* without joining the others but whether he can *give a discharge* without the concurrence of the others. (See Note 9.)

The section is controlled by S. 8 which serves as an exception both to it and to section 6. (See section 6, Note 2.)

Section 185 of the Bihar Tenancy Act (VIII [8] of 1885) bars the application of this section to suits and applications mentioned in S. 184 of that Act.⁴ As regards the applicability of this section to arbitration proceedings, see S. 3, N. 27 and the undermentioned case.⁵

3. "Where one of several persons." — The terms of the section refer to a case where *one* of several persons jointly entitled to sue or apply is under a disability. But illustration (a) to the section shows that it also applies where more than one of the persons jointly entitled to sue or apply are under a disability. Similarly, illustration (b) shows that the section applies *mutatis mutandis* even where *all* the persons jointly entitled to sue are under disability. (See also section 6, Note 8, and also Note 14.)

4. "Jointly entitled." — This section only applies to cases in which several persons are *jointly* entitled to institute a suit or make an application for the execution of a decree. The expression "jointly entitled" refers to cases in which the *cause of action* is common to a number of persons. The section does not apply to cases in which several persons, each having a *distinct* cause of action, are entitled to combine their causes of action in the same suit.¹

[See also ('19) 6 A I R 1919 Mad 911 (922) : 41 Mad 659 : 46 Ind Cas 202 (FB), *Varamma v. Gopaladasayya*.]

3. ('19) 6 AIR 1919 Mad 911 (922) : 41 Mad 659 : 46 Ind Cas 202 (FB).

4. ('41) 28 AIR 1941 Pat 499 (501, 502): 196 I. C. 609, *Jagdeo Singh v. Babu Lal*.

5. ('48) 35 AIR 1948 Nag 334 (337) : I L R (1947) Nag 477 (DB), *Fatechand v. Wasudeo*. (It would be incorrect to urge that Ss. 4 to 25 would not apply to arbitration proceedings — Case before the passing of the Arbitration Act 1940.)

Section 7 — Note 4

1. ('18) 5 AIR 1918 Mad 724 (727) : 41 Mad 102 : 40 Ind Cas 664, *Kandasamy Naicken v. Irusappa Naicken*. (The section contemplates the existence in two or more persons of a joint right and a joint cause or joint causes of action in support of a single suit.)

Section 7
Note 4

But, it is not necessary that the *substantive right* of the parties should be joint. The section applies to cases in which, though the *substantive right* is not joint, the *right to sue or apply* is joint. Thus, where several persons are entitled to distinct interests in the substantive right, such right will not be joint. But, their right to sue or their *cause of action* may be joint and they may be precluded from bringing separate suits in regard to their respective interests. Thus, co-mortgagees are presumed to have distinct interests in the mortgage (see S. 45, Transfer of Property Act); but they cannot bring separate suits to enforce the mortgage to the extent of their respective interests. (See S. 67, Transfer of Property Act.) Similarly, though co-heirs may be entitled to distinct interests in the substantive right inherited by them, they cannot sue separately in regard to causes of action based on transactions that happened prior to the death of the deceased. (See Note 23.) The section will apply to such cases although the *substantive right* is not joint.

Under the Act of 1877, it was held in some decisions that the section only applied to cases in which the *substantive right* was joint.² This view was based on the fact that the section used the words "joint creditors or claimants." The amendment of the section changing the said words into "persons jointly entitled to institute a suit or make an application for the execution of a decree" now makes it clear that the section also applies to cases in which the substantive right is *not* joint, provided that the cause of action or right to sue is joint.

But where several persons are in the position of tenants-in-common with regard to the substantive right and each of them can sue separately in regard to his own interest in the right, neither the substantive right nor the right to sue is joint and this section does not apply to such a case.³ (See also Notes 23 and 27.)

Where a matter gives a separate right to different persons to sue for the same relief, they are not "jointly entitled" to sue within the meaning of this section. In such cases, each person has a *distinct, though similar*, right to sue. Thus, where every member of a com-

(05) 28 Mad 479 (485, 486) : 15 Mad L Jour 363, *Harold Clive Johnson v. Porto Novo Cundasamy*. (Beneficiaries entitled to compensation under Fatal Accidents Act (Act XIII of 1855) are not persons entitled to claim compensation jointly, but are parties entitled to relief severally.)

2. (05) 28 Mad 479 (485) : 15 Mad L Jour 363, *Harold Clive Johnson v. Porto Novo Cundasamy*. (25 Mad 26 distinguished on the ground that right to sue for an account and share of profits of the partnership sought to be enforced by heirs of the deceased partner was joint and indivisible.)

(07) 6 Cal L Jour 383 (396, 397), *Harihar Pershad v. Bholi Pershad*.

[But see (02) 25 Mad 26 (35, 41) (DB), *Ahinsa Bibi v. Abdul Kader Saheb*.]

3. (19) 6 AIR 1919 Cal 378 (379) : 51 Ind Cas 797, *Rakhal Chandra Ghose v. Mohendra Narain Sen*. (Dispossession of several persons entitled to a piece of land—Each of them entitled to sue in regard to his share of the land—Section does not apply.)

[See also (07) 6 Cal L Jour 383 (388, 395), *Harihar Pershad v. Bholi Pershad*. (Suit for mesne profits—Instances in which discharge can be given without concurrence of others jointly entitled to sue, pointed out.)]

Section 7
Notes 4-5

munity has an individual right to offer worship on a certain platform and the defendant unlawfully raises a structure on the platform which obstructs such right, any member of the community can sue in his own right to have the structure removed.⁴ Similarly, it has been held in a case under the Bengal Patni Regulation of 1819 that any one of the co-sharers of a patni taluk can sue to set aside a sale of the taluk.⁵ Reference may also be made to the view taken in some decisions (see Note 17) that the right to set aside an unauthorized alienation of joint family property is separate and distinct for each coparcener.

X, a member of a Hindu joint family transfers certain property belonging to the family. The circumstances are such that X can sue to set aside the transfer on the ground that it was brought about by fraud. The circumstances are also such that Y, another coparcener can sue to set aside the transfer on the ground that it is not binding on the family. X and Y are not "jointly entitled" to sue.⁶

Where A and B constitute a Mitakshara joint family and a cause of action accrues to A in his own *individual* right, this section does not apply, the reason being that the right is not joint.⁷

Where the cause of action is joint as between two or more persons, this section applies notwithstanding that it may be open, in a particular case, to any one of them to sue without joining the others as parties to the suit. Thus, though any member of a Mitakshara joint family can sue to set aside an alienation of family property, the cause of action is *joint* within the meaning of this section. (See Note 17.)

The sons of the daughter of a Hindu take the property of their maternal grand-father with mutual rights of survivorship and they come under the expression "persons jointly entitled to sue."⁸

The joint right to sue under this section must exist *at the commencement of limitation*. (see Note 7.)

5. Applicability of section to proceedings for execution.

—The words used in S. 7 of the Act of 1871 (now S. 6) to describe the person to whom it was intended to apply were "person entitled to sue." In S. 8 of the Act (now S. 7) the words were "joint creditors or

4. ('97) 24 Cal 385 (390), *Baiju Lal v. Gulaklal*. (There was no question of limitation in this case.)

5. ('09) 2 Ind Cas 77 (79) (Cal), *Gangadhar Sarkar v. Khaja Abdul Ajij*. (This section is inapplicable in such cases.)

6. ('39) 26 AIR 1939 Mad 907 (909) : 189 Ind Cas 167, *Kunhi Kannan v. Vazhayil Devaki*.

7. ('86) 10 Bom 241 (242) : 1886 Bom P J 13, *Yeknath Ramchandra v. Waman Brahmadev*. (A suit brought by a person within three years of his attaining majority on a bond obtained by his guardian in his name alone during his minority was held to be within time, although the minor had an undivided brother who had attained majority more than three years prior to the suit, the reason being that the bond had been given to the plaintiff alone and the brother was not a party to the bond.)

8. ('47) 34 A I R 1947 Mad 102 (104) : 231 Ind Cas 143, *Kuppuswami v. Than. gavelu*. (A. I. R. 1944 Mad. 512 foll.)

('44) 31 AIR 1944 Mad 512 (512, 513), *Ramayya v. Veerabhadrachari*.

claimants." When the sections were amended in the Act of 1877, the words "person entitled to sue" in S. 7 (now S. 6) were changed into "person entitled to institute a suit or make an application." But the words "joint creditors or claimants" in section 8 (now S. 7) were not changed. In view of the change of words in S. 7 (now S. 6), it was clear that that section applied both to suits and applications including applications for execution. But, as no change was made in regard to the words in section 8 (now S. 7), the question arose as to whether the section would govern applications for execution. On this question, there was a conflict of decisions. The Calcutta High Court held in the undermentioned case¹ that the words "joint creditors" in the section were wide enough to include joint execution creditors. But the Madras High Court took the contrary view.² According to that High Court, the expression "joint creditors or claimants" could not include joint execution creditors. The words could only apply to creditors or claimants whose claim had not merged into a decree. Further, the fact that no change was made in the wording of the section while the words in S. 7 (now S. 6) were altered as indicated above, showed that the scope of the two sections was intended to be different. (see also Note 8 to section 6.)

The amendment of the section in the present Act which brings the words in the two sections (Ss. 6 and 7) into conformity with each other in this respect shows that both of them apply not only to suits but also to applications for execution. (See also Note 6.)

5a. Applicability of the section to period of twelve years fixed by Section 48 of the Civil Procedure Code. — This section is subsidiary to section 6 and the time mentioned in this section must be taken to be the time referred to in S. 6, that is, the time specified in the first schedule of this Act. Hence, the period of twelve years under section 48 of the Civil Procedure Code cannot be extended under this section.¹ See also section 6 Note 21.

6. Disability of one of several joint decree-holders.

Position under the old Act.

Under the Act of 1877, there was a conflict of views as to the proper interpretation of this section (then S. 8) with reference to such cases and at least four different views were expressed :

1. According to the first view, the first part of S. 8 (now S. 7) did not apply to such cases and the reasoning on which this view was based was this : The first part of the section applied only to cases in

Section 7 — Note 5

1. ('12) 15 Ind Cas 664 (664, 665) (Cal), *Jagarnath Singh v. Mohabir Das*. See also Note 6.

2. ('02) 25 Mad 431 (441, 442) : 12 Mad L Jour 166 (FB), *Periasamy v. Krishna Ayyan*.

Section 7 — Note 5a

1. ('41) 28 AIR 1941 Pat 45 (47, 48) : 20 Pat 1 : 190 Ind Cas 369 (DB), *Mt. Zali Khan Bibi v. Rama Prasad*.

('38) 25 A I R 1938 Cal 25 (30) : I L R (1937) 2 Cal 373 : 176 Ind Cas 212 (DB), *Kartic Chandra v. Bala Krishna*.

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Note 6

which the act of the joint decree-holder (who was free from disability) *per se* amounted to a discharge of the judgment-debtor. Under S. 258, Civil Procedure Code of 1882 (now Order 21, Rule 2), no payment or adjustment under a decree made out of Court could be recognized by the executing Court unless it had been certified to the Court. Under S. 231 (now O. 21, R. 15) it was provided that if the Court allowed any joint decree-holder to execute the decree on behalf of all the decree-holders, the Court must pass such order as it deemed necessary for protecting the interests of the persons who had not joined in the application. Having regard to the above two provisions, it was not the act of the joint *decree-holder* but the act of the *Court* executing the decree that was intended to operate as a valid discharge. Hence, the first part of S. 8 (now S. 7) did not apply to such cases.¹

The logical result of holding that one joint decree-holder could not give a valid discharge on behalf of all the decree-holders would be to make the second part of the section applicable to the case (if it was otherwise applicable), such part dealing with cases in which a discharge could not be given by one of the joint creditors on behalf of all.² But the decisions propounding the first view, notwithstanding they held that one joint decree-holder could not give a valid discharge on behalf of all the decree-holders, did not consider the applicability of the second part of the section to such cases at all. Having held that the first part of the section did not apply, they proceeded to consider the applicability of section 7 (now section 6).

2. The second view was expressed by Bhashyam Aiyengar, J., in *Periasamy v. Krishna Ayyan*.³ The learned Judge dissented from the view that it was the act of the Court and not of the decree-holder that amounted to a discharge of the judgment-debtor in cases of adjustment or payment out of Court. But, he held that under S. 257, Civil Procedure Code of 1882 (now O. 21, R. 1), if payment was made out of Court to the decree-holder, it must be made to all the decree-holders jointly in cases where there were several joint decree-holders and that this rule applied even in cases in which, if the debt had not merged into a decree, one of the joint creditors would have been entitled to give a discharge on behalf of all the joint creditors. Hence, one joint decree-holder could not, even in such cases, give a valid discharge on behalf of all the joint decree-holders. Thus, though on a different ground, the learned Judge also came to the conclusion that the first part of section 8 (now S. 7) did not apply to cases in which one of several joint decree-holders was under disability.

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1. (1900) 22 All 199 (203): 1900 All W N 8 (FB). *Zamir Hasan v. Sunder*. (1884 All W N 58, *Hargbind v Sri Kishen*, is based on wrong view of S. 8 of Limitation Act of 1877.)
- (190) 13 Mad 236 (239, 240), *Seshan v. Rajagopala*. (It was observed that S. 8 of the old Act did not include execution creditors.)
- (196) 20 Bom 383 (385), *Govindram v. Tatia*.
2. See (1902) 25 Mad 431 (441): 12 Mad L Jour 166 (FB), *Periasamy v. Krishna Ayyar*.
3. (1902) 25 Mad 431 (440, 441, 443): 12 Mad L Jour 166 (FB).

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But, he proceeded to consider the question whether in view of the fact that one joint decree-holder could not give a discharge so as to bind the others, the second part of the section (dealing with cases in which a discharge could not be given without the concurrence of the person under disability) applied to the case so as to give all the decree-holders the benefit of an extended period of limitation. On this question, he held that the expression "joint creditors or claimants" in the section did not include joint execution creditors (see Note 5) and that, therefore, the section was not applicable at all to the case of joint decree-holders.

3. The third view was that "joint creditors" included *execution* creditors. This was the view of the Calcutta High Court in the undermentioned case⁴ where the view of Bhashyam Iyenger, J., that the expression "joint creditors or claimants" in S. 8 (now S. 7) did not include execution creditors, was not accepted.

4. The fourth view was that the second part of the section applied only to cases in which all the joint creditors were under a disability and was not applicable to cases in which only one of the joint creditors was under a disability.⁵ The logical result of this position was that the second part of the section would not apply to cases in which one of several joint decree-holders was under a disability.

In several decisions, the question of the applicability of S. 8 (now S. 7) to cases in which one of the joint decree-holders was under a disability was not considered at all and the question was merely considered from the point of view of S. 7⁶ (now S. 6).

Thus, in most of the cases decided under the Act of 1877 it was held (expressly or tacitly) that this section did not apply to cases in which one of several joint decree-holders was under a disability at the commencement of limitation. So, the question arose as to the applicability of S. 6 in such cases. On this question there was a conflict of decisions, for a discussion of which see Note 8 to S. 6.

Position under the present Act.

Under the present section, the amendment of the opening words of the section, whereby the words "joint creditors or claimants" have been replaced by the words "persons jointly entitled to institute a suit

4. ('12) 15 Ind Cas 664 (664, 665) (Cal), *Jagarnath Singh v. Mohabir Das*. (14 Cal 50, *Anando v. Anando*, distinguished on the ground that the Court in that case was not dealing with an application for execution.)

See also Note 5.

5. ('87) 14 Cal 50 (53):11 Ind Jur 143 (DB), *Anando Kishore v. Anando Kishore*. ('93) 16 Mad 436 (438, 439): 3 Mad L Jour 216 (DB), *Vigneswara v. Bappayya*. See also Note 14.

6. See ('04) 1 All L Jour 408 (Note), *Liladhar v. Chaturbhuj*.

('04) 27 All 67 (68): 1 All L Jour 407: 1904 All W N 163 *Jiwan Ram v. Ram Sarup Ram*, (Section 7 (now S. 6) applies even where some only and not all of the judgment creditors are affected by legal disability.)

('07) 7 Cal L Jour 308 (309), *Sheikh Jamir v. Srimati Lal Bibi*. (The decree in this case was one which could be executed jointly and severally and the minor was held to have right to execute the whole decree.)

('06) 9 Oudh Cas 269 (270), *Nawab Ibn Hussain Khan v. Munir Ahmad*.

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or make an application for the execution of a decree" has removed the ground for the argument that the expression "joint creditors or claimants" did not include joint *execution* creditors but only referred to joint creditors or claimants whose claims had not merged into a decree. (see Note 5.) But the question still remains whether one decree-holder can give a valid discharge without the concurrence of others, so as to make the first part of the section applicable (see the first view mentioned above), or, if no such discharge can be given, the second part of the section will apply. (See the fourth view mentioned above.)

As regards the first question, it will be shown in Note 15 that it is not correct to say that when payment is made under a decree out of Court, it is the act of the *Court* and not that of the *decree-holder* that constitutes the discharge of the judgment-debtor. It will also be shown in that Note that the argument that one joint decree-holder can in no case give a discharge on behalf of other joint decree-holders unless they have constituted him their agent is not correct. As regards the argument with reference to the second question that the latter part of the section applies only to cases where *all* the joint creditors are under a disability, it will be shown in Note 14 that whatever justification there might have been for such a view under the old section, it is not sustainable under the present section. Thus, there is no reason for holding that notwithstanding the obvious intention of the section which is evident from its opening words, neither of its parts applies to cases in which one of several joint decree-holders is under a disability.

See also Section 6 Note 8.

7. "Is under any such disability." — These words relate back to S. 6 and show that the disability contemplated by this section is of the same description as that referred to in S. 6.¹ Thus, the disability must be of the *same kind* as is mentioned in S. 6. In other words, this section applies only to cases in which one of the persons entitled to sue or apply is a *minor, insane* or an *idiot*. It does not apply to any *other* kind of disability.

Again, the disability must exist *at the time* mentioned in S. 6, that is at the time from which limitation is to be reckoned.²

Section 7 — Note 7

1. ('41) 28 A I R 1941 Pat 45 (48) : 20 Pat 1 : 190 I. C. 369 (DB), *Mt. Zalikhani Bibi v. Rama Prasad*.

('21) 8 AIR 1921 Oudh 196 (199) : 64 Ind Cas 757 : 24 Oudh Cas 330, *Chokhey Singh v. Hurdeo Singh*.

2. ('46) 1946 J L R 136 (139) (DB), *Ramsahai v. Ishwarsaran*. (Extended period under S. 8 is available only in the case of one already in existence on the date on which the cause of action accrued.)

('43) 30 AIR 1943 Lah 281 (287) : I L R (1944) Lah 287 : 209 Ind Cas 257 (FB), *Indar Pal v. Badri Das*. (Both Ss. 6 and 7, Lim. Act go together. In fact as worded, S. 7 is obviously an extension of S. 6. If an after-born reversioner is non-existent at the time from which the period of limitation is to be reckoned, S. 7 cannot be invoked in his case.)

('24) 11 AIR 1924 All 912 (914) : 79 Ind Cas 1019, *Dhanraj v. Ram Naresh*.

Illustrations.

(a) At the time from which the period of limitation is to be reckoned, *A* and *B* are jointly entitled to sue or apply for execution but neither of them is under any disability. Subsequently, *A* becomes insane. The section will not apply to such cases because the disability does not exist at the commencement of limitation but arises subsequently.

(b) *A*, a Hindu father, and *B* and *C*, his two adult sons, constitute a Mitakshara joint family. In 1910, *A* alienates a portion of the family property without the consent of *B* and *C* and without any justifying necessity. The transferee is put in possession of the property immediately. *B* and *C* are jointly entitled to sue to set aside the alienation. Limitation for the suit runs from 1910, the date on which the transferee is put in possession (Article 126). In 1912, during the lifetime of *B* and *C*, another son *D* is born to *A*. According to the Mitakshara law as administered in certain provinces, *D*, the after-born son, also is entitled to sue to set aside the alienation. But *D* does not get an independent cause of action on his birth, but is entitled to sue on the cause of action accrued in favour of *B* and *C*. In other words, *D* becomes *jointly* entitled with *B* and *C* to sue to set aside the alienation. But *D*'s minority being a factor which arises only *after* the commencement of limitation in 1910, the disability does not attract the provisions of this section.³

8. Applicability of the first part of the section. — The test for the applicability of the first part of this section is that a discharge must be capable of being given without the concurrence of the person under disability.¹ The section contemplates a discharge being given by one or more of the *joint claimants* without the concurrence of the others. (See Note 9.) Hence, the nature of the obligation or the relations between the parties must be such that a discharge can be given by one or more of the joint claimants without the concurrence of the others.

Further, the section contemplates a capacity to give a discharge which exists *at the time from which limitation is to be reckoned*. Hence, although the nature of the obligation or the relations between the parties may admit of a discharge being given by one of them, if none of them is in a *position* to give a discharge at the commencement of limitation, the first part of the section will not apply.

Both the above elements are present in the example given in illustration (a) to the section. The joint claimants being partners, the *relations* between them are such that one of them can give a discharge

(21) 8 AIR 1921 Oudh 196 (199) : 64 Ind Cas 757 : 24 Oudh Cas 330, *Chokhey Singh v. Hurdeo Singh*. (Birth of a new coparcener into a family — No fresh extension of limitation can be obtained.)

3 ('24) 11 AIR 1924 All 912 (914) : 79 Ind Cas 1019, *Dhanraj v. Ram Naresh*.

(23) 10 AIR 1923 Oudh 52 (54) : 66 Ind Cas 938, *Ranodip Singh v. Rameshar Prasad*. (Such after-born son cannot obtain benefits of S. 6 of Limitation Act and hence can give no benefit under S. 7 to his elder brothers.)

[See also ('18) 5 AIR 1918 All 183 (184) : 40 All 630 : 46 I. C. 584 (FB), *Kalika Bakhsh v. Ramcharan*. (Case relating to application for execution.)]

Section 7 — Note 8

1. See ('39) 26 AIR 1939 Mad 907 (909) : 189 Ind Cas 167, *Kunhi Kannan v. Devaki*. (Section 7 of the Limitation Act is a disabling section, and so far as it takes away the right conferred by S. 6, has to be strictly construed and before dismissing the suit of a minor which is in time under S. 6 the Court should be quite certain that the disabling provisions of S. 7 apply to the case.)

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on behalf of all. Secondly, one of them is free from any disability at the commencement of limitation and hence, is in a *position* at such time to give a discharge on behalf of all. Hence, the first part of the section applies to the case and time begins to run against all the partners.

But, in illustration (b), although the nature of the relations of the parties is such as to admit of a discharge being given by one of them on behalf of all, all of them being under a disability at the commencement of limitation, none of them is in a position *at such time* to give a discharge. Hence, the case in illustration (b) is one in which a discharge cannot be given without the concurrence of the person under disability, within the meaning of the section. (See Note 11.)

9. "Discharge," meaning of. — The term "discharge," when used with reference to a legal obligation means a release from such obligation. The power to give a discharge, therefore, simply means the power to release a person from liability. This power may be exercised in two ways :

- (1) By the creditor or claimant accepting or receiving satisfaction of the claim from the debtor and making an acknowledgment to the effect that the claim has been satisfied and that nothing further is due from the defendant.
- (2) By the creditor relinquishing or giving up the claim wholly or partially.

A person having power only to give a release in the first sense mentioned above will still be a person competent to give a discharge within the meaning of this section.¹ Thus, a partner cannot *relinquish* a claim belonging to the firm.² But he can receive payment of a debt due to the firm and give a discharge in respect of it. This is sufficient to make him a person capable of giving a discharge within the meaning of this section. (See illustrations to section.) Similarly, the manager of a Mitakshara joint family cannot *relinquish* a debt due to the family.³ But he can receive payment of the debt on behalf of the family and give a good discharge in respect of it within the meaning of this section. (See Notes 16 to 18.)

Section 7 — Note 9

1. See ('28) 15 AIR 1928 Mad 933 (937) : 112 Ind Cas 501, *Arunachallam v. Ramaswamy*. (*Obiter* — One of the several payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other payees provided that the payment is made in *full* to one of the promisees of the debt.)

[See also ('21) 8 AIR 1921 Bom 289 (291) : 45 Bom 446 : 59 Ind Cas 759, *Bapu Tatya v. Bala Ravji Desai*. (The fact that the manager of a joint Hindu family can give a discharge only for the benefit of the family does not make him a person who cannot give a discharge.)
(('33) 20 AIR 1933 Lah 479 (480) : 142 Ind Cas 295, *Lal Chand v. Gian Chand*. (Do.))]

2. See Partnership Act (1932), Section 19.

3. ('28) 15 AIR 1928 Mad 601 (602) : 51 Mad 484 : 109 Ind Cas 320, *Dasaratharama Reddi v. Narasa Reddi*.

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The expression "discharge" is not confined to a discharge of a debt or other pecuniary liability. It applies to any form of quittance whereby the rights and liabilities of parties are put an end to.^{3a} Thus, the expression is applicable even to cases in which the right involved is a right to set aside an alienation of property or a right to redeem a mortgage. (See Note 17.)

The right of a joint claimant to give a discharge without the concurrence of the other claimants is not identical with the right to sue or apply for execution without their concurrence or without joining them as parties to the proceedings.⁴ Hence, the fact that a joint claimant can sue without making the other claimants parties to the suit or that he cannot do so, is not conclusive of the question whether he can give a discharge without their concurrence. (See Notes 2 and 18.)

The discharge contemplated by this section is a discharge given by a joint claimant in his *own right* as such joint claimant. The power, therefore, which a joint claimant has, as a *guardian* of another claimant, to give a discharge on the latter's behalf is not sufficient for the purposes of this section.⁵ (See also Note 15.) *A fortiori*, the mere fact that there was a guardian or other person who was not a joint claimant but who could have given a discharge on behalf of the person under disability does not deprive the claimants of the extension of limitation under this section. In this view, the undermentioned decisions⁶ do not seem to be correct.

3a. ('50) 37 AIR 1950 T C 57 (Pr 3) (FB), *Ramchandran v. Narayanan*. (The term 'discharge' used in Section 8 of Travancore Limitation Act includes release of rights in respect of immovable property and even the right to institute a suit.)

4. ('01) 25 Mad 26 (40) (DB), *Ahinsa Bibi v. Abdul Kader Saheb*.

[See also ('94) 4 Mad L Jour 52 (Jour). (Critical note on 16 Mad 436, *Vigneswara v. Bappayya*.)]

('22) 9 AIR 1922 Bom 319 (320) : 46 Bom 535 : 64 Ind Cas 972, *Bai Keval v. Madhu Kala*. (Suit for redemption on behalf of Hindu joint family — All members must be made parties to suit — Hence manager cannot give discharge in such cases although he can do so in regard to suits for setting aside alienation of joint family property, because in latter case he can sue without joining other members as parties—Submitted reasoning is not correct.)

('19) 6 AIR 1919 Mad 911 (922) : 41 Mad 659 : 46 Ind Cas 202 (FB), *Varamma v. Gopaladasayya*. (Per Seshagiri Iyer, J. — The principle of the section is that where some of the joint claimants are adults and could have safeguarded the interests of themselves and others, limitation runs against them all.)

[But see ('93) 16 Mad 436 (439) : 3 Mad L Jour 216 (DB), *Vigneswara v. Bappayya*. (Submitted not correct.)]

5. ('02) 25 Mad 26 (39, 40) (DB), *Ahinsa Bibi v. Abdul Kader Saheb*.

('35) 22 AIR 1935 Cal 631 (632, 633) : 158 Ind Cas 567 : 63 Cal 92, *Abed Hossein v. Abdul Rahman*. (A certificated guardian is not in a position to give a discharge.)

[But see ('29) 16 AIR 1929 Cal 165 (165) : 115 Ind Cas 354, *Ashutosh Ghose v. Sashi Mohan Roy*. (Submitted not correct.)]

See also Note 15.

6. ('14) 1 AIR 1914 Cal 35 (36) : 20 Ind Cas 701, *Raj Kumar Giriya Nandan v. Kanhaiya Prasad*. (Receiver appointed for estate of minors—Capacity of receiver to give discharge—Minors not entitled to extension of limitation.)

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The section contemplates a discharge that can be given as a matter of *right*. A discharge that can be given only with the permission of the Court is not within the section.⁷

10. In what cases discharge can be given by one joint claimant without the concurrence of others. — It is a matter of substantive law whether one of several persons jointly entitled to institute a suit can give a discharge on behalf of others. The general principles on the subject would seem to be as follows :

1. Where the substantive right is *joint* in the sense that each of the joint creditors is a creditor for the whole, any one of them can give a discharge so as to bind the others.¹ Thus, where there are several joint executors one of them can give a good discharge in regard to any debts owing to the estate. (See Note 26.)

2. Where the parties are in the position of *tenants-in-common* with regard to the substantive right, one of them cannot give a discharge without the concurrence of the others. In other words, where the co-owners are entitled to *distinct* interests in the substantive right, one of them alone is not entitled to receive payment and give discharge on behalf of all.² (See Note 22.)

3. Where there are several co-owners of a right, they must be *presumed* to be in the position of tenants-in-common and not joint tenants in regard to such right. In other words, the general presumption under the law is that co-owners are entitled to distinct interests in the right owned by them. (See Note 22.)

4. A joint claimant who is under a legal disability cannot give a discharge even if in the absence of legal disability he could have done so. (See illustration (b).)

The above are only *general* rules and are subject to exceptions in special cases. Thus, though joint trustees are only in the position of *joint tenants* in respect of the rights and properties vested in them as trustees, the law provides that one of them *cannot* give a good

[See also ('19) 6 AIR 1919 All 297 (299) : 41 All 473 : 50 Ind Cas 730, *Amina Bibi v. Rama Shankar*. (A Mahomedan mother, who is a *de facto* guardian having no authority to transfer or deal with the property of the minors, cannot give a valid discharge for 'payments made to the minors. The underlying assumption, that the capacity of a guardian to give a discharge is sufficient for the purpose of this section, is not correct.)]

7. ('19) 6 AIR 1919 All 297 (299) : 41 All 473 : 50 Ind Cas 730, *Amina Bibi v. Rama Shankar*. (Guardian *ad litem*, incapacity of, to give a discharge without the leave of the Court — He cannot give discharge within the meaning of this section.)

('35) 22 AIR 1935 Cal 631 (632, 633) : 158 Ind Cas 567 : 63 Cal 92, *Abed Hossain v Abdul Rahman*. (Do.)

Section 7 — Note 10

1. ('07) 6 Cal L Jour 383 (395), *Harihar Pershad v. Bholi Pershad*. (Joint right arising out of a tort — No inflexible rule that one of the holders of such a right can give a discharge without the concurrence of others.)

2. ('07) 6 Cal L Jour 383 (395, 397), *Harihar Pershad v. Bholi Pershad*. (The section does not apply to persons whose rights are distinct and different, but who are permitted to enforce such separate rights by one judicial process.)

discharge on behalf of all. (See Note 25.) Similarly, though the members of a Mitakshara joint family are in the position of *joint tenants* in respect of the rights belonging to the family, it is not any and every one of the members that can give a discharge on behalf of the family. Such a right is recognized only in the case of the *manager* of the family. (See Note 16.) So also, in the case of *partners*, though they may be entitled to *distinct* interests in the partnership business and in the rights which are the subject-matter of suit and as such are in the position of *tenants-in-common*, each partner has implied authority under the law to give discharge in respect of the debts due to the partnership. (See Note 24.)

10a. "Time will run against them all." — See Note 2.

11. "Where no such discharge can be given." — These words relate to the time from which the period of limitation is to be calculated. (See Note 8.) The incompetency of one joint creditor at such time to give a discharge so as to bind the others may be due to either of two circumstances —

(1) The *nature of the debt* or liability itself or the relations between the parties may be such that one joint creditor cannot give a discharge on behalf of the other joint creditor or creditors. Thus, where the liability is based on a tort, none of the persons jointly entitled to sue in respect of it can give a discharge without the concurrence of the others (except in some special cases).¹ In such cases the incompetency of one of the joint creditors to give a discharge so as to bind all the joint creditors is not merely a *temporary* incompetency existing at the commencement of limitation but capable of disappearing subsequently. Hence, there will be no question of one of the joint creditors *becoming* capable at any time, of giving a discharge without the concurrence of the others. In such cases, the additional period of limitation under the section should be computed from the time when the disability of such of the joint creditors as are under disability at the commencement of limitation comes to an end.

(2) None of the joint creditors may be in a *position* to give a discharge (though the nature of the *debt* or liability itself or the relations between the parties may admit of a discharge being given by any of the joint creditors). For instance, in the example given in illustration (b) to the section, the nature of the debt is such that a discharge is capable of being given by any of the joint creditors. For, the rule is that one partner can give a discharge in respect of a debt due to all the partners. (See Note 24.) But all of them being under disability at the commencement of limitation, none of them is in a *position* at such time to exercise his right of giving a discharge. (See Note 10.) In such a case, the incompetency of one joint creditor to give a

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1. ('07) 6 Cal L Jour 383 (395, 396), *Harihar Pershad v. Bholi Pershad*.

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discharge so as to bind the other creditors is merely a *temporary* incompetency. In other words, one of the joint creditors can, in such cases, be expected subsequently to *become capable* of giving a discharge without the concurrence of the others. In such cases, the additional period of limitation under the section is to be computed from the time when one of the creditors so becomes capable of giving a discharge.² Thus, in the example given in illustration (b) to the section, the additional period under the section will run from the time when the disability of one of the partners comes to an end and he becomes capable of giving a discharge on behalf of all the partners.

Thus, the second part of the section applies *both* to cases in which the debt or liability or the relationship of the parties is of such a nature that a discharge can be given by one of the joint creditors without the concurrence of the others, as well as to cases in which such debt or liability or relationship is not of such a nature.

But, in *Harihar Pershad v. Bholi Pershad*,³ Mookerjee, J., of the Calcutta High Court held that the second part of S. 8 of the Act of 1877 (now S. 7) applied only to cases in which the debt or liability of the defendant was of such a nature that a discharge was capable of being given by one of the joint creditors alone. His view was based on the wording of the second part of the section as it stood then. At that time, the words "or until the disability has ceased" which occur at the end of the present section did not find a place in the section. The second part of the section simply ran as follows: "but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others." The second part of the section in the Act of 1871 ran as follows: "but where no such discharge can be given, time will not run as against any of them until they all are free from disability." The learned Judge contrasted the language of the two sections and pointed out how the words of the section in the previous Act were capable of applying to cases where the debt or liability was of such a nature that one joint creditor could not give a discharge on behalf of all and how the language of the section in the later Act was not capable of applying to such cases. According to his Lordship, the substitution of the words "until one of them becomes capable of giving such discharge without the concurrence of the others" in the place of the words which occurred in the previous Act showed that the cases contemplated by the new section were those in which a discharge was capable of being given by one joint creditor alone on behalf of all, though at the commencement of limitation none of the

2. ('38) 25 AIR 1938 Bom 392 (393) : 177 I C 286 (DB), *Bhikarchand Devidas v. Lachhmandas Bansilal*. (If manager of Hindu joint family is minor time will be computed from his becoming major.)

[See ('41) 28 AIR 1941 Oudh 165 (169) : 191 Ind Cas 825 (DB), *Jagdish Narain v. Bishun Datt*. (Eldest brother being the manager of the family, time will run against the younger brother from the time when former attained majority.)]

3. ('07) 6 Cal L Jour 383 (395, 396, 397).

joint creditors might be in a position to exercise the right of giving such discharge. Thus, according to his Lordship, both the parts of the section applied only to cases in which the nature of the debt or liability of the defendant was such that one of the joint creditors might alone give a discharge on behalf of all. The first part of the section referred to cases in which such discharge was *immediately* capable of being given. The second part referred to cases in which such discharge would be capable of being given as soon as one of the joint creditors attained the position in which he could exercise his right of giving a discharge.

The amendment of the section in the present Act by the addition of the words "or until the disability has ceased" at the end of the section has removed the basis for the view expressed by Mookerjee, J., in the above case. It is therefore now clear that, as already said, the latter part of the section applies also to cases where the debt or liability is of such a nature that one joint creditor alone cannot give a discharge in respect of it.

In the undermentioned case,⁴ however, a case arising under the present Act, it was held that this section applied only to cases "where persons who could give a discharge, could not do so on account of incapacity such as lunacy, or minority or some such thing." It is submitted that in view of the above discussion the observation is not correct.

12. "Time will not run." — It has been seen in the Notes to S. 6 that that section only *extends* the period of limitation (Note 2) and does not *prevent the running of limitation* against the person under disability. (Note 32.) It has also been seen (Note 2) that this section provides a special rule for some of the cases falling under S. 6. Under these circumstances, it follows that this section also must be considered only to *extend* the period of limitation and not to prevent the running of limitation. The words "Nothing in S. 6 or in S. 7. . . . shall be deemed to extend" in S. 8, also make this clear.

The section, however, uses the words "time will not run." It is submitted that this section being really only an appendix to S. 6 (see S. 6 Note 2), the above provision must be interpreted, if possible, in the same manner as the corresponding expression in S. 6. It is possible to interpret the second part of the section as meaning that in the cases coming within its purview, the litigant should be entitled to an additional period and that such *additional* period should be computed from the cessation of the disability or from the time when one of the persons jointly entitled to sue or apply becomes capable of giving a discharge. In this view, the words "time will not run" in the second part of the section would merely refer to the *additional* period conferred by the section.

If the above interpretation is not adopted, the result will be that under this section the starting point of limitation is itself postponed

4. ('27) 14 AIR 1927 Mad 216 (216) : 99 I C 668, *Neelkantamier v. Chinnammal*.

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till the events specified therein, while under S. 6, limitation is merely extended and the starting point is not postponed. It is submitted that such a disharmony in the construction of the two sections should, if possible, be avoided.

12a. "As against any of them."—See Note 2.

13. "Until one of them becomes capable of giving such discharge." — Under the second part of the section, the additional period of limitation conferred by it begins to run from the time when one of the persons entitled to sue or apply *becomes* capable of giving a discharge without the concurrence of the person under disability. The provision contemplates cases in which the liability is of such a nature that a discharge can be given by one of the joint claimants on behalf of all, but where none of them is in a *position* to give such a discharge. (See Note 11.)

Illustration (b) to the section is an instance in point. The debt being due to a firm, it is of such a nature that any of the partners (the joint claimants) can give a discharge on behalf of all. But, all the partners being under a disability at the commencement of limitation, none of them is in a position, *then*, to give a discharge. In such cases, the joint claimants are entitled to an additional period and such additional period must be computed from the time when one of them becomes free from his disability and therefore, capable of giving a discharge.

In the cases of right of action belonging to the members of Mitakshara joint family, it is only the *manager* of the family that can give a discharge. Suppose, at the commencement of limitation, though some of the coparceners entitled to sue are adults and free from any disability, none of them is in the position of the manager of the family. In such a case, if subsequently one of them becomes the manager of the family, the additional period conferred by the section should be reckoned from the time of his becoming such manager.

14. **Whether the latter part of the section applies to cases in which one of the persons entitled to sue or apply is under a disability.** — The opening words of the section, "where *one* of several persons jointly entitled" etc., govern both the parts of the section. Hence, the latter part of the section, which deals with cases in which no discharge can be given without the concurrence of the person under disability, also applies to cases in which *one* of several persons jointly entitled to sue or apply for execution is under a disability. It was, however, held in some cases¹ decided under the Act of 1877 that the latter part of the corresponding section of that Act (s. 8) only applied to cases in which *all* the joint creditors or

Section 7 — Note 14

1. ('87) 14 Cal 50 (53) : 11 Ind Jur 143 (DB), *Anando Kishore v. Anando Kishore* (Obiter.)

('93) 16 Mad 436 (439) : 3 Mad L Jour 216 (DB), *Vignaswara v. Bapayya*.
See also Note 6.

claimants were under a disability and not to cases in which only *one* of them was under a disability.

Probably there was some justification for this construction under the Acts of 1871 and 1877. Thus, the second part of the section in the Act of 1871 ran as follows: "but where no such discharge can be given, time will not run as against any of them until they *all* are free from disability." The words "until they all are free from disability" perhaps could be construed as meaning that only cases in which all the joint creditors or claimants were under a disability, were in contemplation.

Similarly, the second part of S. 8 of the Act of 1877 ran as follows: "but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others." Illustration (b) also was added to the section in the Act of 1877. The words "until one of them *becomes* capable of giving such discharge" together with illustration (b) probably suggested that the cases contemplated were those in which *all* the joint creditors or claimants were under a disability at the commencement of limitation but one of them subsequently *became* capable, by reason of the cessation of his disability, of giving a discharge.

Thus, under the Acts of 1871 and 1877 there was room for the view that the second part of the section only applied to cases in which *all* the joint creditors or claimants were under a disability.

But, under the present Act, the second part of the section has been amended by the addition of the words "or until the disability has ceased." The disability referred to in the above clause may be that of one of several persons jointly entitled to sue or apply and does not necessarily denote the disability of all of them. Hence, the amendment of the section in the present Act makes it clear that, cases in which one of the persons entitled to sue or apply is under a disability are within the purview of the second part of the section. The retention of illustration (b) is not inconsistent with such an interpretation. The illustration only shows that the principle of the latter part of the section applies *also* to cases in which all the persons entitled are under a disability. (See Note 3.)

15. Competency of one joint decree-holder to give discharge on behalf of all. — As a *general* rule, one joint decree-holder cannot give a discharge to the judgment-debtor without the concurrence of the other decree-holders.¹ The provisions of O. 21, R. 15

Section 7 — Note 15

1. ('29) 16 AIR 1929 All 267 (267) : 118 I C 229 · *Chiranjil Lal v. Ram Sarup*. (Where a joint decree for possession of land and demolition of a construction is passed in favour of a major brother, widow and a minor, although their interests were distinct and separate, the major cannot give a valid discharge for the minor and, therefore, an execution application by the minor within three years from attaining majority is not barred.)
- ('31) 18 AIR 1931 Lah 5 (6) : 130 Ind Cas 403, *Mahomed Kasam v. Nadir Ali Shah*. (One of deceased decree-holder's legal representatives minor—Majors can-

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which enable one of several joint decree-holders to apply for execution on behalf of all the decree-holders, do not imply that one joint decree-holder can give a discharge on behalf of all the decree-holders.² As seen in Note 9, the capacity to *institute a suit* or make an application on behalf of another person does not necessarily imply a capacity to give a *discharge* on behalf of such person. Moreover, the right of one joint decree-holder to apply for execution on behalf of all under O. 21, R. 15 is dependent on the permission of the Court. Therefore, even supposing that such a right implies a right to give a discharge, the discharge will not be of such a character as is contemplated by the section. For, the discharge contemplated by the section is a discharge given by a person *as of right* and not one which depends on the permission of the Court. (See Note 9.)

There are, however, exceptions to the general rule that one joint decree-holder cannot give a discharge on behalf of others. For instance, when the decree itself authorizes one of the decree-holders to receive the decretal amount and to give a discharge to the judgment-debtor he can do so without the concurrence of the other decree-holders.³

It has also been held that where a decree is passed in favour of a Hindu joint family, the manager of the family can give a valid discharge to the judgment-debtor.⁴ The reason given is that where

not give valid discharge—Section 7, Limitation Act, is not affected by C. P. C. O. 21, R. 15.)

('87) 14 Cal 50 (54): 11 Ind Jur 143 (DB), *Anando Kishore Dass Bakshi v. Anando Kishore Bose*. (14 Cal 350 (DB), *Ahamudeen v. Grish Chunder*, distinguished.)

('04) 1 Nag L R 24 (30), *Sambhusa v. Gopal*. (A payment to one of the joint decree-holders not proved to be for the benefit of all decree-holders operates as a discharge to the extent of the payee's share of the decree.)

('03) 26 All 318 (319, 320): 1904 All W N 22, *Tamman Singh v. Lachhmin Kunwari*. (14 Cal L R 70 (DB), *Bibee Budhun v. Hafezah*, approved.)

[See ('45) 32 AIR 1945 Cal 387 (393, 394): ILR (1946) 1 Cal 45 (DB), *Satyanarayan Banerji v. Kalyani Prosad*. (One of decree-holders, a minor—Others not competent to give discharge—Time will not run against any of them till the minor attains majority.)]

2. ('31) 18 AIR 1931 Lah 5 (6): 130 IC 403, *Mahomed Kazam v. Nadir Ali Shah*.

3. ('34) 21 AIR 1934 Mad 103 (103): 148 IC 54, *Venkatarama v. Bheema Rao*.

('29) 16 AIR 1929 Bom 382 (384): 121 Ind Cas 446, *Murlidhar v. Shivram*.

4. ('19) 6 AIR 1919 All 209 (210): 41 All 435: 49 IC 990, *Rati Ram v. Nadar*. (Decree-holder died during pendency of execution proceedings—The adult and eldest son not applying in time for execution of the decree—Application by younger son after attaining majority held barred.)

('26) 94 Ind Cas 922 (922, 923) (All), *Radha Kant Shukul v. Butia Misir*. (Mortgage decree.)

('29) 16 AIR 1929 Bom 13 (13): 52 Bom 441: 110 IC 276, *Sapdu v. Sakharam*.

(7 Ind Cas 939, *Mulchand v. Kesari Khupchand*, dissented from; AIR 1921 Bom 289: 45 Bom 446 (DB), *Bapu v. Bala*, followed.)

('35) 22 AIR 1935 Cal 631 (632): 158 Ind Cas 567: 63 Cal 92, *Abed Hossain v. Abdul Rahman*. (Hindu manager's capacity to give discharge is derived from the substantive law.)

('11) 12 Ind Cas 503 (505) (Mad) (DB), *Duraisamy Sastrial v. Venkatarama Iyer*. (Reversing 10 Ind Cas 464, *Venkatarama v. Duraiswamy*.)

('36) 23 AIR 1936 Mad 434 (436, 437): 161 Ind Cas 969, *Administrator-General, Madras v. Radhakrishna Chettiar*. (The power of manager to give discharge is

one of the several joint creditors is competent under the substantive law to give a discharge in respect of the *debt*, he can give such discharge even after the debt has merged into a *decree*.⁵ But, this view has been dissented from in several decisions.⁶ Thus, it has been held that the mere fact that a decree has been passed in favour of a joint Hindu family and that the manager of the family is not under any disability is not sufficient to enable him to give a discharge in respect of the decree so as to bind the other members of the family.⁷ Similarly, it has been held that the fact that the decree is in favour of partners⁸ or joint executors⁹ does not make one of the decree-holders alone competent to give a discharge, though, if the debt had not passed into a decree, he would have been competent to give such discharge.

* The above decisions proceed on two lines of reasoning :

(1) Under this section, the discharge must be the act of the *party* himself and not of the *Court*. But, having regard to the provisions of O. 21, Rr. 2 and 15 of the Civil Procedure Code, the discharge of the judgment-debtor under a decree is not the act of the *decree-holder* but that of the *Court*. Hence, one joint decree-holder cannot give a valid discharge on behalf of others.¹⁰

not affected by the fact that it was another person who was representing the minor as next friend.)

(13) 18 Ind Cas 723 (724) (Mad), *Ramanandhan Sivayya v. Udatha Atchayya*.

(14) 1 AIR 1914 Mad 1 (1) : 22 I C 76, *Palaniandi Pillai v. Pappathiammal*. (Observations to the contrary in 25 Mad 431 (FB), *Periasami v. Krishna*, not relevant as they are based on old S. 8, Limitation Act.)

(18) 5 AIR 1918 Mad 85 (86) : 44 I C 566, *Venkatasubbiah v. Venkateswarlu*. (Do.)

(15) 2 AIR 1915 Oudh 227 (228) : 30 Ind Cas 75, *Naurang Singh v. Sheoraja*. (AIR 1914 Bom 300 (DB), *Mahableswar v. Ramchandra*, referred.)

[See also (29) 16 AIR 1929 Cal 165 (165) : 115 Ind Cas 354, *Asutosh Ghose v. Sashi Mohan Roy*. (Suit for accounts—Part of claim dismissed as barred by time—Plaintiffs 1 and 2 were members of joint Hindu family of which plaintiff 1 was the karta—Held, S. 7 was inapplicable as plaintiff 1 could give a full discharge.)

(27) 14 AIR 1927 Pat 329 (330) : 103 I C 75, *Jhakhri Gope v. Phagu Mahto*. (C. P. O., O. 21, R. 15—Joint decree—One joint decree-holder can give a valid discharge.)]

5. See (11) 12 Ind Cas 503 (505) (Mad), *Duraisamy Sastrial v. Venkatarama Aiyar*.

6. See cases cited in foot-notes (7), (8), (9) and (10).

7. (17) 4 A I R 1917 Mad 988 (988, 989) : 35 Ind Cas 157 (DB), *Mahomed Silar Sahib & Co. v. Nabi Khan*. (No question of limitation was involved in this case.)

8. (17) 4 A I R 1917 Mad 988 (988, 989) : 35 Ind Cas 157 (DB), *Mahomed Silar Sahib & Co. v. Nabi Khan*. (No question of limitation was involved in this case.)

9. (06) 28 All 252 (255) : 1906 All W N 16 : 3 All L Jour 49, *Lachman Das v. Chaturbhuj Das*. (No question of limitation was involved in this case.)

10. (90) 13 Mad 236 (240) (DB), *Seshan v. Raja Gopala*. (It was held in this case that S. 8 (now S. 7) applies only to those cases in which the act of the adult joint owner is *per se* a valid discharge.)

(1900) 22 All 199 (203) : 1900 All W N 8 (FB), *Zamir Hasan v. Sunder*. (1884 All W N 58 (DB), *Hargobind v. Srikishen*, overruled.)

(96) 20 Bom 383 (385) (DB), *Govindram v. Tatia*.

(10) 7 Ind Cas 939 (940) : 34 Bom 672 (DB), *Mulchand Panachand v. Kesari Khupchand*. (Applicability of 22 All 199 and 20 Bom 383 has not ceased owing to any change in words of present S. 7.)

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It is submitted that though the view that a discharge under this section must be the act of the *party* himself and not of the *Court* is not open to any criticism, yet, the view that under the Civil Procedure Code the discharge of the judgment-debtor under a decree is the act of the *Court* and not that of the *decree-holder* does not seem to be correct. As pointed out by Bhashyam Iyengar, J., in *Periasami v. Krishna*,¹¹ if payment be made out of Court to a sole decree-holder or several joint decree-holders, as the case may be, such payment will be a sufficient discharge of the decree debt and it is not the act of the *Court* in recording such payment that operates as a discharge. Under O. 21, R. 2, the act of the Court simply consists in *recording* satisfaction of the decree. A discharge not so recorded cannot be recognized by the Court *executing* the decree, since, for purposes of executing the decree, such record is, by statute, made indispensable evidence for proving the alleged discharge.

Even for purposes of execution, sub-rule (3) of O. 21, R. 2 shows that it is not necessary that the payment or adjustment out of Court should *both* be certified and recorded. Where such adjustment or payment has been *certified* by the decree-holder, it must be recognized by the executing Court although it has not been *recorded* by the Court.¹²

Moreover, the view that one joint decree-holder cannot give a discharge on behalf of others will make the first part of the section inapplicable to cases of joint decree-holders, whereas the obvious intention of the section (as amended by the present Act), as evident from its opening words, is to cover such cases.

(2) The second line of reasoning is this. Under O. 21, Rr. 1 and 2 of the Civil Procedure Code, where there are several joint decree-holders, any payment under the decree out of Court or any adjustment of the decree must be made to or with *all* the decree-holders. Such payment or adjustment made to or with only one of several joint decree-holders cannot bind the others, unless he was also constituted by them an *agent* for the purpose. The mere fact that one of the joint decree-holders is the manager of a joint Hindu family or is otherwise a person who would have been able to give a discharge if the debt or liability of the defendant had not merged into a decree, will not empower him to give a valid discharge under the decree without the concurrence of the other decree-holders any more than it will empower him to execute the whole decree as of right without the concurrence of the remaining decree-holders.¹³

It is submitted that this reasoning also does not appear to be correct. The discharge contemplated by this section is a discharge

11. ('02) 25 Mad 431 (440, 441) : 12 Mad L Jour 166 (FB).

12. ('15) 2 AIR 1915 Cal 744 (745) : 30 I. C. 45, *Tarak Nath v. Natabar Mondal*. See also the cases cited in A. I. R. Commentary on the Civil Procedure Code, 5th (1950) Edn., Vol. II, O. 21 R. 2 Note 19.

13. ('02) 25 Mad 431 (440, 441) : 12 Mad L Jour 166 (FB), *Periasami v. Krishna*. ('17) 4 AIR 1917 Mad 988 (988, 989) : 35 Ind Cas 157 (DB), *Mohamed Silar Sahib & Co. v. Nabi Khan*.

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given by a joint creditor in his *own right* as such creditor and not as an *agent* or *guardian* acting on behalf of the other joint creditors. (See Note 9.) Hence, a discharge given by a joint decree-holder as an *agent* of the other decree-holders will not be a discharge within the meaning of this section. As, under the view in question, a discharge cannot be given by a joint decree-holder in any other case, the result will be that *in no case* can one joint decree-holder give a discharge on behalf of others. This will make the first part of the section not applicable at all to the case of joint decree-holders—a result, which, as already pointed out, is against the plain intention of the section.

Moreover, the fact that under O. 21, R. 15 even a person in the position of a manager of a Hindu joint family is not entitled as of right to execute a decree in favour of the members of the family but can only do so with the permission of the Court, does not affect the question of his competency to give a *discharge* under the decree on behalf of the other joint decree-holders. As seen in Note 9, the capacity to sue or apply on behalf of others is a distinct matter from the capacity to give a discharge and the considerations applicable to the one are not necessarily applicable to the other.

The true view seems to be that the expression “decree-holder” in O. 21, Rr. 1 and 2 will include any person who is competent to act on behalf of a decree-holder. So, if one of the several joint decree-holders is a person who, if the debt or liability of the defendant had not passed into a decree, would have been competent to give a discharge, it must be held that he is competent to give a discharge under the decree.

Mention must, however, be made of the decision of the Privy Council in *Ganesha Row v. Tulja Ram Row*¹⁴ and the principle involved therein. In that case, it was held that the powers of the manager of a Hindu joint family to enter into a compromise on behalf of the family are controlled by the provisions of O. 32, R. 7 of the Civil Procedure Code which provide that no next friend or guardian of an infant can enter into a compromise on behalf of the infant without the permission of the Court. Hence, it was held that the manager of a Hindu joint family who was also the guardian of a minor member of the family could not, without the permission of the Court, enter into a compromise on behalf of the minor purporting to do so as the manager of the family. It was laid down that the manager could not, without the leave of the Court, do any act which he was forbidden as guardian to do without such leave. The principle of the decision has been applied to the receipt of money under a decree. In such cases it is provided by O. 32, R. 6 that no moneys can be received by the guardian or next friend of a minor without the permission of the Court. Applying the principle of the Privy Council decision, it has been held that even if the next friend or guardian of the minor is the manager of a joint Hindu family of which the minor is a member and in favour of which the decree has been passed, the next friend or

14. ('13) 19 Ind Cas 515 (517) : 36 Mad 295 : 40 Ind App 132 (PC). (Appeal from 3 Ind Cas 928 (DB), *Ganesha Row v. Tuljaram Row*.)

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guardian cannot receive any moneys under the decree or give a discharge to the judgment-debtor without the permission of the Court.¹⁵ But, where the decree itself permits one of the joint decree-holders who is also the guardian of the minor decree-holder to receive the decretal amount, no *fresh* permission from the Court is necessary to enable him to receive the amount and give a discharge to the judgment-debtor.¹⁶

The Privy Council decision and the other decisions which follow it are based on the general principle that a rule of statutory law must prevail over a rule of non-statutory law when there is a conflict between the two rules in any case. This principle, as seen from the above decisions, seems to be equally applicable whether the rule of statutory law is one of procedural or substantive law. Hence, the view expressed by Walsh, J., in the undermentioned case¹⁷ seems to be open to doubt. In that case, the question under consideration was whether the fact (assuming it to be a fact) that under the Civil Procedure Code the order of the Court was necessary to constitute a discharge of the judgment-debtor under a decree, was a ground for holding that one joint decree-holder cannot give a valid discharge on behalf of all the joint decree-holders. It was observed that this section referred to the status of parties under the substantive law and was not affected by any rule of procedure which required the intervention of the Court for completing the discharge of the judgment-debtor. This view seems to be open to question for the reason already stated.

The question, therefore, arises whether the view, that a joint creditor who under the general law is competent to give a discharge to the debtor can also give a discharge after the debt has passed into a decree, does not, in view of the provisions of O. 21, Rr. 1 and 2, offend the principle stated above. It is submitted that it does not. As already

15. ('43) ILR (1943) Mad 595 (600) (DB), *Krishna Reddi v. Jayarama Rao*.

('42) 29 A I R 1942 Lah 280 (283, 284) : 203 Ind Cas 295 (DB), *Ram Prakash v. Jodh Singh*. (The prohibition is not removed merely because the decree is passed in the name of the firm without further mention of the minor. Consequently, if an application for execution of the decree filed by the manager is dismissed as barred by limitation, a subsequent application for execution filed by the minor within three years after attaining majority is not barred either by reason of S. 7 of the Limitation Act or by the principle of *res judicata*. Ex. F. A. No. 422 of 1939 reversed.)

('39) 26 AIR 1939 Pat 33 (34) : 177 Ind Cas 713, *Parmeshwari Singh v. Ranjit*.

('25) 12 AIR 1925 Mad 78 (80) : 82 Ind Cas 785 : 47 Mad 920 (DB), *Lakshmanan Chetty v. Subbiah Chetty*.

('25) 12 AIR 1925 Mad 230 (232) : 82 Ind Cas 588, *Pitchakkuttiya Pillai v. Doraiswamy Moopanar*.

('12) 15 Ind Cas 664 (665) (DB) (Cal), *Jagarnath Singh v. Mohabir Das*.

('37) 24 AIR 1937 Cal 649 (651) : 174 I C 887 (DB), *Kanai Lal Saha v. Baijanath Khetri*.

16. ('29) 16 A I R 1929 Bom 382 (384) : 121 Ind Cas 446, *Murlidhar Laxman v. Shivaram Sadashiv*.

('34) 21 AIR 1934 Mad 103 (103):148 I. C. 54, *Venkata Ramadoss v. Bheema Rao*.

17. ('19) 6 AIR 1919 All 209 (211) : 41 All 435 : 49 Ind Cas 990 (DB), *Rati Ram v. Nadar*.

stated, the expression "decree-holder" in O. 21, Rules 1 and 2 seems to *include* a person competent to act on behalf of a decree-holder whatever may be the basis of such competency.

Thus, neither of the reasons given above really militates against the view that a joint creditor who could have given a discharge if the debt had not merged into a decree can do so also after the debt has passed into a decree. (See Note 5.)

The question, whether a discharge can be given by one of the joint creditors on behalf of all, is no doubt one which does not fall to be determined *under this section*. But, in considering the question, it is proper to take into account the fact that a particular view advanced is inconsistent with the view which the Legislature seems clearly to have adopted in enacting the section and leads to a result which is directly contrary to the section. The legislature in this section seems clearly to have proceeded on the view that a discharge *can* be given by joint decree-holders without the intervention of the Court and that in some cases one or some of them alone can give a discharge on behalf of all. Acting on this view, it has expressly made the principle of the section (under which the question of limitation depends on the capacity of one of the joint creditors to give a discharge on behalf of others) applicable to joint decree-holders also. (See Note 5 dealing with the effect of the amendment of the section under the present Act, in this respect.) To hold that in no case can one joint decree-holder give a discharge on behalf of another would be inconsistent with the view on which the Legislature seems to have proceeded and will lead to a result which is contrary to the plain words of the section.^{17a}

But, where, under the substantive law itself it would not have been competent to one of the joint creditors to give a discharge if the debt had not passed into a decree, it follows that after the decree is passed one of the decree-holders cannot give a discharge on behalf of all the decree-holders. Thus, where a decree is passed jointly in favour of several persons who are Muhammadan co-heirs, one of them cannot give a discharge in respect of the decree on behalf of all.^{17b} The reason is that unlike the case of a Mitakshara joint family (in which the manager of the family can give a discharge on behalf of the family) no one Muhammadan co-heir can give a discharge on behalf of the others.

Reference has already been made to the fact that in view of O. 32, R. 6 of the Civil Procedure Code, the guardian of a minor decree-holder who is a joint decree-holder with him cannot give a valid discharge to the judgment-debtor on behalf of the minor *without the permission*

^{17a}. See ('19) 6 AIR 1919 All 209 (210) : 41 All 435 : 49 Ind Cas 990 (DB), *Rati Ram v. Nadar*. (Per Piggot, J. — All cases anterior in date to the passing of Act IX of 1908 require to be re-considered in the light of the words then inserted in S. 7.)

^{17b}. ('29) 16 AIR 1929 Lah 467 (467, 468) : 119 I. C. 234, *Fazal Ilahi v. Aishan*. ('31) 18 AIR 1931 Lah 5 (6) : 130 I. C. 403, *Mahamed Kazam v. Nadir Ali Shah*. ('24) 11 A I R 1924 Lah 681 (682) : 78 Ind Cas 285, *Muhammad Zulfikar Ali Khan v. Abrar Ali*.

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of the Court, even though the decree-holders constitute a joint Hindu family and the guardian is the manager of such family. Is the competency of such guardian to give a discharge *with the permission of the Court* sufficient for the purpose of the section? No.¹⁸ The reason is that a discharge under this section must be a discharge given *as of right*¹⁹ (see Note 9). Moreover, the section contemplates a discharge given by a person in his *own right* as a joint creditor. A right to give a discharge *as guardian* of a minor joint creditor is not within the section.²⁰ In this view, the undermentioned decisions²¹ do not seem to be correct. (See Note 9.)

But, where the decree itself permits one of the decree-holders to receive the decretal amount on behalf of all the decree-holders, his competency to give a discharge becomes a matter of *right*. Moreover, such right arises under the *decree* itself and though he may also be the guardian of the other joint decree-holders, the right is not attributable to his guardianship but to his *own* right under the decree. Hence, his power to give a discharge in such a case is within the section.²²

Where the manager of a Hindu joint family is not the next friend or guardian *ad litem* of a minor member thereof, O. 32, R. 6 or R. 7 does

18. ('25) 12 AIR 1925 Mad 78 (80) : 82 I. C. 785 : 47 Mad 920 (DB), *Lakshmanan Chetty v. Subbiah Chetty*. (AIR 1919 All 209 : 41 All 435 (DB), *Rati Ram v. Nadar*, distinguished and held to be correctly decided.)

('12) 15 Ind Cas 664 (665) (DB) (Cal), *Jagarnath Singh v. Mahabir Das*. (The provisions of O. 32, R. 6 were not brought to the notice of the Court in 6 Cal W N 348, *Bholanand v. Padmanund*.)

('35) 22 AIR 1935 Cal 631 (632, 633) : 158 Ind Cas 567 : 63 Cal 92 (DB), *Abed Hossein v. Abdul Rahman*.

[See also ('25) 12 AIR 1925 Mad 230 (232) : 82 Ind Cas 588, *Pitchakkuttiya Pillai v. Doraiswamy Moopanar*. (No question of limitation was involved in this case.)]

19. ('35) 22 AIR 1935 Cal 631 (632) : 158 Ind Cas 567 : 63 Cal 92 (DB), *Abed Hossain v. Abdul Rahman*. (Section does not contemplate a legal capacity which only empowers a person to realize a debt on behalf of another by the process of execution with the permission of the Court.)

[See also ('31) 18 AIR 1931 Lah 5 (6) : 130 Ind Cas 403, *Mohamed Kazam v. Nadir Ali Shah*. (Order 21, Rule 15, C. P. C., which enables one joint decree-holder to apply for execution on behalf of all does not imply that he can give a discharge on behalf of all as the right of the decree-holder under the rule is dependent on the section.)

('90) 13 Mad 236 (240) (DB), *Seshan v. Rajagopala*. (Section only applies where the act of the joint decree-holder is *per se* a discharge of the judgment-debtor.)

('96) 20 Bom 383 (385) (DB), *Govindram v. Tatia*. (Do.)

(1900) 22 All 199 (203) : 1900 All W N 8 (FB), *Zamir Hasan v. Sunder*. (Do.)]

20. ('35) 22 AIR 1935 Cal 631 (632) : 158 Ind Cas 567 : 63 Cal 92 (DB), *Abed Hossein v. Abdul Rahman*.

21. ('29) 16 AIR 1929 Cal 165 (165) : 115 I. C. 354 (DB), *Asutosh Ghose v. Sashi Mohan*. (Decree in favour of Hindu joint family — Eldest member acting as manager of family and as guardian of minor members — He can give discharge in either capacity.)

('01) 6 Cal W N 348 (351), *Bholanand Jha v. Padmanund Singh*. (One of the joint decree-holders acting as guardian of the others — He can give a discharge.)

22. ('34) 21 AIR 1934 Mad 103 (103) : 148 Ind Cas 54, *Venkatarama v. Bheema*. ('29) 16 AIR 1929 Bom 382 (384) : 121 Ind Cas 446, *Murlidhar v. Shiwram*.

not apply to him and the fact that there is some other person who is the next friend of the minor does not deprive the manager of his power to receive moneys under a decree and give a discharge for them.²³

A natural guardian of a minor co-decree-holder cannot be treated as a co-decree-holder with other decree-holders and cannot give a valid discharge on behalf of the minor decree-holder during the continuance of his minority. Section 7 will therefore operate to save limitation in favour of the decree-holders in such a case.²⁴

16. Mitakshara joint family. — In the case of a Mitakshara joint family, no individual member of the family is entitled to a definite share of the family property till partition. The ownership of the property is in the whole body of coparceners.¹ Thus, the members of a Mitakshara joint family are in the position of *joint tenants* with regard to the family property. Hence, in regard to rights of action affecting the family property, as a general rule, they are jointly entitled to sue within the meaning of this section.^{1a}

But, in spite of their being in the position of *joint tenants* and not tenants-in-common with regard to their substantive rights, one of them alone cannot give a discharge in regard to causes of action in favour of the family.² But the member who is the *manager* of the family can give such discharge.³ Thus, the manager can give a discharge in the following cases :

23. ('36) 23 AIR 1936 Mad 434 (436, 437): 161 Ind Cas 969 (DB), *Administrator-General, Madras v. Radha Krishna Chettiar*.

('27) 14 A I R 1927 Pat 329 (330) : 103 Ind Cas 75 (DB), *Jhakhri Gope v. Phagu Mahto*. (No question of limitation was involved in this case.)

24. ('49) 36 AIR 1949 Pat 212 (213) : 26 Pat 744 (DB), *Kamleshwari v. Shiva-chandra*.

Section 7 — Note 16

1. (1863) 9 Moo Ind App 539 (611) : 2 Suth W R (PC) 31 : 1 Suther 520 : 2 Sar 25 (PC), *Katama Natchiar v. Srimut Rajah Moottoo Vijaya*. (There is community of interest and unity of possession between all the members of the family.)

1a. ('41) 28 AIR 1941 Oudh 165 (169) : 191 Ind Cas 825 (DB), *Jagdis Narain v. Bishun Datt*.

2. ('38) 25 AIR 1938 Bom 206 (207) : 174 Ind Cas 820 (DB), *Sureshchandra Jamietram v. Bai Ishwari*. (Elder brother attaining majority but not being manager of family so as to be entitled to sue on behalf of minor brother — S. 7 does not apply.)

('18) 5 AIR 1918 Mad 29 (31) : 45 Ind Cas 419 : 41 Mad 637 (DB), *Ankalamma v. Chenchayya*. (Junior member of joint Hindu family cannot give discharge to debtor — It is only manager that can do so.)

('33) 20 AIR 1933 Bom 245 (249) : 145 Ind Cas 164 (DB), *Umakant Ballkrishna v. Martand Keshav*. (Do.)

[See also ('16) 3 AIR 1916 Pat 120 (121): 39 Ind Cas 85 : 2 Pat L Jour 124 (DB), *Brij Behari Singh v. Sheo Shankar Jha*.]

3. ('41) 28 A I R 1941 Sind 166 (167) : ILR (1941) Kar 72 : 196 Ind Cas 572 (DB), *Topammal v. Gordhandas*. (Section 7 does not apply to a case where a suit is brought by a Hindu father as the manager of a joint family to recover a debt due to the joint family and in which the father and manager unnecessarily joint his minor son as co-plaintiff, appointing himself as next friend of the minor sons. The fact that he quite unnecessarily chooses to join his minor son as a co-plaintiff and to appoint himself as next friend cannot make any difference to the law of limitation and time would not be extended by S. 7.)

Section 7
Note 16

- (1) Suit for debt.⁴
- (2) Suit for accounts.⁵
- (3) Suit for mesne profits.⁶
- (4) Suit for possession against person holding adversely to the family.⁷
- (5) Suit for arrears of allowance.⁸
- (6) Suit to set aside decree.⁹
- (7) Suit to set aside partition.¹⁰
- (8) Suit to set aside alienation of joint family property.¹¹

It has even been held that in regard to a suit for partition on behalf of one branch of the family which has been excluded from the enjoyment of the joint property, the father or other senior member of the branch can give a discharge within the meaning of this section.¹²

('41) 28 AIR 1941 Oudh 165 (169) : 191 Ind Cas 825 (DB), *Jagdish Narain v. Bishun Datt*.

('38) 25 AIR 1938 Bom 392 (393) : 177 Ind Cas 286 (DB), *Bhikharchand Devidas v. Lachhamandas Bansilal*.

('33) 20 AIR 1933 Bom 245 (249) : 145 Ind Cas 164 (DB), *Umakant Balkrishna v. Martand Keshav*.

('29) 16 AIR 1929 Bom 382 (393) : 121 Ind Cas 446, *Murlidhar v. Shivram*.

('21) 8 AIR 1921 Bom 289 (291) : 45 Bom 446 : 59 Ind Cas 759 (DB), *Bapu Tatya Desai v. Bala Ravji Desai*. (The fact that a discharge can be given by the manager only for the benefit of the family does not make him a person who cannot give a discharge within the meaning of this section.)

('33) 20 AIR 1933 Lah 479 (480) : 142 I. C. 295, *Lal Chand v. Gian Chand*. (Do.) [See ('18) 5 AIR 1918 Mad 29 (31) : 45 I. C. 419 : 41 Mad 637 (DB), *Ankalamma v. Chenchayya*.]

See also cases cited in foot-notes (4) to (11) below.

4. ('82) 4 All 512 (514) : 1882 All W N 114 : 7 Ind Jur 268, *Surju Prasad Singh v. Khwahish Ali*.

('10) 7 Ind Cas 267 (267) (DB) (Mad), *Anantarama v. Mandarthi Shrinivasa*.

5. ('29) 16 A I R 1929 Cal 165 (165) : 115 Ind Cas 354 (D B), *Asutosh Ghose v. Sashi Mohan Roy*. (Distinguishing AIR 1916 P C 148 : 44 Cal 1, *N. Chandra v. C. Madhab*.)

6. ('07) 6 Cal L Jour 383 (393, 395) (DB), *Harihar Pershad v. Bholi Pershad*.

('19) 6 A I R 1919 Mad 215 (217) : 53 Ind Cas 161 (D B), *Venkatasubba Row v. Yemmanur Venkatamayya*.

('09) 1 Ind Cas 670 (676) (DB) (Cal), *Banwari Lal v. Sheo Shanker Misser*. (14 Cal 50 (DB), *Anando v. Anando*, distinguished on the ground that the case was governed by Dayabhaga law.)

7. ('28) 15 A I R 1928 Lah 484 (487) : 110 Ind Cas 293 (DB), *Sharam Singh v. Sadhu Singh*.

('24) 11 AIR 1924 All 738 (739) : 80 Ind Cas 12 (DB), *Baijnath v. Ram Bilas*.

8. ('17) 4 A I R 1917 Bom 10 (11) : 42 Bom 277 : 44 Ind Cas 851 (D B), *Huchrao v. Bhima Rao*. (6 Bom L R 647 (DB), *Ganpat v. Sheshgiri*, distinguished on the ground that that was a case of joint decree-holders.)

9. ('20) 7 AIR 1920 Mad 615 (646) : 43 Mad 842 : 59 Ind Cas 662 (DB), *Kuppuswami v. Kamalammall*. (Distinguishing AIR 1916 P C 148 : 44 Cal 1 (PC), *Nabin Chandra v. Chandra Madhab*.)

10. ('14) 1 AIR 1914 Bom 59 (87) : 38 Bom 449 : 22 Ind Cas 195, *Jan Mahomed v. Dattu Jaffar*. (Suit to set aside partition—Father of plaintiffs may give discharge.)

11. See Note 17.

12. ('20) 7 AIR 1920 Mad 793 (798) : 52 Ind Cas 725 (DB), *Narasimha v. Krishna Chandra*.

In *Nobin Chandra v. Chandra Madhab*¹³ (a case from Bengal), a suit for accounts was brought by certain plaintiffs who were Hindu brothers. Some of the plaintiffs were minors. It was held by the Privy Council that the eldest brother could not have given a discharge so as to bind the others and that therefore the suit was not barred by limitation notwithstanding the expiry of time as against the eldest brother. In view of this decision, it has sometimes been doubted¹⁴ whether the senior member of a joint Hindu family can give a discharge on behalf of the family within the meaning of this section. But in the vast majority of cases¹⁵ the above Privy Council decision has not been taken as an authority for the proposition that a manager cannot give a discharge on behalf of a Mitakshara joint family. The circumstances of the case decided by the Privy Council are not clear. Perhaps, as observed by the Madras High Court in the undermentioned decision,¹⁶ the case before the Privy Council was one under the *Dayabhaga* law and not under the *Mitakshara* law.

But, as already said, it is only the managing member that can give a discharge on behalf of a Mitakshara joint family. Although in several decisions it seems to have been assumed almost as a matter of law that the eldest adult male member of the family is the manager,¹⁷ yet it has been held in some decisions¹⁸ that such a presumption alone

(23) 10 A I R 1923 Oudh 61 (79) : 74 Ind Cas 225 (DB), *Rudra Pratap Narain Singh v. Nirman Prasad Singh*.

13. (16) 3 AIR 1916 P C 148 (149) : 44 Cal 1 : 36 Ind Cas 1 (P C).

14. (19) 6 A I R 1919 Mad 218 (219) : 53 Ind Cas 239 (DB), *Kalliani Amma v. Achuthan Nair*.

15. See foot-notes (3) to (11).

16. (20) 7 A I R 1920 Mad 645 (646) : 43 Mad 842 : 59 Ind Cas 662, *Kuppuswamy v. Kamalammall*.

17. (41) 28 A I R 1941 Oudh 165 (169) : 191 Ind Cas 825 (DB), *Jagdis Narain v. Bishun Datt*. (Eldest brother can give discharge as the manager of family.)

(40) 27 AIR 1940 Mad 530 (531) : I L R (1940) Mad 752 . 191 Ind Cas 369 (DB), *Bhaktavatsaludu v. Venkatanarasimha Rao*. (Eldest member of joint Hindu family is presumed to be manager of family unless presumption is rebutted—In Madras he can give valid discharge without concurrence of other members.)

(34) 21 A I R 1934 Mad 469 (470) : 150 Ind Cas 76 : 58 Mad 155 (DB), *Jaddu Padhi v. Chokkapu Bodda*.

(36) 23 A I R 1936 Mad 914 (914, 915) : 65 Ind Cas 656, *In re Annia Pillai*. (Such a presumption prevails especially in Madras.)

[See also (38) 25 AIR 1938 Bom 392 (393, 394) : 177 Ind Cas 286 (DB), *Bhikarchand Devidas v. Lachhamandas Bansilal*. (Alienation by mother of two brothers during their minority—No other property belonging to two brothers as members of joint family—Brothers maintained by aunt—Presumption that elder brother is manager of joint family does not apply.)]

See also cases in foot-notes (3) to (11) above.

18. (38) 25 AIR 1938 Bom 500 (503) : 179 Ind Cas 33 (DB), *Shantaya Kotraya v. Mallappa Basappa*. (Eldest major brother in joint Hindu family never acting as manager and so incapable of giving valid discharge without concurrence of other brothers—Suit by other brothers to set aside alienation by father within three years of their attaining majority is not barred by time.)

(37) 24 AIR 1937 Pat 155 (156) : 167 Ind Cas 934, *Gangadeo Singh v. Ram Prasad Singh*. (Until it is proved by evidence that elder brother exercised authority as manager he will not be taken as such.)

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is not sufficient and that unless there is evidence that the eldest male member has actually acted as manager, his omission to sue must not be held to bar the rights of the whole family. Thus, it has been held that a suit by the younger of the two brothers constituting a joint Hindu family filed within three years of his attaining majority will not be barred under this section if the elder brother was not the manager of the family during the relevant period.^{18a}

With regard to their separate properties, the members of a Mitakshara joint family do not constitute a coparcenary and one of them cannot give a discharge in regard to causes of action affecting such separate properties.¹⁹ (See also Note 4.)

17. Suit to set aside alienation of joint family property — Manager's power to give discharge. — The general principle that the manager of a Mitakshara joint family can give a discharge in regard to causes of action accruing in favour of the family, applies also to suits to set aside alienations of the family property. Such suits may be classified as follows :

- (1) Suits to set aside alienations by the *father* of the family or other coparcener. In such cases the authority of the father or other coparcener to alienate the property is called in question and hence, a question is raised as between the members of the family *inter se*.¹
- (2) Suits to set aside alienations by a *guardian* of minor coparceners.

('27) 14 AIR 1927 All 188 (188) : 98 Ind Cas 508, *Lachman Prasad v. Salu Salik Chand*. (The fact that the elder brother filed an objection in a mutation case is not sufficient to establish managership.)

('22) 9 A I R 1922 Bom 319 (321) : 46 Bom 535 : 64 Ind Cas 972 (DB), *Bai Keval v. Madhu Kala*. (Property managed by minors' mother — Nothing to show that the elder son on attaining majority took over charge of management — He could not have given a discharge — A I R 1921 Bom 289 : 45 Bom 446 (DB), *Bapu v. Bala*, distinguished.)

('27) 14 A I R 1927 Cal 952 (954) : 55 Cal 608 : 104 I C 668 (DB), *Jugal Kishore Debi v. Baidya Nath*.

('33) 20 A I R 1933 Lah 479 (480) : 142 Ind Cas 295, *Lal Chand v. Gain Chand*.

('25) 12 AIR 1925 Nag 385 (387, 388) : 88 Ind Cas 268, *Shampuri v. Ramchandra*. (Court cannot assume that a particular person is the manager unless there is admission of parties, proof or other material on the record.)

('29) 16 AIR 1929 Mad 394 (395) : 119 Ind Cas 39, *Mannarswamy v. Ramaswamy*.

('09) 1 Ind Cas 824 (825) : 31 All 156 (DB), *Gangadaya v. Mani Ram*.

[See also ('39) 26 AIR 1939 Mad 907 (909) : 189 Ind Cas 167, *Kunhi Kannan v. Vizhayil Devaki*.

('24) 11 AIR 1924 All 916 (917) : 79 Ind Cas 296, *Ish Dal Tewari v. Tameshar*.

('27) 14 AIR 1927 Nag 145 (147) : 99 Ind Cas 1050, *Mahadeo v. Somaji*.

('16) 3 AIR 1916 Pat 120 (121) : 39 Ind Cas 85 (DB), *Brij Behari Singh v. Sheo Sankar Jha*.]

18a. ('45) 32 AIR 1945 Mad 498 (499) (DB), *Subbarao v. Pattabhiramayya*.

19. ('07) 6 Cal L Jour 383 (388, 393, 397) (DB), *Harihar Persad v. Bholi Pershad*.

Section 7 — Note 17

1. ('35) 22 A I R 1935 All 746 (747) : 155 Ind Cas 569 : 57 All 891 (D B), *Anrudh Rai v. Sant Prasad Rai*.

- (3) Suits to set aside alienations *not* made by either of the persons mentioned above. A suit to set aside an alienation made by the mortgagee of the joint family property will fall under this class.²

In classes 2 and 3 above, no question is raised as between the members of the family *inter se*. The question is purely one between the members of the family on one side and a stranger on the other side.³

The managing member of the family can give a discharge in all the above cases.⁴

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2. ('29) 16 AIR 1929 Nag 267 (268) : 118 Ind Cas 682, *Daulat v. Bali Ram*.
3. See ('35) 22 AIR 1935 All 746 (747) : 155 Ind Cas 569 : 57 All 891 (DB), *Anrudh Rai v. Sant Prasad Rai*.
4. ('50) 37 AIR 1950 T C 57 (Pr 3) (FB), *Ramchandran v. Narayanan*. (The right of suit available to junior members of a joint family to set aside alienations made by the manager or karnavan is governed by the First Part of S. 8, Travancore Limitation Act and when any of them is under no disability to institute such a suit, the period of limitation will run against all the members of the joint family—Adult male members can give valid discharge.—Concurrence of minors not necessary.)
- ('41) 28 AIR 1941 Oudh 165 (168, 169) : 191 Ind Cas 825 (DB), *Jagdis Narain v. Bishnu Datt*. (Alienation by guardian.)
- ('15) 2 AIR 1915 Mad 1201 (1202) : 21 Ind Cas 410 (412, 413) : 38 Mad 118 (DB), *Doraisamy Sirumadan v. Nondisamy Saluvan*. (Do.)
- ('34) 21 AIR 1934 Mad 469 (470) : 150 Ind Cas 76 : 58 Mad 155, *Jaddu Padhi v. Chokkapu Boddu*. (Do.)
- ('17) 4 AIR 1917 Mad 700 (702) : 34 Ind Cas 794 (DB), *Soundararajan v. Saravana Pillai*. (Do.)
- ('16) 3 AIR 1916 Mad 1011 (1012) : 32 Ind Cas 802 (DB), *Surapa Raju v. Venkayya*. (Do.)
- ('21) 8 AIR 1921 Bom 289 (290, 291) : 45 Bom 446 : 59 Ind Cas 759 (DB), *Bapu Taty v. Bala Raojee Desai*. (Do.)
- ('35) 22 AIR 1935 Bom 259 (261) : 157 I C 592, *Kondaji v. Dagadu*. (Do.)
- ('29) 16 AIR 1929 Lah 14 (16) : 114 I C 59, *Luta Ram v. Shiv Ram*. (Do.)
- ('36) 23 AIR 1936 Mad 914 (914) : 165 I C 656, *In re Annia Pillai*. (Do. — The fact that the elder brother did not live with the minor brothers was insufficient to rebut the presumption of managership of the elder brother.)
- ('28) 15 AIR 1928 Mad 42 (42) : 106 Ind Cas 863 (DB), *Kola Surayya v. Kola Subbamma*. (Alienation by guardian — Overruled on another point in AIR 1940 Mad 33 : I L R (1940) Mad 358 (FB), *Chennappa v. Onkarappa*.)
- ('93) 16 Mad 436 (439) : 3 Mad L Jour 216 (DB), *Vigneswara v. Bappayya*. (Suit to set aside sale in execution of mortgage decree against father.)
- ('14) 1 AIR 1914 Bom 300 (301) : 38 Bom 94 : 21 Ind Cas 350 (DB), *Mahableswar Krishnappa v. Ramchandra Mangesh Kulkarni*. (Suit to set aside sale by manager appointed by father.)
- ('94) 17 Mad 189 (192, 193) : 4 Mad L Jour 79 (DB), *Narayanan v. Damodaran*. (Per Best, J. — Suit to set aside revenue sale on ground of fraud.)
- ('25) 12 AIR 1925 All 672 (673) : 87 Ind Cas 177 (DB), *Shiam Lall v. Mool Chand*. (Suit to set aside execution sale.)
- ('33) 20 AIR 1933 Lah 479 (480) : 142 Ind Cas 295, *Lal Chand v. Gain Chand*. (Suit by the plaintiffs claiming to be the owners of certain property alleged to have been given in trust to the defendants during plaintiffs' minority and to have been misappropriated by them.)
- ('29) 16 AIR 1929 Nag 267 (268) : 118 I C 682, *Daulat v. Baliram*. (Suit against purchaser from mortgagee of joint family property — AIR 1925 Nag 385, *Shampuri v. Ramchandra*, Dist.)
- ('35) 22 AIR 1935 All 746 (747, 748) : 57 All 891 : 155 Ind Cas 569 (DB), *Anrudh Rai v. Sant Prasad Rai*. (Suit against transferee from tenant of the family.)

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The above view is not inconsistent with the decision of the Privy Council in *Jawahir Singh v. Udai Parkash*.⁵ In that case an alienation had been made by the father and a suit was brought by the sons to set aside the alienation. The father was made a defendant in the suit. It was held by the Privy Council confirming the judgment of the High Court that the eldest son could not have given a discharge within the meaning of this section so as to make limitation run as against all of them. The Privy Council do not give any reasons for their decision but merely express their concurrence with the decision of the High Court. But in view of the facts of the case, it seems clear that the Privy Council could not have held that the *manager* of a joint family cannot give a discharge in such cases. As the father was still living, the eldest son had never been the manager of the family so as to be able to give a discharge within the meaning of this section.^{5a}

The undermentioned decisions⁶ also only illustrate the rule that a member who is not the *manager* of the family cannot give a discharge. The view that any of these decisions lays down that in such cases the eldest male member of the family can never give a discharge on behalf of the whole family⁷ is not correct.

But it has been held in some decisions that a discharge cannot be given *at all* on behalf of the whole family in such cases. These decisions proceed on the following lines of reasoning :

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- (35) 22 A I R 1935 Mad 1085 (1087) : 158 Ind Cas 874, *Nemmayya Shetty v. Nagaraja Shetty*. (Proof of *de facto* management by managing member is not necessary in every case.)
- (37) 24 A I R 1937 Pat 435 (439, 440) : 16 Pat 422 : 170 I C 362 (F B), *Karan Singh v. Mt. Tetar Kuar*. (Suit for possession of property alienated by the guardian.)
- (36) 23 AIR 1936 Mad 434 (437) : 161 Ind Cas 969 (DB), *Administrator-General, Madras v. Radhakrishna Chettiar*. (Power of manager to give discharge not affected by fact that some other person is acting as next friend of minor.)
5. (26) 13 AIR 1926 PC 16 (18) : 93 I. C. 216 : 48 All 152 : 53 Ind App 36 (PC).
- 5a. (34) 21 AIR 1934 Mad 469 (470) : 150 Ind Cas 76 : 58 Mad 155 (DB), *Jaddu Padhi v. Chokkapu Boddu*.
- (29) 16 AIR 1929 Lah 14 (16) : 114 Ind Cas 59, *Luta Ram v. Shiv Ram*.
- (33) 20 AIR 1933 Lah 479 (479, 480) : 142 I. C. 295, *Lal Chand v. Gain Chand*.
6. (09) 1 Ind Cas 824 (825) : 31 All 156 (DB), *Ganga Dayal v. Mani Ram*. ("Nothing to show that first plaintiff ever acted as manager.")
- (28) 15 AIR 1928 Mad 1055 (1056) : 109 Ind Cas 572 : 51 Mad 627 (DB), *Rajagopala Iyengar v. Srinivasaraghava Ayyengar*. (Father and managing member alive. AIR 1926 PC 16 : 48 All 152 : 53 Ind App 36 (PC), *Jawahir Singh v. Udai Parkash*, followed.)
- (26) 13 AIR 1926 Mad 1190 (1191) : 98 Ind Cas 31 (DB), *Narayana Naicken v. Venkataswamy Naicken*.
- (37) 24 AIR 1937 Pat 155 (156) : 167 I. C. 934, *Gangadeo Singh v. Ram Prasad Singh*. (Mere coming of age of one of the brothers in a joint Hindu family does not raise a presumption that he is the manager of the family in the absence of any evidence.)
7. (39) 26 AIR 1939 Mad 907 (908) : 189 I. C. 167, *Kunhi Kannan v. Vizhayil Devaki*.
- (24) 11 AIR 1924 All 916 (917) : 79 Ind Cas 296, *Ishdat Tewari v. Tameshar*.

(1) The right to set aside an unauthorised alienation of the family property is not a *joint* right at all.⁸ According to these decisions, each coparcener has an *independent* cause of action to sue to set aside such an alienation. It is submitted that this view is not correct. As seen in the Notes to S. 6, an unauthorised alienation of joint family property gives rise to only *one* cause of action, so much so that even an after-born coparcener is only entitled to sue on the basis of an existing cause of action and does not get a fresh and independent right to sue on his birth.^{8a}

(2) The expression "discharge" can only apply to the discharge of a *debt* and cannot apply to a right to have an alienation set aside.⁹ But, it is submitted that this view is not correct. In a wide sense, the term "discharge" can include any form of quittance whereby the rights and liabilities of the parties are put an end to.¹⁰ (See Note 9.)

18. Suit by members of Mitakshara joint family for redemption of mortgaged property. — In the undermentioned case¹ it was held by the Bombay High Court that the manager of a

8. ('30) 17 AIR 1930 All 861 (861) : 52 All 768 : 130 I. C. 691 (DB), *Sheonandan Prasad v. Mt. Tahiran Bibi*. (Alienation by father or manager.)

('31) 18 AIR 1931 All 398 (400) : 133 Ind Cas 155 (DB), *Kamta Rai v. Rani Jaluraj Kunwari*. (Alienation by guardian.)

('25) 12 AIR 1925 Nag 385(388, 389) : 88 Ind Cas 268, *Shampur v. Ramchandra*.

('28) 15 AIR 1928 Lah 484 (486) : 110 Ind Cas 293 (DB), *Sharam Singh v. Sadhu Singh*. (Suit against stranger claiming property by adverse possession — Suit barred against manager of the family is barred against every member of the family.)

[See also ('35) 22 AIR 1935 All 746 (747) : 57 All 891 : 155 Ind Cas 569 (DB), *Anrudh Rai v. Sant Prasad Rai*. (But where the dispute is between the family as a whole on one side and stranger on the other S. 7 is applicable.)]

8a. This does not militate against the position that any coparcener can sue to set aside the unauthorized alienation without making the others parties to the suit. See Notes under Section 6.

9. ('30) 17 AIR 1930 All 861 (861) : 52 All 768 : 130 I. C. 691 (DB), *Sheonandan Prasad v. Mt. Tahiran Bibi*.

('31) 18 AIR 1931 All 398(400) : 133 I.C. 155 (DB), *Kamta Rai v. Jaduraj Kunwar*.

10. ('22) 9 AIR 1922 Bom 319 (320) : 46 Bom 535 : 64 Ind Cas 972 (DB), *Bai Keval v. Madhu Kala*. (Discharge can be given of a right to redeem a mortgage.)

('33) 20 AIR 1933 Lah 479 (480) : 142 Ind Cas 295, *Lal Chand v. Gain Chand*. (The view expressed in AIR 1931 All 398, *Kamta v. Jaduraj* to the effect that S. 7 applies only where the question of discharge arises with respect to a debt is not supported by any authority.)

('37) 24 AIR 1937 Pat 435 (439) : 16 Pat 422 : 170 Ind Cas 362 (FB), *Karan Singh v. Mt. Tetar Kuar*. (The term 'discharge' in S. 7 includes a release of rights in equity of redemption or a release of other rights as for instance a right to institute a suit.)

('15) 2 AIR 1915 Mad 723 (724) : 25 Ind Cas 755 (DB), *Parameswaran Nambudripad v. Sankaran Nambudripad*. ("Discharge" in S. 7 is not confined to pecuniary liability but includes also "release of rights to immovable property," and other rights which may belong to the plaintiffs.)

Section 7 — Note 18

1. ('22) 9 AIR 1922 Bom 319 (320) : 46 Bom 535 : 64 Ind Cas 972 (DB), *Bai Keval v. Madhu Kala*. (The decision in this case was further influenced by the fact that the elder brother was not proved to be the manager of the family.)

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joint family cannot give a discharge on behalf of the whole family in regard to a suit for the redemption of a mortgage so as to make the suit time-barred as against all the members of the family. The decision proceeds on two grounds :

- (1) In a suit for redemption, all the members of the family must be made parties under the provisions of the Civil Procedure Code, while in a suit to set aside an unauthorized alienation of family property, it is open to a coparcener to proceed without making the other coparceners parties to the suit. Hence, it is open to the manager in regard to a suit to *set aside* an alienation of family property to give a discharge without the concurrence of the other members of the family, while it is not open to him to do so in regard to a suit for *redemption*. It is submitted with respect that this reasoning is not correct. The power to give a discharge is not identical with the power to sue without making the other persons jointly entitled, parties to the suit. (See Note 9.)
- (2) The second reason for holding that a discharge cannot be given in such cases is couched in the following terms : "The right to redeem a mortgage of joint family property vests in all the members of the family whoever is the manager, and it is difficult to see how the right of the second plaintiff to redeem, which was in existence during his minority, could be defeated by the fact that his elder brother did not file a suit to redeem within the period allowed to him." If the meaning of this passage is that the coparceners have each an *independent* cause of action to sue for redemption, it is submitted that the correctness of the view is doubtful.

As regards the applicability of the word "discharge" to suits for redemption of a mortgage, Macleod, C. J., observed that it was difficult to say that the plaintiff seeking redemption gave a "discharge" to the mortgagee, but that if the word "discharge" was given a wider meaning as including any form of quittance whereby the rights and liabilities between two parties were put an end to, it could be said that the plaintiff seeking redemption gave a discharge when he paid the mortgage debt and recovered possession of the mortgaged property from the mortgagee, thus putting an end to all rights and liabilities between the parties, so that, no further proceedings could be taken.

19. Suit by ward on attaining majority to set aside alienation by guardian. — Article 44 of the first schedule provides a period of three years for a suit by a ward who has attained majority to set aside a transfer of property by his guardian. The period of limitation under the article starts from the date on which the ward attains majority. Suppose there are several wards who constitute the members of a Mitakshara joint family, and that the guardian of such wards transfers property belonging to them as such coparceners, to a stranger. In such a case a joint cause of action accrues in favour of the wards to sue to set aside the sale. Hence, when one of the wards attains majority and time begins to run against him under the above

article it would be a case of several persons being jointly entitled to institute a suit and some of them being under a disability at the time from which the period of limitation is to be computed. Hence, if the ward who first attains majority is competent to give a discharge without the concurrence of the other wards, then, under the first part of this section, time will begin to run as against *all* the wards. In such a case, each of the wards will not be entitled to a start of limitation from the date of *his* attaining majority under the above article. The reason is that under S. 3, the articles in the first schedule must be read subject to the provisions of ss. 4 to 25 of the Act.¹ As to the question whether the ward who attains majority first can give a discharge, see Note 17.

20. Suit by members of Dayabhaga family.—The members of a Dayabhaga family hold as *tenants-in-common* and not as joint tenants. In other words, the members are entitled to *definite* shares of the joint property even before partition.¹ Hence, it is apprehended that one member of the family cannot give a discharge in regard to causes of action accruing in favour of the members of the family.²

21. Karnavan of Malabar tarwad.—The karnavan and adult male members of a Malabar *tarwad* can give a discharge in respect of causes of action accruing in favour of the *tarwad*.¹

21a. Hindu reversioners challenging alienation by limited owner.—X, a Hindu widow, alienated the property of her husband for a purpose not binding on the estate. At the date of the alienation, the next reversioners were A and B who were brothers, of whom A was an adult and B was a minor. A did not do anything by way of challenging the alienation. B filed a suit to challenge it within three years of his attaining majority but more than twelve years after the date of the alienation. It has been held in the undermentioned

Section 7 — Note 19

1. ('36) 23 AIR 1936 Mad 914 (914) : 165 Ind Cas 656, *In re Annia Pillai*. (AIR 1915 Mad 1201, Foll.)
- ('28) 15 AIR 1928 Mad 42 (42) : 106 Ind Cas 863 (DB), *Surayya v. Subamma*.
- ('15) 2 AIR 1915 Mad 1201 (1202, 1203) : 21 Ind Cas 410 : 38 Mad 118 (DB), *Doraisamy Sirumadan v. Nondisami Saluvan*.
- ('14) 1 AIR 1914 Bom 300 (301) : 21 Ind Cas 350 (351) : 38 Bom 94 (DB), *Mahableshwara Krishnappa v. Ramchandra Mangesh*.

Section 7 — Note 20

1. ('09) 3 I. C. 878 (880) : 32 Mad 271 (DB), *Balakrishna Iyer v. Muthuswamy*.
2. ('20) 7 AIR 1920 Mad 645 (646) : 43 Mad 842 : 59 Ind Cas 662 (DB), *Kuppusamy Iyengar v. Kamalammall*.
[See also ('16) 3 AIR 1916 PC 148 (149) : 36 Ind Cas 1 : 44 Cal 1 (PC), *Nobin Chandra v. Chandra Madhab*. (It was remarked in ('20) AIR 1920 Mad 645 that AIR 1916 P C 148 was perhaps a case dealing with Dayabhaga law.)]

Section 7 — Note 21

1. ('41) 28 AIR 1941 Mad 678 (679) : 197 Ind Cas 245 (DB), *Devaki v. Kannan*. AIR 1939 Mad 907, *Kunhi Kannan v. Vazhayil Devaki*, Reversed.)
- ('15) 2 AIR 1915 Mad 723 (724, 725) : 25 Ind Cas 755 (DB), *Parameswaran v. Sankaran*. (Suit to set aside *karar* on ground of fraud.)
[See ('95) 18 Mad 38 (40), *Moidin Kutty v. Beevi Kutti Ummah*. (Suit to set aside compromise.)]

Section 7
Notes 21a-21b

case¹ that one reversioner could not give a discharge on behalf of the whole body of reversioners, but that nevertheless B's suit was barred by reason of the fact that A who could have instituted the suit did not do so and that therefore limitation must be counted from the time of the alienation. As has been seen in Note 11, the basis for the reasoning on which the decision was based, namely that the section applied only to cases where persons who could give a discharge could not do so on account of disability, does not exist under the present section. The case will, it is submitted, clearly fall within the second part of the section and limitation will run against both A and B only from the date when the disability of B ceases.

The right which the sons of a daughter acquire in the property of their maternal grandfather is not a coparcenary right in the sense in which the term is used under the Hindu law. Hence the elder brother is not in a position to give a valid discharge on behalf of his minor younger brother. In such a case, the time for a suit to set aside an alienation by the daughter does not begin to run until all the brothers become major.²

21b. Reversioners under Punjab Customary Law suing to set aside alienation by collateral. — In the undermentioned case,¹ the sons of a Mahomedan governed by the Punjab Customary Law were entitled to sue for a declaration that an alienation made by their father could not affect their reversionary rights. It was contended that the eldest son who was an adult could have given a discharge and so the suit by the younger son who was a minor was also barred. In overruling the contention the Court observed as follows: "Here the plaintiff and his brothers are Mussalmans and are not members of a joint family. Their rights are *independent* of each other. The fact, therefore, that the eldest brother of the minor plaintiff can no longer sue, does not affect the right of the plaintiff to sue." It is submitted that the view that the rights of the plaintiffs were *independent* of each other seems to be open to doubt.² But, even if their rights are not independent of each other it does not necessarily follow from this that the eldest son could have given a discharge within the meaning of this section. On this point the position seems to be as laid down in the decision, viz., that the eldest son cannot give a discharge in such cases.³ It is conceived that in such cases the second part of the section will apply. (See Note 21a)

Section 7 — Note 21a

1. ('27) 14 AIR 1927 Mad 216 (217): 99 Ind Cas 668, *Neelankantamier v. Chinnu Ammal*. (Section 7 does not apply to cases of reversioners.)
2. ('47) 34 AIR 1947 Mad 102 (104): 231 Ind Cas 143, *Kuppuswami Mudali v. Thangavelu Mudaliar*. (Suits for declaration that alienation is not binding.)
- ('44) 31 AIR 1944 Mad 512 (512, 513), *Ramayya v. Veerabhadrachari*.

Section 7 — Note 21b

1. ('29) 16 AIR 1929 Lah 582 (582): 122 Ind Cas 92, *Ghulam Rasul v. Hussain*.
2. See ('32) 19 AIR 1932 Lah 39 (40): 132 Ind Cas 665, *Wali Chand v. Punjab Singh*. (Case of alienation by widow.)
3. See ('32) 19 AIR 1932 Lah 39 (40): 132 Ind Cas 665, *Wali Chand v. Punjab Singh*. (Case of alienation by widow.)

22. Joint creditors. — There is a conflict of decisions on the question whether one of several co-creditors of the same debt can receive payment of the debt and give a discharge on behalf of all. In *Barber v. Ramana*,¹ it was held by the Madras High Court that one co-mortgagee could receive payment of the mortgage money and give a good discharge so as to bind all the co-mortgagees. The decision was based on s. 38 of the Contract Act and the English case of *Wallace v. Kelsall*.² Section 38 of the Contract Act provides that the refusal of a valid tender by a promisor under a contract will discharge him from the liability for non-performance of the contract and that a tender to one of several joint promisees has the same effect as one made to all the joint promisees. The decision in *Wallace v. Kelsall*² was to the effect that in the case of a joint debt, one joint creditor could receive payment of the debt and give a good discharge for it.

The correctness of the above Madras decision was doubted in some later decisions of that Court,³ but it was approved of by a Full Bench of the Court in *Annapurnamma v. Akkayya*.⁴ That was a case relating to a negotiable instrument and not a mortgage; but their Lordships held that there was no difference in the principle applicable to the two classes of cases.

The decision of the majority in the above Full Bench case was to the effect that one of several joint creditors of a debt can receive the debt on behalf of all and give a good discharge for it. Reliance was again placed on s. 38 of the Contract Act and the decision in *Wallace v. Kelsall*² in support of this view. Arnold White, C. J., who was a member of the Full Bench, however, differed from the majority of the Bench and held that one joint creditor cannot give a good discharge for the debt. His Lordship held, following the view laid down in *Steeds v. Steeds*,⁵ that co-creditors must be presumed to have distinct interests in the debt and to be in the position of tenants-in-common with reference to it. In such a view, one of them could not give a good discharge for the debt, even according to the English law. His Lordship held that such a presumption is not affected by the provisions of the Contract Act. As regards s. 38 of the Contract Act, his Lordship held that it only dealt with the *tender* of a debt and not the *payment* of it.

The above Full Bench decision has been followed in subsequent

Section 7 — Note 22

1. ('97) 20 Mad 461 (463, 464): 7 Mad L Jour 269 (DB).
2. (1840) 10 L J Ex 12 (15): 7 M & W 264: 4 Jur 1064: 56 R. R. 707: 8 D P C 841.
3. ('02) 25 Mad 26 (38, 39) (DB), *Ahinsa Bibi v. Abdul Kader*. (The principle of ('97) 20 Mad 461, *Barber v. Ramana* was held applicable to joint promisees but not to the case of co-heirs.)
- ('10) 5 Ind Cas 343 (347) (DB) (Mad), *Ramaswamy v. Munia idy Servai*.
- ('12) 10 Ind Cas 874 (876): 35 Mad 685 (DB), *Sheikh Ibrahim v. Rama Iyer*.
4. ('13) 19 Ind Cas 12 (16, 17, 18): 36 Mad 544 (FB). (Promissory note in favour of three brothers of whom two were minors—Suit by adult brother barred, suit by minor brothers is also barred.)
5. (1889) 22 Q B D 537 (541): 60 L T 318: 37 W R 378: 58 L J Q B 302.

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decisions of the Madras High Court,⁶ though its correctness has been questioned in some of them.⁷

As regards the other High Courts, they have also accepted the principle that the same rule applies to co-creditors of a secured debt as well as to co-creditors of an unsecured debt. But, the Madras view that one co-creditor can give a good discharge for the whole debt has not been accepted by the other High Courts.⁸ Thus, it has been held that one co-mortgagee cannot give a good discharge for the mortgage debt so as to bind the other co-mortgagees.⁹ Similarly, it has been held that one of several co-creditors under a money bond cannot give a good discharge for the debt.¹⁰ These decisions proceed on the view that co-creditors of a debt must be presumed to have distinct interests in the debt and to be in the position of tenants-in-common with reference to it. According to these decisions also, the authority of the decision in *Wallace v. Kelsall*¹¹ has been considerably shaken by the judgment of Farwell, J., in *Powell v. Brodhurst*.¹²

6. ('13) 20 Ind Cas 792 (795, 797) (DB) (Mad), *Appavu v. Nanjappa Goundan*. ('25) 12 AIR 1925 Mad 261 (263) : 85 Ind Cas 297 : 48 Mad 693 (DB), *Ramaswami v. Chandra Kottayya*.

('17) 4 AIR 1917 Mad 269 (270) : 32 I. C. 173 (DB), *Ponnusamy v. Thyagaraja*.

7. ('17) 4 AIR 1917 Mad 269 (270) : 32 I. C. 173 (DB), *Ponnusamy v. Thyagaraja*.

('18) 5 AIR 1918 Mad 29 (30) : 45 Ind Cas 419 : 41 Mad 637 (DB), *Ankalamma v. Chenchayya*.

8. See cases in foot-notes (9) and (10) below.

[But see ('17) 4 AIR 1917 Pat 82 (84) : 42 Ind Cas 408 (DB), *Parbhu Ram Pandey v. Raghubir Sah*. (A joint creditor in equity can give a valid receipt in full discharge of claims of himself and the other joint creditors.)]

9. ('10) 8 Ind Cas 837 (839, 840) : 38 Cal 342 (DB), *Husainara Begum v. Rahmannessa Begum*. (('07) 6 Cal L Jour 383 (DB), *Harihar v. Bholi* relied on.)

('15) 2 AIR 1915 Cal 528 (528) : 29 Ind Cas 956 (DB), *Umes Chandra Banerji v. Dinabandhu Mahanti*. (The mortgage bond in this case stated expressly that mortgagors would repay the loan to the two mortgagees.)

('27) 14 AIR 1927 Cal 425 (429, 430) : 101 I. C. 530 (DB), *Satindra v. Jatindra*.

('34) 21 AIR 1934 Cal 1 (2) : 149 I. C. 1062 (DB), *Satish Chandra v. Jewan Lal*.

('14) 1 AIR 1914 All 518 (519) : 23 Ind Cas 8 (DB), *Ram Jit v. Khem Chand*.

('10) 5 Ind Cas 129 (130) : 32 All 164 (DB), *Ram Chandra v. Rajjan Lal*. 25 All 155 (DB), *Manzur Ali v. Mahmud-un-nissa* held to be rightly decided.)

('21) 8 AIR 1921 Pat 27 (28) : 56 Ind Cas 403 (DB), *Ablas v. Misri Lal*.

('20) 7 AIR 1920 Pat 464 (468) : 55 Ind Cas 841 (DB), *Banamali Satpathi v. Talua Ramhari*. (Case of co-heirs of same mortgagee.)

[See ('19) 6 AIR 1919 All 275 (276) : 41 All 631 : 51 Ind Cas 107 (DB), *Jauhari Singh v. Ganga Sahai*.]

10. ('02) 25 All 155 (157, 158) : 1902 All W N 216 (DB), *Manzur Ali v. Mahmud-un-nissa*.

[See ('24) 11 AIR 1924 Cal 710 (713) : 51 Cal 566 : 84 Ind Cas 204 (DB), *Bilwar Bibi v. Muhamed Habibar Rahman*. (Decree-holders of a money decree.)]

[But see ('79) 4 Cal 350 (354, 355) : 1 Shome L R 169 (DB), *Ahamudeen v. Girish Chunder Shamunt*. (Rent paid to one of several cosharer landlords — Held, tenant not liable to pay rent over again to the other landlords.)]

('93) 1893 Pun Re No. 60, *Daulat Ram v. Sayed Abdul Kasim*. (Suit for rent — Adult cosharer held capable of giving discharge without concurrence of the minor cosharers — S. 38, Contract Act, relied on.)]

11. (1840) 10 L J Ex 12 (15) : 4 Jur 1064 : 7 M & W 264 : 56 R R 707 : 8 DPC 841.

12. (1901) L R 2 Ch 160 (165) : 70 L J Ch 587 : 84 L T 620 : 49 W R (Eng.) 532 : 17 T L R 501.

It is submitted that the Madras view is not correct. As pointed out by Arnold White, C. J., in his dissenting judgment in *Annapurnamma v. Akkayya*,¹³ the question does not seem to be capable of determination purely on the interpretation of the provisions of the Contract Act. Neither s. 38 nor s. 45 of that Act seems to touch the question. Section 38 merely lays down that an offer of performance made to one of several joint promisees will have the same effect as an offer made to them all. This only means that where the promisor has made an offer of performance to one of several joint promisees and the offer has not been *accepted*, the promisor is not responsible for the non-performance of the contract. The section says nothing as to what constitutes a valid *acceptance* of an offer of performance.

As regards section 45, it only provides that performance of a joint contract can only be claimed by all the joint promisees jointly and does not touch the question under consideration. As has been seen in Note 9, the power to give a discharge on behalf of all the joint claimants is not identical with the power to sue on behalf of all without joining the others. Hence, the fact that a joint claimant is prevented from suing without joining the other claimants as parties to the suit does not necessarily mean that he cannot give a good discharge for the debt without the concurrence of the other joint claimants.

Hence, it would seem that the question falls to be decided with reference to the general principles of law. And as to these, it seems well settled that co-creditors of a debt (secured or unsecured) should be presumed to be in the position of tenants-in-common and not joint tenants, so that one of them cannot give a good discharge for the debt.¹⁴ Even the Madras High Court seems to concede that this is the true position in *equity*.¹⁵

This view is also supported in the case of *co-mortgagees* by the provisions of section 45 of the Transfer of Property Act. That section shows that transferees under a joint transfer for consideration are entitled to distinct interests in the subject-matter of the transfer. This means that co-mortgagees are entitled to distinct interests in the mortgage or, in other words, that they are in the position of tenants-in-common with regard to the debt and the security.

Thus, the better view seems to be that one co-creditor cannot give a good discharge for the entire debt without the concurrence of the others.

Even according to the Madras High Court, one co-mortgagee (or co-creditor of an unsecured debt) cannot *relinquish* the mortgage (or the debt) wholly or partially.¹⁶

13. ('13) 19 Ind Cas 12 (14, 15) : 36 Mad 544 (FB).

14. See cases cited in foot-notes (9) and (10).

15. ('97) 20 Mad 461 (464) : 7 Mad L Jour 269, *Barber Maran v. Ramana Goundan*.

16. ('28) 15 AIR 1928 Mad 933 (935) : 112 I. C. 501 (DB), *Arunachallam Chetty v. Ramaswamy Iyer*.

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Though co-creditors of secured or unsecured debts are generally in the position of tenants-in-common and not joint tenants, they are *jointly entitled* to institute a suit for such debt and cannot sue separately for their respective shares. This is clear from the provisions of S. 45 of the Contract Act and section 67 of the Transfer of Property Act. Section 45 of the Contract Act provides that the right to claim performance of a contract is vested in all the co-promisees jointly. Section 67 of the Transfer of Property Act provides that though co-mortgagees may be entitled to distinct interests in the security, they cannot sue separately in regard to their respective rights but must all sue together. Reference may also be made to S. 60 of the Transfer of Property Act which prohibits the piecemeal redemption of a mortgage though the equity of redemption may be vested in a body of persons each of whom may be entitled to a distinct interest in the equity.

23. Co-heirs.—Co-heirs, except when they are Hindus governed by the Mitakshara law and inherit the property of a male ancestor, are in the position of tenants-in-common with regard to the property inherited by them.¹ Thus, Muhammadan co-heirs are entitled to the estate as tenants-in-common.² But, in regard to causes of action based on transactions which happened during the lifetime of the deceased, the co-heirs are "jointly entitled" to sue and cannot sue separately with reference to their respective shares. Thus, when upon the death of an obligee of a money bond the right to realise the money devolves in specific shares upon his heirs, each of such heirs cannot maintain a separate suit for recovery of his share of money.³ Similarly, the cause of action for a suit by the heirs of a deceased partner to sue for accounts arises from the partnership contract and all the heirs must join in such suit.⁴ See also the undermentioned cases.⁵

Section 7 — Note 23

1. ('02) 25 Mad 26 (39) (DB), *Ahinsa Bibi v. Abdul Kader Saheb*.
 - ('07) 6 Cal L Jour 383 (393) (DB), *Harihar Pershad v. Bholi Pershad*. (Property inherited by Hindu brothers from maternal uncle — They are tenants-in-common.)
 2. ('19) 6 AIR 1919 Mad 172 (173) : 51 Ind Cas 748 (DB), *Alla Pichai Rowthan v. Pappathiammal*.
 3. ('85) 7 All 313 (315) : 1885 All W N 34 : 9 Ind Jur 314 (FB), *Kandhiya Lal v. Chandar*. (Per Oldfield, J.)
 4. ('02) 25 Mad 26 (32) (DB), *Ahinsa Bibi v. Abdul Kader Saheb*.
 - ('17) 4 AIR 1917 Mad 197 (198) : 33 Ind Cas 564 (DB), *Uthenpurayil Bava: hutty v. Kunhi Pathumma*. (Plaintiffs as representatives of the deceased partner are *jointly entitled to sue* within the meaning of this section.)
- See also S. 22 Note 18.
5. ('19) 6 AIR 1919 Bom 78 (79) : 51 Ind Cas 79 : 43 Bom 487 (DB), *Guilam Gous Mia Khot v. Shriram Pandurang*. (Mortgage by deceased—Suit for redemption by heirs—They are "jointly entitled" — Suit brought within three years of the date when the youngest plaintiff attained majority was held to be within time.)
 - ('31) 18 AIR 1931 Lah 5 (6) : 130 Ind Cas 403, *Mahomed Kazam v. Nadir Ali Shah*. (Decree-holder dying leaving several heirs — The latter constitute one legal representative of the deceased decree-holder and one of them cannot execute the decree nor can he give a valid discharge.)

But, where one of the co-heirs was himself the debtor of the deceased, the right of the co-heirs is necessarily split up and there is no joint right to sue within the meaning of the section. Thus, where a Muhammadan woman dies leaving her husband and other heirs, her right to dower devolves on all the heirs including the husband as tenants-in-common. As the husband is himself a co-heir, the right of the co-heirs to sue for the dower debt is necessarily split up and hence, each of the other co-heirs can sue him for his or her share of the dower debt.⁶

If the cause of action is based on a transaction happening after the death of the deceased, i. e., after the inheritance has opened, the co-heirs can sue separately for their respective shares. Thus, if a stranger gets into possession of the estate of the deceased on his death, the co-heirs are not bound to sue jointly for the recovery of the property, but each of them may sue separately in regard to his particular share.⁷

As regards the question whether one of several co-heirs who are in the position of tenants-in-common can give a discharge in respect of the right in regard to which they are jointly entitled to sue, the general rule is that such discharge cannot be given.⁸ But, where one or more of them have taken out a succession certificate in respect of the debt which is the subject of the suit, it has been held that he or they can give a good discharge so as to bind the other co-heirs and that this power is sufficient for making limitation run against all the co-heirs under this section.⁹ The correctness of this proposition is, however, open to question, because the section contemplates a discharge

6. ('29) 16 AIR 1929 All 142 (143, 144) : 116 Ind Cas 481 (DB), *Mahomed Zahur Ahsan v. Mt. Maimuna*. (7 All 313 (FB), *Kandhiya Lal v. Chandar* distinguished.)

7. See ('19) 6 AIR 1919 Mad 172 (173) : 51 I. C. 748 (DB), *Alla Pichai Rowthan v. Pappathiammal*.

('88) 1888 Pun Re No. 89, *Nasir-ud-din Shah v. Mt. Lal Bibi*. (A suit for share of inheritance.)

('03) 1903 Pun L R No. 51, p. 203 (DB), *Basant v. Indar*. (Right of collateral heirs to the estate of a Punjab agriculturist.)

8. ('07) 6 Cal L Jour 383 (395) (DB), *Harihar Pershad v. Bholi Pershad*.

('02) 25 Mad 26 (39) (DB), *Ahinsa Bibi v. Abdul Kader Saheb*. (Hindu co-heirs—Eldest if manager can give discharge; not so in case of Mahomedan co-heirs.)

('19) 6 AIR 1919 Bom 78 (79) : 43 Bom 487 : 51 Ind Cas 79 (DB), *Gulam Gous Mia Khot v. Shriram Pandurang*. (A suit for redemption by Mahomedan brothers—Suit brought within three years of younger brother attaining majority held not barred even as against the elder brother.)

('03) 27 Bom 292 (295) : 5 Bom L R 91 (DB), *Sitaram v. Shridhar*.

('16) 3 AIR 1916 Mad 1128 (1128):29 Ind Cas 586 (DB), *Muniandi v. Ramasamy*.

('20) 7 AIR 1920 Pat 464 (468) : 55 Ind Cas 841 (DB), *Banamali Sa'pathi v. Talua Ramhari*. (Mortgagee dying, leaving two heirs—Payment to one cannot discharge whole mortgage.)

9 ('24) 11 AIR 1924 Cal 710 (711, 712) : 51 Cal 566 :84 Ind Cas 204 (DB), *Bilwar Bibi v. Muhamed Habibar Rahman*. (The Judges differed as to the interpretation of the succession certificate in the case—According to Walmsley, J. it was given only to some of the heirs; but Suhrawardy, J., held that it had been given to all the heirs and therefore one could not give a discharge on behalf of all.)

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given by a joint claimant by virtue of his *own right* as such joint claimant and not by virtue of some other authority. (See Note 9.)

As to suits by co-heirs who constitute a Mitakshara joint family, see Note 16.

24. Partners. — Though partners may be entitled to distinct interests in the partnership business, and as such, they may be in the position of tenants-in-common and not joint tenants as regards their rights as partners, yet, they can only sue jointly in regard to such rights, or in other words, they are “jointly” entitled to sue within the meaning of this section. The position is not affected by the fact that under O. 30 R. 1 of the Civil Procedure Code a suit can be brought in the name of the firm and one partner can sign and verify pleadings on behalf of all the partners in such suits.

Though partners may be in the position of tenants-in-common and not joint tenants with regard to their rights as partners, yet, one of them can give a good discharge to the debtor in respect of debts due to the partnership.¹ This is based on the principle that a partner has implied authority to do everything necessary and usual in the ordinary course of the partnership business. It has been held that this authority to receive and give discharges for debts due to the partnership even extends to cases in which the partnership has been dissolved.²

But, under S. 19 of the Partnership Act of 1932, a partner has, in the absence of an usage of trade-custom to the contrary, no power to *relinquish* or compromise a claim belonging to the firm. It is apprehended, however, that this will not affect the question as to the competency of a partner to give a *discharge* within the meaning of this section.

25. Joint trustees. — Joint trustees are in the position of *joint tenants* with regard to the properties and rights vested in them as trustees and so, they are persons jointly entitled to institute a suit with regard to any matter affecting such rights or property.

Being in the position of joint tenants in regard to their rights, it would seem that if the general rule referred to in Note 10 should apply, one joint trustee should be held to be competent to give a good discharge on behalf of all the joint trustees.¹ But, this general principle seems to be subject to an exception in the case of joint trustees. In their case, it is provided by S. 42 of the Trusts Act of 1882 as follows :

Section 7 — Note 24

1. ('10) 9 Ind Cas 116 (117) (DB) (Cal), *Baikunta Nath v. Hara Lal*.
(‘09) 1 Ind Cas 200 (201) (DB) (Mad), *Veerasami Naicker v. Ibramsa Rowther*.
(Discharge given in fraud of other partners is not binding on them.)
2. ('18) 5 AIR 1918 Mad 238 (241) : 41 Mad 446 : 44 Ind Cas 466 (DB), *Palaniyappa Chettiar v. Veerappa Chettiar*.
(‘19) 6 AIR 1919 Mad 146 (149) : 52 Ind Cas 456 (DB), *Annamalai v. Annamalai*.

Section 7 — Note 25

1. ('10) 6 Ind Cas 992 (993) : 34 Mad 284 (DB), *Thiagaraja v. Ratnasabapathi*.
[See also (1901) 70 L J Ch 587 (590) : 1901 L R 2 Ch 160 : 84 L T 620 : 49 W R (Eng.) 532 : 17 T L R 501, *Powell v. Brodhurst*.]

"Any trustees or trustee may give a receipt in writing for any money, securities or other moveable property payable, transferable or deliverable to them or him by reason, or in the exercise, of any trust or power; and, in the absence of fraud, such receipt shall discharge the person paying, transferring or delivering the same therefrom, and from seeing to the application thereof, or being accountable for any loss or misapplication thereof."

Construing the above section, it has been held by the Madras High Court that one joint trustee cannot give a good discharge on behalf of all the joint trustees.² The decision proceeds on the ground that the expression "any trustees or trustee" in the above section shows that if there are more than one trustee, all of them should join in giving the receipt. This seems to be the position even under the English law.³ The view is also supported by S. 48 of the Trusts Act which provides that when there are more trustees than one, all must join in the execution of the trust, except when the instrument of the trust otherwise provides. In this view, the undermentioned decisions⁴ do not seem to be correct.

26. Joint executors or administrators. — Section 311 of the Succession Act of 1925 provides that where there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration. Thus, one of several executors has power to release a debt due to the deceased. Hence, one of several executors or administrators can give a discharge in respect of obligations due in favour of the estate, without the concurrence of the other executors or administrators.¹

2. ('16) 3 AIR 1916 Mad 692 (694) : 30 Ind Cas 713 : 39 Mad 597 (DB), *Netthiri Menon v. Gopalan Nair*. (Dissenting from 1 Bom L R 667 (DB), *Rambabu v. Committee of Rameswar* — One joint trustee can however give discharge if he is authorized by his co-trustees.)

3. See Halsbury's Laws of England, 1914 Edn., Vol 28, page 140, foot-note (p). [But see (1901) 70 L J Ch 587 (590) : (1901) L R 2 Ch 160 : 84 L T 620 : 49 W R (Eng) 532 : 17 T L R 501, *Powell v. Brodhurst*.]

4. ('10) 6 Ind Cas 992 (993):34 Mad 284 (DB), *Thiagaraja v. Ratnasabapathi Pillai*. (Where adult trustee allows his rights as such to become time-barred, the other trustees who are minors are also barred — It seems to have been taken for granted that being joint tenants, one joint trustee must necessarily be held to be competent to give a good discharge — The provisions of the Trusts Act which seem to make the case of joint trustees an exception to the general rule have not been referred to.)

('99) 1 Bom L R 667 (669) (DB), *Rambabu v. Committee of Rameswar*. (In case of religious or charitable endowments, it is permissible for one trustee to pass receipts for rents or dividends — The learned Judges seem to have been under a mis-impression as to the wording of S. 42 of the Trusts Act — They proceed on the footing that the section uses the words "any trustee" and not "any trustees or trustee" — The decision would probably have been different if the correct wording of the section had been before the minds of the learned Judges.)

Section 7 — Note 26

1. See (1857) 27 Beav 446 (454), *Smith v. Everett*. (Any one of several representatives may settle an account and the settlement is binding upon the others.) (1869) 4 Ch App 433 (439, 440), *Charlton v. Earl of Durham*. (Distinguished in 25 Mad 389, *Sivasami v. Sevugan Chetti*.)

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27. Co-sharers entitled to sue for mesne profits.—Where land belonging to two *tenants-in-common* has been wrongfully taken possession of by a stranger, each of the tenants-in-common is entitled to sue separately for his share of the mesne profits. Hence, they are not persons *jointly* entitled to sue within the meaning of this section. Further, one of them cannot give a discharge for the entire claim so as to bind the other co-sharer.¹

28. Persons aggrieved by the same tortious act.—Where several persons are injured by the same tortious act, each of them can bring a separate suit for damages in so far as his own rights have been injured. So, such persons are not “jointly entitled to sue” within the meaning of this section as regards the right to sue.¹ Hence, the question as to whether one of them can give a valid discharge to the defendant in such cases does not arise. But assuming that the question can arise, it is clear that such discharge cannot be given as the persons are in the position of tenants-in-common and not joint tenants.²

29. Effect of appointment of guardian for minor.—Where a right to sue is vested jointly in X, an adult, and a minor for whose estate a guardian has been appointed by the Court, X cannot give a discharge without the concurrence of the guardian.¹

Section 8

***8. *Nothing in section 6 or in section 7 applies to Special exceptions. suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from**

* Act of 1877 : S. 7.

7. * * * * *
Nothing in this section applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.

Illustrations.

* * * * *
(b) A, to whom a right to sue for a legacy has accrued during his minority, attains majority eleven years after such accrual. A has, under the ordinary law,

Section 7 — Note 27

1. ('07) 6 Cal L Jour 383 (395) (DB), *Harihar Pershad v. Bholi Pershad*.
 - ('87) 14 Cal 50 (54) : 11 Ind Jur 143 (DB), *Anando Kishore v. Anando Kishore*.
[See ('09) 1 Ind Cas 670 (676) (Cal) (DB), *Bunwari Lal v. Daya Sunker*. (The rule will be different if the cosharers formed members of a Mitakshara joint family and one of them was the manager of the family.)]
- See also Note 4.

Section 7 — Note 28

1. ('07) 6 Cal L Jour 383 (392, 395) (DB), *Harihar Pershad v. Bholi Pershad*.
2. ('07) 6 Cal L Jour 383 (395) (DB), *Harihar Pershad v. Bholi Pershad*.

Section 7 — Note 29

1. ('38) 67 Cal L Jour 88 (91) (DB), *Gourhari Ghose v. Srimati Anardai Bibi*. (Family business—A and B proprietors—B, a minor represented by certificated guardian—A cannot give valid discharge.)
- ('07) 6 Cal L Jour 383 (395) (DB), *Harihar Pershad v. Bholi Pershad*. (Following (1888) Bom P J 141, *Balkrishna v. Naro* and 14 Cal 50 (DB), *Anando Kishore v. Anando Kishore*.)

the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.

Illustrations.

(a) A, to whom a right to sue for a legacy has accrued during his minority, attains majority eleven years after such accrual. A has, under the ordinary law, only one year remaining within which to sue. But under S. 6 and this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority, within which he may bring his suit.

(b) A right to sue for an hereditary office accrues to A who at the time is insane. Six years after the accrual A recovers his reason. A has six years, under the ordinary law, from the date when his insanity ceased within which to institute a suit. No extension of time will be given him under S. 6 read with this section.

(c) A right to sue as landlord to recover possession from a tenant accrues to A, who is an idiot. A dies three years after the accrual, his idiocy continuing up only one year remaining within which to sue. But under this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority within which he may bring his suit.

(e) A right to sue for an hereditary office accrues to A, who at the time is insane. Six years after the accrual A recovers his reason. A has six years, under the ordinary law, from the date when his insanity ceased within which to institute a suit. No extension of time will be given him, under this section.

(f) A right to sue as landlord to recover possession from a tenant accrues to A, who is an idiot. A dies three years after the accrual, his idiocy continuing up to the date of his death. A's representative in interest has, under the ordinary law, nine years from the date of A's death within which to bring a suit. This section does not extend that time, except where the representative is himself under disability when the representation devolves upon him.

Act of 1871 : S. 7.

7. * * *

Nothing in this section shall be deemed to extend for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which the suit must be brought.

Illustrations.

(b) A, to whom a right to sue for a legacy has accrued during his minority, attains full age eleven years after such right accrued. A has, under the ordinary law, only one year remaining within which to sue. But under this section an extension of two years will be allowed him, making in all a period of three years from the date of his majority, within which he may bring his suit.

(c) A right to sue for an hereditary office accrues to A, who at the time is insane. Six years after the accrual of the right, A recovers his reason. A has six years, under the ordinary law, from the date when his insanity ceased, within which to institute a suit. No extension of time will be given him under this section.

(d) A right to sue as landlord to recover possession from a tenant accrues to A, who is an idiot. A dies three years after the accrual of the right, his idiocy continuing up to the date of his death. A's representative in interest has, under the ordinary law, nine years from the date of A's death within which to bring a suit. This section does not extend that time.

Act of 1859.

See Section 11 printed under S. 6.

Section 8 Notes 1-3

to the date of his death. A's representative in interest has, under the ordinary law, nine years from the date of A's death within which to bring a suit. Section 6 read with this section does not extend that time, except where the representative is himself under disability when the representation devolves upon him.

- a. Section 8 has been declared not to apply to suits, appeals or applications under the Bengal Public Demands Recovery Act, 1913 (Beng. Act III of 1913); see S. 56 of that Act.

Synopsis

1. Legislative changes.
2. Scope.
3. Suits to enforce rights of pre-emption.
4. Period of limitation under section.

TOPIC INDICATOR.

Computation of period. See Note 4.

Section enlarges and does not curtail time. See Note 4.

Sections 6, 7 and 8 — Combined effect. See Note 4.

1. Legislative changes. — The provision excluding suits for pre-emption from the operation of Ss. 6 and 7 was not present in the Acts of 1859 and 1871 and was first introduced in the Act of 1877.

2. Scope. — This section serves as an exception to Ss. 6 and 7. It excludes from their cognizance suits for pre-emption and restricts the period for which limitation can be extended under them.

Section 185 of the Bihar Tenancy Act (VIII [8] of 1885) bars the application of this section to suits and applications mentioned in S. 184 of that Act.¹ As regards the applicability of this section to arbitration proceedings see S. 3 Note 27 and the undermentioned case.²

3. Suits to enforce rights of pre-emption. — The policy of the Legislature is that suits for pre-emption should be brought with at little delay as possible. Hence, it is provided under this section that the extended period of limitation under S. 6 or S. 7 does not apply to suits for pre-emption.¹ A similar provision is also made in S. 17.

Under the Acts of 1871 and 1859, however, the minority or other disability of the plaintiff formed a ground of extension of limitation even in the case of suits for pre-emption.²

Section 8 — Note 2

1. ('41) 28 AIR 1941 Pat 499 (501) : 196 Ind Cas 609, *Jagdeo v. Babu Lal*.
2. ('48) 35 AIR 1948 Nag 334 (337) : I L R (1947) Nag 477 (DB), *Fatechand v. Wasudeo*. (It would be incorrect to urge that Ss. 4 to 25 would not apply to arbitration proceedings — Case before the passing of Arbitration Act (1940).)

Section 8 — Note 3

1. ('04) 1 Nag L R 6 (8), *Seetaram v. Ram Dayal Marwari*.
(19) 6 AIR 1919 Lah 25 (26) : 52 I. C. 587 : 1919 Pun Re No. 86 (DB), *Mt. Husain Bibi v. Hakim*.
(24) 11 AIR 1924 Mad 57 (60) : 76 Ind Cas 467, *Viswanathan v. Ethirajulu*.
See also Art. 10, Note 6.
2. ('75) 1 All 207 (211) (DB), *Raja Ram v. Bansi*.
(67) 7 Suth W R 279 (279) (DB), *Jungoo Lal v. Lalla Alum Chund*. (Case under Act of 1859.)

Section 8
Note 4

4. Period of limitation under section. — Under section 3 the period of limitation *prima facie* applicable to a suit or other proceeding is the period prescribed in the first schedule, but this period is liable, in the particular circumstances of a case, to be modified by the provisions of ss. 4 to 25 of the Act. Hence, if a case falls within the purview of S. 6 or S. 7, the period of limitation prescribed by the first schedule as modified by such section will apply to the case. Section 6 provides that in the circumstances mentioned therein, the suits or application for execution may be filed within the same period after the cessation of disability or the death of the person affected by it as would otherwise have been allowed from the time mentioned in the third column of the first schedule. Section 7 provides that in the circumstances mentioned in the second part of it, time will not run as against any of the plaintiffs or applicants till one of them becomes capable of giving a discharge without the concurrence of the others or until the disability has ceased. Thus, the effect of both the sections is to provide a fresh start of limitation from one or other of certain events specified in the sections. But the two sections are subject to the provisions of this section which provides that nothing in either of the two sections shall be deemed to *extend* the period of limitation for more than three years from the cessation of disability or the death of the person affected thereby.^{1a}

The combined effect of the above provisions may be discussed with reference to the following positions :

- (1) Where the ordinary period of limitation expires *after* three years from the cessation of disability.
- (2) Where the ordinary period of limitation expires *at the end of* three years from the cessation of disability.
- (3) Where the ordinary period of limitation expires *before* the cessation of disability.
- (4) Where the ordinary period of limitation expires *after* the cessation of disability, but *before* the end of three years from the cessation of disability.

In case 1, the period cannot be extended under S. 6 or S. 7. The reason is that such extension will be clearly opposed to the provisions of this section. Thus, in illustration (b) to this section, the ordinary period of limitation expires *after* three years from the cessation of the disability. This section prohibits the *extension* of the period under S. 6. This, however, does not mean that in cases coming within S. 6 or

Section 8 — Note 4

1a. ('48) 35 AIR 1948 Bom 150 (152) : I L R (1947) Bom 750 (DB), *Basayya v. Baslingayya*. (Alienation of family property by father—Son in mother's womb at such time—Suit to set aside alienation by such son on attaining majority — Benefit of Ss. 6 and 8 can be claimed by him.)

('48) 35 AIR 1948 Oudh 351 (352), *Chhedi Lal v. Gopi Nath*.

[See ('41) 28 AIR 1941 Nag 357 (360) : I L R (1942) Nag 564 : 197 Ind Cas 612 *Narainbhai v. Narbada Prasad*. (Minority does not prevent ouster and stop running of adverse possession — Minor only gets another three years after attaining majority if time expires before three years.)

Section 8

Note 4

S. 7, the *period of limitation* itself should be three years from the cessation of disability or the death of the person affected by it. Hence, the section does not stand in the way of a suit being instituted within the *ordinary* period of limitation even though such period may extend to more than three years from the cessation of disability.¹ The object of Ss. 6 to 8 is to provide for an *additional* period of limitation in cases where the person entitled to sue is under a disability and not to place him at a disadvantage as compared with other litigants.

In case 2, also, the period of limitation cannot be extended under S. 6 or S. 7, as such extension would contravene the provisions of this section. But, the suit may be instituted within the ordinary period of limitation.

In cases 3 and 4, the period of limitation can be extended under S. 6 or S. 7, provided that such extended period does not exceed three years from the cessation of disability. In other words, in such cases, the litigant is entitled to a *fresh starting point* of limitation from the cessation of disability, subject to the condition that in no case the period extended by this process shall exceed three years from the cessation of disability.

The above rule (i. e., the rule applicable to cases 3 and 4) may be explained further with reference to the following three positions that may arise in such cases :

- (a) The period provided by the first schedule may be less than three years.
- (b) The period provided by the first schedule may be three years.

1. ('50) 37 AIR 1950 Pat 191 (Paras 8, 9), *Bishuti Bhusan v. Girish Chandra*. (Where the period of 12 years under Art. 142 expires after 3 years from the date on which the minor attained majority the minor is not entitled to any extension of time under the combined effect of Ss. 6 and 8.)

('48) 35 AIR 1948 Oudh 351 (352), *Chhedi Lal v. Gopi Nath*.

('25) 12 AIR 1925 Pat 30 (31) : 3 Pat 275 : 83 I. C. 871 (DB), *Mahomed Nasrullah v. Mahomed Shukurullah*.

('68) 4 Mad H O R 54 (55, 56) (DB), *Ramanuja Chariar v. Venkatavarada Iyengar*. (Effect of section is to provide in every case a distinct period of limitation, where but for legal disability suit would be barred.)

(1865) 2 Suth W R 305 (305, 306) (DB), *Kalee Das v. Beharee Lall*.

(1865) 3 Suth W R 21 (22) (DB), *Bissumbhur Sirkar v. Soorodhun Dossee*.

('66) 5 Suth W R 219 (219) (DB), *Luchmun Singh v. Mt Bibee Miriam*. (Plaintiff is not bound to sue within three years of attaining majority, if he has general limitation of twelve years from cause of action.)

('66) 5 Suth W R 204 (204) (DB), *Hurish Chunder Nag v. Abbas Ali*. (Do.)

('66) 6 Suth W R 20 (20) (DB), *Poorun Singh v. Kashee Nath Singh*. (Do.)

('67) 7 Suth W R 3 (4) (DB), *Radhamohun Gowie v. Mohesh Chunder Kotwal*. (Do.)

('68) 10 Suth W R 44 (44) (DB), *Sree Pershad v. Rajgooroo Treeumbuknath*.

(1864) 1864 Suth W R Gap 302 (303) (DB), *Guz Behari Singh v. Mt. Beebee Washun*.

[See also ('46) 1946 J L R 319 (323) (DB), *Naziruddin v. Sadrudin*. (Sale of immovable property by de facto guardian—Suit to recover such property—Suit is governed by Art. 144 read with S. 8 and may be brought during which ever period that may be longer.)]

(c) The period provided by the first schedule may be more than three years.

In case (a) the suit may be brought at any time within the period provided by the first schedule calculated from the cessation of disability. But the suit cannot be brought *after* the expiry of the period so calculated, though three years may not have elapsed from the cessation of disability.² The reason is that, as already said, this section does not provide that in cases coming under S. 6 or S. 7 the period of limitation should be three years from the cessation of disability. In other words, the section only restricts the period that can be extended under S. 6 or 7 where such period exceeds three years from the cessation of disability. Where such period is less than three years, this section *does not extend it to three years*.

In case (c) the suit may be brought at any time within the period of three years from the cessation of disability.^{2a}

In case (c) the suit may be brought at any time within three years from the cessation of disability,³ but *not afterwards*,⁴ though

2. ('50) 1950 Ker L T 46 (49)(DB), *Nilakantan Thampi v. Kunjukrishna Pillai*. (Section 9 of the Limitation Act (Travancore) cannot be interpreted as giving a waiting period of three years in every case. Thus, where a suit for cancellation of a court-sale has to be instituted within one year, a minor has only one year to sue after attaining majority.)

('94) 17 Mad 316 (323) : 4 Mad L Jour 152 (DB), *Subramaniya Pandya Chokka Talavar v. Siva Subramaniya Pillai*.

('25) 12 AIR 1925 Mad 379 (380) : 80 I. C. 992 (DB), *Subbiah v. Arunachala*.

('18) 5 AIR 1918 Lah 330 (331) : 48 I. C. 399 : 1918 Pun Re No. 113, *Hira Singh v. Ghulam Quadir*.

('18) 5 AIR 1918 Lah 182 (183) : 43 I. C. 712, *Pal Singh v. Harnama*. (Section does not extend period.)

2a. ('46) 1946 J L R 319 (325, 326) (DB), *Naziruddin v. Sadruddin*.

3. ('41) 28 AIR 1941 Cal 41 (57) : 1 L R (1941) 1 Cal 234 : 193 Ind Cas 419 (DB), *Janaki Nath v. Jyotish Chandra*. (Immediate reversioners parties to alienation by widow—Suit by remote reversioner for declaration that alienation is improper—Art. 120 applies—Plaintiff born after alienation—Plaintiff entitled to institute suit within 3 years after attainment of majority.)

('10) 5 Ind Cas 84 (84, 85) : 33 Mad 366 (DB), *Annayan v. Chinnan*. (Title by adverse possession against a minor is not complete before the end of three years after his attaining majority.)

('16) 3 AIR 1916 Mad 33 (35, 36) : 38 Mad 1076 : 29 I. C. 314 (DB), *Pasumarti Payidanna v. Lakshminarasamma*.

('24) 11 AIR 1924 All 625 (633) : 83 I. C. 782 : 46 All 575, *Phulwanti Kunwar v. Janeshar Das*.

('16) 3 AIR 1916 All 356 (356, 357) : 33 Ind Cas 913 : 38 All 126 (DB), *Lachmi Narain Prasad v. Kishan Kishore Chand*.

('97) 1897 Pun Re No. 33, *Mt. Fazul Nishan v. Muhammadji*.

('35) 22 AIR 1935 Lah 924 (925) : 160 Ind Cas 557, *Nawab v. Lachhman Singh*.

[See ('46) 1946 J L R 319 (323) (DB), *Naziruddin v. Sadruddin*. (Sale of immovable property by de facto guardian—Suit for recovery of such property—Suit is governed by Art. 144 read with S. 8 and may be brought during whichever period that may be longer.)]

4. ('18) 5 AIR 1918 P C 118 (118) : 41 All 63 : 45 I. A. 284 : 21 Oudh Cas 228 : 49 Ind Cas 540 (PC), *Banwari Lal v. Mahesh*.

('01) 24 Mad 387 (395, 396) : 28 Ind App 81 : 3 Bom L R 303 : 5 Cal W N 545 : 7 Sar 819 (PC), *Vasudeva Padhi v. Maguni Devan Bakshi*.

Section 8
Note 4

the full period of limitation calculated from the cessation of disability may not have elapsed. Thus, in illustration (a) to this section, the ordinary period of limitation expires at the end of one year from the cessation of the disability of A, the person entitled to sue in the illustration. In such cases, as already said, the period can be extended under S. 6. That is, A is entitled to a fresh starting point of limitation from the date of his attaining majority. But, such right is subject to the condition that the period extended by the process should not exceed three years from the cessation of his disability. Hence, although the period provided for the suit is twelve years, A only gets an extension of limitation up to three years from the date of his attaining majority.

The above illustration also brings out another point. Under this section, the extension of limitation that can be allowed under S. 6 or S. 7 is measured not from the end of the ordinary period of limitation but from the *cessation of disability*. So, in the above illustration, A is entitled to three years not from the end of the ordinary period of limitation but from the cessation of his disability which has taken place one year before the end of the ordinary period of limitation, with the result that the period of limitation in his case is only extended by two years. The three years period has to be counted, in the case of a minor, from the date of cessation of minority and not from the date of attainment of majority.⁵

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- (25) 12 AIR 1925 All 692 (693) : 87 I. C. 315 (DB), *Anantoo v. Ramrup Tiwari*.
 (24) 11 AIR 1924 All 625 (634) : 46 All 575 : 83 I. C. 782 (DB), *Mt. Phulwanti Kunwar v. Janeshar Das*.
 (03) 27 Bom 515 (545) : 5 Bom L R 274 (DB), *Thakore Fatesingji v. Bamanji Ardeshir Dalal*.
 (76) 1876 Bom P J 57 (DB), *Rama v. Ranu*.
 (21) 8 AIR 1921 Cal 572 (573) : 62 I. C. 428 (DB), *Laloo Karikar v. Jagat Chandra*.
 (72) 18 Suth W R 173 (174) (DB), *Meer Fyezali v. Meer Nuzuff Ali*.
 (69) 11 Suth W R 532 (532) (DB), *Chowdhry Zuhoorul Huq v. Mt. Bagoo Jan*.
 (1865) 3 Suth W R 184 (184) (DB), *Khetter Mohun Ghose v. Ramessur Ghose*.
 (24) 11 AIR 1924 Lah 427 (428) : 77 Ind Cas 588, *Thi Raj v. Kheausi*.
 (26) 13 AIR 1926 Mad 284 (285) : 91 Ind Cas 914, *Thayammal v. Perumal Chetty*.
 (20) 7 AIR 1920 Mad 793 (798) : 52 I. C. 725 (DB), *Narasimha Deo v. Krishna-chandra Deo*. (Period of three years cannot be extended by reason of S. 15 (2).)
 (15) 2 AIR 1915 Mad 398 (399) : 26 I. C. 90, *Subramaniya v. Kulayappan*.
 (97) 7 Mad L Jour 131 (133) (DB), *Kamakshy Nayakan v. Ramaswamy Nayakan*.
 (13) 21 Ind Cas 348 (349) : 7 Low Bur Rul 97, *Maung Shwe Pe v. Ma U Ma*.
 (09) 4 Ind Cas 854 (855) : 1909 Pun Re No. 100 (DB), *Shamir v. Ladha Singh*.
 (30) 17 AIR 1930 Pat 141 (142) : 123 Ind Cas 411 (DB), *Musahar v. Kishun Narayan*. (Execution application brought six years after attaining majority is barred.)
 [See (25) 12 AIR 1925 P C 264 (267) : 47 All 795 : 52 Ind App 443 : 28 Oudh Cas 371 : 91 Ind Cas 471 (PC), *Lal Bahadur v. Ambika Prasad*.]
 5. (50) 37 AIR 1950 Pat 206 (Para 4) (DB), *Batuk Prasad v. Rudra Das*. (Minority expiring on 3rd May—Three years' period runs from 3rd May and not 4th May when majority is attained — So, excluding under S. 12 the date from which time runs, limitation must be computed from 4th May and not 5th May, from which the reckoning would have to be made if time was to be reckoned from attainment of majority.)

Continuous running of time. stops it :

9.* Where once time has begun to run, no subsequent disability or inability to sue

Section 9
Note 1

Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.

- a. Section 9 has been declared not to apply to suits, appeals or applications under the Bengal Public Demands Recovery Act, 1913 (Beng. Act III of 1913), see S. 56 of that Act.

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope of limitation. 3. "Subsequent disability or inability to sue." 4. "Disability or inability to sue," meaning of. 5. Proviso. 6. No exemption from limitation except as otherwise provided for by statute. 7. Where cause of action has not arisen, limitation cannot begin to run. 8. Cause of action accruing after starting point specified in article — Effect. 9. Suits based on different causes | <ol style="list-style-type: none"> of action are governed by different periods of limitation. 10. Several persons having distinct causes of action in respect of same matter—Distinct periods of limitation apply. 11. Satisfaction or discharge and revival of cause of action. 12. Fusion of interests of debtor and creditor. 13. Agreement to refer dispute to arbitration, whether puts an end to cause of action. 14. Limitation only applies to institution of proceedings and not their continuation. 15. Repeal of statute and running of limitation. |
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TOPIC INDICATOR

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| Application — Principle of section, whether applies. See Note 4. | Section 9 does not control S. 13. See Note 3. |
| Defendant's absence—Not a subsequent inability. See Notes 3 and 4 and S. 13. | Starting point—Whether same as cause of action. See Note 9. |
| Fresh cause of action—Fresh period of limitation. See Note 11. | Successive causes of action. See Note 9. |
| No cause of action—No limitation. See Notes 2, 7, 8 and 11. | Suspension of time. See Note 11. |
| Running of time not stopped by subsequent event. See Note 11. | 'To sue' does not cover 'to apply.' See Note 4. |
| | War and rebellion — Limitation not checked. See Notes 4 and 11. |

1. Legislative changes. — This section was first enacted in the Act of 1871. But the principle underlying the section, viz., that once limitation begins to run, no subsequent disability or inability to

***Acts of 1877 and 1871**

Same as that of Act IX of 1908.

Act of 1859 : S. 11.

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out if, at the time when the cause of action accrues to any person, he is not under a legal disability, no time shall be allowed on account of any subsequent disability of such person or of the legal disability of any person claiming through him.

Section 9 Notes 1-2

sue can stop it except as may be otherwise provided for by the statute, was recognized even before the Act of 1871.¹

Under Bengal Regulation 3 of 1793, the fact that the plaintiff had been precluded by minority or *other good and sufficient cause* from obtaining redress was one of the grounds on which exemption from limitation could be claimed. It was held that the pendency of litigation between two claimants to an estate was a good and sufficient cause within the above provision for delay in the institution of a suit for the enforcement of a right on behalf of or against such estate.² Under the present law, such a circumstance would not be a good ground for claiming exemption from limitation. See Notes 2 and 6.

2. Scope of the section.—This section is based on the general principle that when once limitation has commenced to run, it will continue to do so unless it is stopped by virtue of any express statutory provision.¹

The section only deals with the question of *stopping* of limitation. It does not affect any exemption from limitation which may operate

Section 9 — Note 1

1. (1849) 5 Moo Ind App 43 (69, 70) : 7 Moo P C 85 : 14 Jur 253 : 1 Sar 394 (PC), *The East India Co. v. Odithchurn Paul*. (Case decided under English Statute 21 Jac. 1.)
2. (1859) 7 Moo Ind App 323 (352, 357) : 4 Suth W R (PC) 37 : 1 Suther 367 : 1 Sar 692 (PC), *Prannath Roy v. Rookea Begum*.
(1858) 7 Moo Ind App 238 (258, 259) : 1 Sar 633 (P C), *Rajah Enayet Hossein v. Sayud Ahmed Reza*.

Section 9 — Note 2

1. ('50) 37 A I R 1950 Mad 552 (Pr 2), *Ramakrishna v. Srinivasalu*. (There can be no suspension of time which has once begun to run except under the heads of deduction specifically recognised and provided for by the statute.)
- ('47) 34 A I R 1947 Oudh 128 (129) : 22 Luck 33 : 228 Ind Cas 87, *Ramkumar v. Baqridi*. (When once limitation has begun to run the period can only be extended in the manner laid down in the Limitation Act and not by mere agreement of the parties which does not come within any of the extending sections of the Limitation Act.)
- ('29) 16 A I R 1929 P C 158 (162) : 56 Ind App 192 : 51 All 367 : 117 Ind Cas 22 (PC), *James Richards R. Skinner v. Naunihal Singh*. (Section follows provisions of English law.)
- ('27) 14 AIR 1927 All 446 (449) : 49 All 565 : 102 Ind Cas 96 (DB), *Ram Charan Sahu v. Goga*. (It would be dangerous to lay down generally that there is some principle outside Limitation Act under which limitation can be suspended.)
- ('27) 14 AIR 1927 All 818 (820) : 50 All 152 : 107 Ind Cas 45 (DB), *Rup Kishore v. Patrani*.
- ('23) 10 AIR 1923 Bom 33 (34) : 67 I C 757 : 47 Bom 244 (DB), *Sidhraj Bhojraj v. Alli Haji*. (Time during which insolvency proceedings were pending cannot be deducted.)
- ('19) 6 AIR 1919 Cal 706 (707) : 46 Cal 526 : 47 Ind Cas 398 (DB), *Deutsche Asiatische Bank v. Hira Lall Burdhan & Sons*.
- ('24) 11 AIR 1924 Lah 40 (41) : 4 Lah 90 : 71 Ind Cas 495 (D B), *Hukam Chand v. Shahab Din*. (Exemptions not specially provided are not allowed.)
- ('21) 8 AIR 1921 Lah 71 (72) : 2 Lah 320 : 64 Ind Cas 454 (D B), *Kartar Singh v. Bhagat Singh*.
- ('13) 19 I C 291 (296) : 35 All 227 : 40 Ind App 74 (P C), *Soni Ram v. Kanhaiya Lal*.
[See ('80) 3 Mad 92 (94) : 5 Ind Jur 242 (DB), *Thir Singh v. Venkataramier*.]

without *stopping* time from running.² Thus, it is no bar to the *exclusion* of time under sections 12 to 16 or to the *enlargement* of the period of limitation under Ss. 6, 7 or S. 19. See Note 3.

The section provides that no subsequent disability or inability to sue can stop limitation from running. Hence, where the circumstances ensuing after limitation has begun to run do not amount to a disability or inability to sue, the section does not apply. But, even in such cases, under section 3 there will be no exemption from limitation except as otherwise provided for by the statute. See Note 4.

Where neither the proviso to this section nor any other exception provided for by the statute applies, there will be no exemption from the bar of limitation. Courts have no power to add new exceptions not recognized by the Act. (See Note 6.) But the Act must be construed and applied with reference to the following principles :

- (1) Where the cause of action for a suit has not arisen, limitation for such suit cannot begin to run. See Note 7.
- (2) Where a suit falls within the class of suits described in the first column of an article but the cause of action for the suit arises *after* the time specified therein as the starting point of limitation, the article will not apply to such a suit. See Note 8.
- (3) Where a person has several causes of action for a certain kind of suit in regard to a matter, he is entitled to an independent period of limitation in respect of each cause of action. See Note 9.
- (4) Where two or more persons have distinct causes of action for a suit of a similar nature in regard to the same matter, each is entitled to a distinct period of limitation. See Note 10.
- (5) Where after the accrual of a cause of action such cause of action is satisfied or discharged and such satisfaction or discharge is nullified subsequently, a fresh cause of action arises and the plaintiff is entitled to a fresh period of limitation in regard to such cause of action. See Note 11.
- (6) Limitation only applies to *institution* of suits and not their *continuation*. See Note 14.

It will be seen that none of the above principles implies any *exception* to the law of limitation contained in the Act.³ As explained in the other Notes to this section, the above principles are perfectly consistent with a proper interpretation of the provisions of the Act and its underlying assumptions.

Thus, with regard to the first two principles, although in few articles in the first schedule the accrual of the cause of action is stated

2. ('91) 5 C P L R 88 (89), *Dawala v. Sitaram*. (Provision that in computing the period of limitation certain period is to be excluded is not the same thing as providing that running of time is to be stopped.)

3. See ('26) 13 AIR 1926 Cal 65 (73): 89 Ind Cas 1000 (DB), *Sarat Kamini Dasi v. Nagendra Nath Pal*. (Cases which are supposed to lay down any general exception not found in the statute will be found not to be laying down any such exception but only interpreting cause of action where cause of action is starting point of limitation or merely interpreting particular article or applying principle of satisfaction of claim and revival of it.)

Section 9
Note 2

in terms to be the time from which limitation begins to run, there is no reason to suppose that the Legislature intended to contravene the principle that limitation necessarily assumes the existence of a cause of action and that where such cause of action has not arisen, there can be no limitation.

The time from which limitation is directed to run under the various articles either coincides with the accrual of the cause of action or refers to a date subsequent to the accrual of the cause of action. Where a suit falls within the first column of an article, but the cause of action for the suit accrues after the time specified in the third column of the article as the starting point of limitation, it must be held that the article does not apply to such a case. For, each article cannot be held to be *exhaustive* of the class of suits described in its first column. An article must be held to apply only to cases where *both* its first and third columns are applicable. Where the words in the third column of an article relating to the starting point of limitation refer to a time which is *before* the accrual of the cause of action for a suit, it must be held, in accordance with the principle already referred to, that such words cannot apply to the suit, or, in other words, that the article does not apply to such suit.⁴ See Notes 7 and 8.

As regards principles 3 to 5, they are merely several aspects of the same principle, viz., that limitation refers to a *particular* cause of action and different periods of limitation will apply to different causes of action, although they may relate to the same subject-matter and may give rise to suits of a similar nature. The Act is clearly based on this principle and treats limitation as a matter affecting each cause of action separately and individually; so that the proposition that a separate and independent period of limitation applies to each distinct cause of action does not involve any derogation from the provisions of the Act.

The last principle clearly follows from section 3.

As to the exclusion of period spent in enemy territory see S. 3 of the Limitation (War Conditions) Ordinance (1945), S. 45 of the Banking Companies (Amendment) Act, 1950, provides for *suspension* of limitation for a period of one year immediately preceding the date of the order for the winding up of the Banking Company. If the time has already run out before this period of one year there can be no question of *suspension*. In such cases there can be no revival of the cause of action.⁵

4. ('03) 26 Mad 780 (785, 786) : 13 Mad L Jour 412 (DB), *Rungiah Goundan & Co. v. Nanjappa Raw.*

('94) 17 All 39 (41) : 1894 All W N 191, *Md. Sulaiman Khan v. Md. Yar Khan.*

('19) 6 AIR 1919 Mad 972 (984) : 40 Mad 1040 : 43 Ind Cas 31 (FB), *Seeti Kutti v. Kunhi Pathumma.* (Per Sreenivasa Iyengar J.)

('02) 24 All 17 (26) : 28 Ind App 248 : 5 Cal W N 888 : 8 Sar 133 : 3 Bom L R 707 (PC), *Batul Begam v. Mansur Ali Khan.*

('02) 24 All 542 (545, 546) : 1902 All W N 160 (DB), *Ali Ahmad v. Naziran Bibi.*

('03) 30 Cal 407 (412, 413) (DB), *Ashraffuddin Ahmed v. Bepin Behari Mullick.*

('85) 8 All 56 (57) : 1885 All W N 327 (DB), *Thakur Das v. Shadi Lal.*

('94) 16 All 237 (239) : 1894 All W N 61 (DB), *Muhammad Islam v. Md. Ahsan.*

5. ('50) 54 Cal W N 710 (713), *Pioneer Bank Ltd. v. Bamandev Banerjee.*
(Difference between suspension and interruption — In cases of suspension, the

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Note 3

3. "Subsequent disability or inability to sue." — This section provides that where limitation has once commenced to run, no *subsequent* disability or inability to sue can stop it. But this does not imply that an *initial* disability or inability to sue, i. e., a disability or inability existing at the time from which limitation would otherwise have run, will *prevent* the running of limitation. Such *initial* disability or inability will have no effect on the period of limitation except as otherwise provided for the statute. For instances of such provisions, see ss. 6 and 17.

The section provides that a disability or inability to sue arising after time has begun to run cannot *stop* it. Thus, where at the commencement of limitation the person entitled to sue or apply is not under any disability, the fact that a disability subsequently supervenes or that a person who subsequently becomes entitled to sue or apply on the same cause of action is under a disability, will not stop the running of limitation.¹

Under S. 6, a disability which exists at the time from which limitation is to be *reckoned* will extend the period of limitation. Hence, a disability which arises after limitation has begun to *run* but which exists at the time from which a fresh period of limitation is to be computed under S. 19 consequent on an acknowledgment of liability by the debtor under that section, will *extend* the period of limitation under S. 6, although under this section such disability cannot *stop* the running of time.²

Where, under any other section of the Act any matter is a ground for exclusion of time in computing the period of limitation and such matter arises in a given case *after* limitation has begun to run, the question arises whether this section will control the operation of the former section and prevent the exclusion of time in such cases. Thus, S. 13 provides for the exclusion of the time during which the defendant is absent from the provinces. The question arises whether in a case where the defendant is absent from the provinces, not at the commencement of limitation but subsequently, the plaintiff will be entitled to the

period already elapsed is not invalidated by suspension but is added to the period which follows the suspension. Interruption cancels the elapsed portion of the period of limitation and a fresh period is computed from its date.)

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1. ('27) 14 AIR 1927 All 818 (820) : 50 All 152 : 107 I C 45 (D B), *Rup Kishore v. Patrani*.
- ('18) 5 A I R 1918 Cal 580 (582) : 44 Ind Cas 567 (DB), *Monmotho Nath Laha v. Annoda Prosad Roy*.
- ('24) 11 AIR 1924 All 677 (678) : 79 Ind Cas 1010, *Sankat Narain Pande v. Ram Bharos*. (Plaintiff not in existence when cause of action arose.)
- ('24) 11 AIR 1924 All 912 (914) : 79 Ind Cas 1019, *Dhanraj Rai v. Ram Naresh Rai*. (Do.)
- ('89) 2 C P L R 141 (145), *Sardar Singh v. Ajit Singh*. (Alienation of joint family property — Minority of subsequently born son does not give him any extra time.)
2. ('33) 20 A I R 1933 All 100 (101, 102) : 54 All 1019 . 142 Ind Cas 794 (D B), *Chandrabhan v. Raj Kumar*.
- ('90) 13 Mad 135 (138) (DB), *Venkataramayyar v. Kothandaramayyar*. (Entirely new period runs from date of acknowledgment.)

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exclusion of time under S. 13. It is clear that in such cases this section is no bar to the exclusion of time under S. 13,³ for two reasons :

- (1) This section only precludes the *stopping* of the running of time, while under S. 13 there is no question of the stopping of limitation, but the section only provides for the *exclusion* of certain time in computing the period of limitation.
- (2) This section applies only to a disability or inability of the *plaintiff*. The *defendant's* absence from the provinces is not *plaintiff's* disability or inability. See Note 4.

4. "Disability or inability to sue," meaning of. — This section applies only where the circumstances arising subsequent to the commencement of limitation amount to a "disability or inability to sue." "Disability" has been defined as the want of *legal qualification* to act and "inability," as the want of *physical power* to act.¹ Thus the two expressions are distinct from each other.² But both of them clearly refer to something which pertains to the *plaintiff*.^{2a} Hence, the *defendant's* absence from the provinces is not a disability or inability to sue within the meaning of this section.³

While the Act contains no instances of "inability to sue," it gives in S. 6 some instances of "disability."⁴ It has been held that the fact that a plaintiff, an alien, is prevented from suing on account of the

3. ('82) 4 All 530 (532) : 1882 A W N 127 : 7 Ind Jur 276 (D B), *Beake & Co. v. Davis*.

('84) 8 Bom 561 (569), *Hanmantram Sadharam Pity v. Arthur Bowles*. ('Disability or inability' in the section must be read with immediate context in S. 6.)

('98) 25 Cal 496 (504) : 2 Cal W N 269 (F B), *Pooroo Chunder Ghose v. Sassoon*.

('91) 5 C P L R 88 (89), *Dawala v. Sitaram*.

('97) 1897 Pun Re No. 26, *Mt. Janki v. Manohar Lal*. (Such absence cannot create any disability or inability for the plaintiff.)

[But see ('82) 6 Bom 103 (105, 106), *Narronji Bhimji v. Mugniram Chandaji*. (Submitted not correct.)]

See also Section 13 Note 2.

Section 9 — Note 4

1. ('18) 5 AIR 1918 Pat 505 (506) : 47 Ind Cas 798 (DB), *Sheo Saran v. Basudeo*.
 ('98) 25 Cal 496 (504) : 2 Cal W N 269 (F B), *Pooroo Chunder Ghose v. Sassoon*.
 ('05) 29 Bom 68 (71) : 6 Bom L R 639 (D B), *Jivraj Gulabchand v. Babaji Apa*.
 ('19) 6 AIR 1919 Cal 1078 (1079) : 47 Ind Cas 122, *Deutsche Asiatische Bank v. Hiralall Burdhan & Sons*.

See also the Concise Oxford Dictionary.

2. ('05) 29 Bom 68 (71) : 6 Bom L R 639 (DB), *Jivraj Gulabchand v. Babaji Apa*.
 ('19) 6 AIR 1919 Cal 1078 (1079) : 47 Ind Cas 122, *Deutsche Asiatische Bank v. Hiralall Burdhan & Sons*.

2a. ('84) 8 Bom 561 (570), *Hanmanthram Sadharam Pity v. Arthur Bowles*. ('Inability' is personal to plaintiff himself and does not refer to circumstances of person against whom he is entitled to institute a suit.)

3. ('97) 1897 Pun Re No. 26, *Mt. Janki v. Manohar Lal*.

('84) 8 Bom 561 (569), *Hanmantram Sadharam Pity v. Arthur Bowles*.

('98) 25 Cal 496 (504) : 2 Cal W N 269 (FB), *Pooroo Chunder Ghose v. Sassoon*.

('91) 5 C P L R 88 (89), *Dawala v. Sitaram*.

('05) 29 Bom 68 (70) : 6 Bom L R 639 (DB), *Jivraj Gulabchand v. Babaji Apa*.

See also Section 13 Note 2.

4. See ('19) 6 A I R 1919 Cal 706 (707) : 46 Cal 526 : 47 Ind Cas 398, *Deutsche Asiatische Bank v. Hiralall Burdhan & Sons*.

outbreak of war between his mother-country and Great Britain, will amount to either a disability or inability within the meaning of this section.⁵

Though the section uses the words disability or inability to *sue*, it has been held applicable to applications.⁶

5. Proviso. — The proviso contains the only exception laid down by this Act to the general rule that once time begins to run, no subsequent disability or inability to sue can *stop* it. The proviso applies only where *letters of administration* to the estate of a creditor have been granted to his debtor.¹ Thus, the section does not provide for cases where the debtor is the executor under the creditor's will or there is otherwise a fusion of the interests of the debtor and creditor. But on the principles discussed in Note 12, limitation is saved even in such cases.

Under the proviso, limitation is *suspended* while the administration continues. That is to say, there is to be no *fresh* period of limitation from the time when the administration ceases, but the period that elapses *before* the grant of letters of administration will also count against the plaintiff. In *other* cases of the fusion of the interests of the debtor and creditor, there is a *satisfaction* of the cause of action itself with the result that on the separation of the two interests, there is a *fresh* period of limitation. See Note 12.

6. No exemption from limitation except as otherwise provided for by statute. — As seen in Note 2 there can be no exemption from the bar of limitation except as otherwise provided for by the statute. In other words, apart from the provisions of the statute, no exception to the law of limitation can be introduced on considerations of equity or hardship or on the ground that a matter is within the *reason* of a provision granting exception. The exceptions to the general rule which this Act provides for are contained in Ss. 4 to 25 (both inclusive), and unless a case comes within any of these sections, there is no exemption from the bar of limitation arising under the Act.¹

5. ('19) 6 A I R 1919 Cal 706 (707) : 46 Cal 526 : 47 Ind Cas 398, *Deutsche Asiatische Bank v. Hiralall Burdhan & Sons*.

[See however ('26) 13 AIR 1926 Cal 65 (67) : 89 I C 1000 (DB), *Sarat Kamini Dasi v. Nagendra Nath Pal*. (Disability or inability contemplated by S. 9 is confined to such cases as are mentioned in the Act itself.)]

6. ('05) 29 Bom 68 (70) : 6 Bom L R 639 (D B), *Jivraj v. Babaji*. (Section 9 applied to execution application.)

('12) 15 Ind Cas 829 (830) : 36 Bom 498 (DB), *Bhagwant Ramchandra v. Kaji Mahammad Abas*. (Do.)

('20) 7 AIR 1920 Mad 1 (10) : 43 Mad 185 : 54 Ind Cas 66 (FB), *Muthu Korakki Chetty v. Md. Madar Ammal*.

[But see ('89) 1889 Pun Re No. 109, *Bihari Lal v. Mrs. Banes*. (Section does not apply to execution applications.)]

Section 9 — Note 5

1. ('09) 4 Ind Cas 283 (285) (Bom), *Damodar v. Dayal*.

Section 9 — Note 6

1. ('39) 26 AIR 1939 Bom 1 (8, 16) : ILR (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jivaji v. Gurunath Gouda*.

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Note 6

Illustrations.

1. Where a decree is passed in favour of *A* and he dies without having taken any steps for the execution of the decree and thereafter his executor applies for execution, the time taken by the executor for obtaining probate of the will cannot be excluded in computing the period of limitation applicable to such application.²

2. Negotiations for amicable settlement will not suspend the running of limitation and will not be ground for excluding the period taken for such negotiations in computing the period of limitation.³

3. In a suit for mesne profits, the period during which a prior suit by the plaintiff for possession was pending cannot be excluded in computing the period of limitation.⁴

4. That the plaintiff was a disqualified proprietor under the Bengal Court of Wards Act of 1879 is no ground for extending limitation for a suit for possession by him.⁵

5. In computing the period of limitation for a suit against a Native Prince, the time taken for obtaining the necessary permission of the Government under S. 86 of the Civil Procedure Code, for instituting the suit cannot be excluded.⁶

('29) 16 AIR 1929 Pat 694 (700) : 9 Pat 385 : 122 Ind Cas 817 (FB), *Mahabir Prosad v. Bhupal Ram*.

('19) 6 AIR 1919 Cal 1078 (1079, 1080) : 47 Ind Cas 122, *Deutsche Asiatische Bank v. Hira'all Burdhan & Sons*. (Section makes no exception in case of alien enemies.)

('26) 13 AIR 1926 Cal 65 (67, 73) : 89 Ind Cas 1000 (DB), *Sarat Kamini Dasi v. Nagendra Nath Pal*.

('24) 11 AIR 1924 Lah 40 (41) : 4 Lah 90 : 71 Ind Cas 495 (DB), *Hukam Chand v. Shahab Din*.

('92) 6 C P L R 67 (68, 70), *Ramji v. Dewaji*.

('27) 14 AIR 1927 Lah 200 (208, 209) : 8 Lah 54 : 102 Ind Cas 523 (DB), *Hari Singh v. Muhammad Said*.

('73) 7 Mad H C R 298 (300), *Venkataramanier v. Manche Reddy*.

('76) 1 All 350 (352) (DB), *Stowell v. Billings*. (Agreement to extend limitation is not a ground for doing so.)

[See ('27) 14 AIR 1927 Mad 927 (929, 930) : 104 Ind Cas 750 (DB), *Venkatarama Iyer v. S. I. Bank of Tinnevely*.]

[But see ('20) 7 AIR 1920 Mad 1 (12) : 43 Mad 185 : 54 Ind Cas 66 (FB), *Muthu Korakki Chetti v. Muhamad Madar Ammal*. (Per Sadasiva Iyer, J. — In exceptional cases there can be suspension of limitation notwithstanding S. 9.)

('22) 9 AIR 1922 Mad 79 (82) : 70 Ind Cas 324 : 45 Mad 466 (DB), *Kuppusami Chettiar v. Rajagopala Iyer*. (Relaxations of the ordinary law of limitation provided in the Act are not exhaustive.)

See also Section 3 Note 3.

2. ('23) 10 AIR 1923 Rang 98 (98) : 79 Ind Cas 284, *F. N. Burn v. G. H. Paul*.

3. (1849) 5 Moo Ind App 43 (69, 70) : 7 Moo P C 85 : 14 Jur 253 : 1 Sar 394 (PC), *The East India Company v. Oditchurn Paul*.

('25) 12 AIR 1925 All 276 (276) : 86 Ind Cas 203, *Banwari Lal v. Municipal Board of Cawnpore*. (Suit by employee for arrears of pay — Claim rejected by employer — Employee making another attempt to get employer alter his decision — Limitation does not stop running.)

4. ('27) 14 AIR 1927 All 446 (450, 451) : 49 All 565 : 102 Ind Cas 96 (DB), *Ram Charan Sahu v. Goga*.

5. ('18) 5 AIR 1918 P C 180 (181) : 46 Cal 694 : 46 Ind App 60 : 50 Ind Cas 202 (PC), *Mt. Mani Singh v. Nawab of Murshidabad*.

6. ('29) 16 AIR 1929 Bom 14 (19, 20) : 53 Bom 12 : 115 Ind Cas 369 (DB), *Sayaji Rao v. Madhavrao*.

See also Section 3 Note 3.

6. The mere fact that a creditor has instituted a suit for the administration of the estate of a deceased debtor does not save limitation for a suit by another creditor.⁷

As to exclusion of time under special enactments, see the under-mentioned cases.⁸ As to whether the adjudication of a person as insolvent will affect the limitation applicable to a suit by or against such person, see Note 8 under S. 15.

See also section 3 Note 3.

7. Where cause of action has not arisen, limitation cannot begin to run.—It is a fundamental principle that limitation always implies an existing cause of action and that unless the cause of action for a suit has arisen, limitation for such suit cannot begin to run.¹ When the cause of action for a suit arises is a matter of substantive law.

Illustrations.

1. *A* executes a simple mortgage of certain land to *B*. Afterwards, *B* sues on his mortgage and in execution of the decree in such suit, he purchases the property. In the meanwhile, *C* has dispossessed *A*, the mortgagor, and is in possession of the property at the time of the execution sale. *B* then sues *C* for possession. The cause of action for his suit arises only on the date of his purchase and not on the date on which *A*, the mortgagor, was dispossessed, the reason being

7. ('36) 23 AIR 1936 Bom 423 (429) : 167 Ind Cas 529, *Kisondas Prem Chand v. Jivatlal Pratapshi & Co.*

8. ('29) 16 AIR 1929 Pat 694 (700) : 9 Pat 385 : 122 Ind Cas 817 (FB), *Mahabir P asad v. Bhupal Ram*. (Vesting order under Chota Nagpur Encumbered Estates Act, S. 2 - Effect is to prohibit suit - No suit need be instituted to keep claim alive.)

('03) 30 Cal 1033 (1040, 1043) : 8 Sar 529 : 30 Ind App 177 : 8 C W N 1 (P C), *Hem Chandra Chowdhry v. Kali Prasanna Bhaduri*. (Case under S. 154 of Bengal Tenancy Act of 1885.)

('22) 67 Ind Cas 379 (380) (Lah), *Feroz v. Ghulam Sarwar*. (Plaintiff held entitled to exclusion of time under Indian Soldiers' Litigation Act, IX of 1918, S. 11.)

('33) 20 AIR 1933 Mad 376 (377) : 142 Ind Cas 286 (DB), *Secy. of State v. Kunhi Krishna Varma*. (Section 18, Indian Securities Act, does not extend the ordinary law of limitation.)

Section 9 — Note 7

1. ('46) 33 AIR 1946 Nag 277 (292) : 1 L R (1946) Nag 159 (DB), *Chattar v. Roshan*.

('19) 6 AIR 1919 Mad 972 (984) : 40 Mad 1040 : 43 Ind Cas 31 (FB), *Seeti Kutti v. Kunhi Pathumma*. (Per Srinivasa Iyengar, J.)

('24) 11 AIR 1924 Cal 600 (609) : 79 Ind Cas 520 (DB), *Dwijendra Narain Roy v. Joges Chandra De*.

[See ('40) 27 AIR 1940 Lah 337 (339) : 192 Ind Cas 93, *Ram Narain v. Maharaj Narain*. (Where no application for execution could be made until the stamped paper was supplied and the decree was drawn up, it was held that the cause of action for execution was *suspended* during the time taken up by the proceedings relating to the dispute about the adequacy of the stamped paper notwithstanding that for purposes of limitation under Art. 182, the date of the decree must be taken to be the date on which the order for drawing up the final decree was passed : ('20) AIR 1920 Mad 1 : 43 Mad 185 (FB), *Muthu Korakki v. Md. Madar* and ('11) 33 All 264 (PC), *Ashfaq Husain v. Gaurisahi*, Rel. on.) ('39) 26 AIR 1939 Lah 6 (9) : 182 Ind Cas 342 (DB), *Harinder Singh v. Anant Ram*. (Right to sue accrues only when cause of action arises. And for cause of action to arise, it must be clear that averments in plaint, if held correct, should lead to successful issue.)]

Section 9 Note 7

that at that date *B* was not entitled to possession.^{1a} It should also be noted that in the above case, *B*'s cause of action is *distinct* from that of *A* which accrues on the date of his dispossession. The dispossession taking place after the execution of the mortgage does not affect the right of *B* to bring the property to sale in enforcement of his mortgage or to take possession of the property under the title acquired at such sale. But, if *after A* is ousted by *C* from a certain property, *A* mortgages the land to *B*, the latter will derive his cause of action from *A* and will not have any independent cause of action against *C*.^{1b}

2. The office of trustee of a temple falls vacant, and during the interval, until the appointment of a new trustee, the temple properties are taken possession of by strangers. The cause of action in favour of the new trustee to recover such properties accrues only on his appointment and not before.²

3. A sale of patni taluk is set aside for irregularity, whereupon the zamindar sues the patnidar for rent. The cause of action for such suit arises on the setting aside of the sale and not before.³

4. At the time of the sale of certain land, in regard to which the plaintiff has a right of pre-emption, he is in possession of such land. The plaintiff is, subsequently, dispossessed by the vendee under the sale. The cause of action for the plaintiff's suit for pre-emption does not arise on his dispossession but it arises on the completion of the sale which he wants to pre-empt.⁴

5. The cause of action for a suit for setting aside a document on the ground that it was obtained by undue influence arises on the execution of such document and not on the cessation of the undue influence.⁵

6. Where a zamindar having a life-interest in an estate transfers such estate to another, the cause of action of the zamindar's successor for a suit for possession against the transferee accrues only on the zamindar's death and not before.⁶

7. Where an order of Court is the cause of action for a proceeding, as for example, an appeal, and such order is passed without notice to the parties, it has been held that the order is not deemed, under the law, as passed until it is communicated to the party, and limitation for the proceeding based on such cause of action cannot run until such communication.⁷

1a. ('18) 5 AIR 1918 Cal 933 (934, 935, 939) : 44 Cal 425 : 37 Ind Cas 277 (D B), *Priya Sakhi Debi v. Bireshwar Samanta*.

('11) 9 Ind Cas 791 (791, 794, 795) : 35 Mad 231 (DB), *Parthasara'hy Naicken v. Lakshmana Naicken*.

[But see ('22) 9 AIR 1922 Lah 380 (385, 386): 67 Ind Cas 388 : 3 Lah 188 (DB), *Ruldu Singh v. Sanwal Singh*. (It is by no means a rare thing that a suit for possession is barred by limitation though the right to sue for possession has not yet accrued — View not necessary for decision which is supportable on principle that cause of action for all reversioners is same in regard to a suit to avoid alienation by collateral under Punjab Customary Law.)]

1b. ('11) 11 Ind Cas 465 (468) (DB) (Cal), *Nand Kumar Dobey v. Ajodhya Sahu*.

2. ('17) 4 AIR 1917 Mad 706 (706) : 34 Ind Cas 945 (D B), *Manikam Pillai v. Thanikachalam Pillai*.

3. ('68) 12 Moo Ind App 244 (251, 253) : 11 Suth W R (P C) 5 : 2 Beng L R P C 10 : 2 Suther 173 : 2 Sar 424 (PC), *Mt. Ranee Surno Moyes v. Shooshee Mokhee*.

4. ('21) 62 Ind Cas 797 (798) (DB) (Lah), *Nagina Singh v. Duni Chand*.

5. ('21) 8 A I R 1921 Mad 394 (398, 399) : 68 Ind Cas 352 (DB), *Sethupathi v. Kuppaswami*. (Cessation of undue influence has no relevancy on question of limitation unless it can be brought under heading of fraud.)

6. See ('19) 6 A I R 1919 Mad 798 (808) : 41 Mad 749 : 47 Ind Cas 733 (DB), *Midnapore Zamindari Co. Ltd. v. Malayandi Appayasami Naicker*.

7. ('30) 17 A I R 1930 Mad 490 (493, 494, 495) : 123 Ind Cas 345 : 53 Mad 491 (DB), *Swaminathan v. Lakshmanan Chettiar*. (Case under Ss. 73 and 77 of Registration Act.)

('11) 34 Mad 151 (154, 155) : 8 Ind Cas 398 (DB), *Secy. of State v. Narayana-swami*. (Decision under Madras Survey and Boundaries Act, 1897, S. 24.)

8. Cause of action accruing after starting point specified in article—Effect.—As has been seen in Note 7, it is a fundamental principle of the law of limitation that where the cause of action has not arisen, limitation cannot begin to run. The provisions of the Act must, therefore, be construed in conformity with this principle. Hence, although a suit may fall within the class of suits described in the first column of an article, if the cause of action, on which the suit is based in the particular instance, has not arisen at the time specified in the article as the starting point of limitation, it must be held that the article does not apply to the case.¹ For, each article must be held to contemplate only cases where the cause of action has accrued at the time specified therein as the starting point of limitation. Otherwise, limitation would begin to run in several cases even before the plaintiff has the right to sue. (See Note 2.)

Illustrations.

1. A sues to set aside an instrument under circumstances which would normally fall under Art. 91 of the Schedule. But owing to the intervention of certain arbitration proceedings, it is held that there is a cancellation of the cause of action which cause of action, however, is subsequently revived owing to the nullification of the cancelling of the original cause of action. The revived cause of action accrues after the time specified in the third column of Art. 91 as the starting point of limitation. It was held that under the circumstances, the article cannot apply to the case, but that the residuary article, viz., Article 120, will apply to the case.²

2. A mortgagor sued for recovery of possession of immovable property from a person to whom it had been transferred by the mortgagee. Such a suit would normally have fallen within Art. 134, under which time begins to run from the

(‘35) 22 A I R 1935 Mad 149 (149, 150) : 153 Ind Cas 167 : 57 Mad 1030 (DB), *Vedavathi v. Sadashiva Rao*. (But actual knowledge is enough and formal communication is not necessary.)

Section 9 — Note 8

1. (‘03) 26 Mad 780 (784, 785, 786) : 13 Mad L Jour 412 (DB), *Rungiah Gounden & Co. v. Nanjappa Row*. (If the various starting points fixed in the third column of any article from which the period of limitation is to be reckoned do not cover all cases falling within the class of suits or applications described in the first column, it will be impossible to hold that the article in question is exhaustive of the class—If the article is inapplicable to certain cases comprised in the class, those cases will be governed, in the case of suits, by the residuary Art. 120 and in the case of applications, by the residuary Art. 178 (now Art. 181).)

(‘19) 6 A I R 1919 Mad 972 (983, 984) : 40 Mad 1040 : 43 Ind Cas 31 (FB), *Seeti Kutti v. Kunhi Pathumma*. (Per Srinivasa Iyengar and Seshagiri Iyer, JJ.)

(‘94) 17 All 39 (41, 42) : 1894 All W N 191 (DB), *Muhammad Suleman Khan v. Muhammad Yar Khan*.

(‘18) 5 AIR 1918 Mad 548 (550, 551) : 41 Ind Cas 581 (DB), *Doraisamy Padayachi v. Vaithilinga Padayachi*. (Per Seshagiri Iyer, J.)

(‘39) 26 AIR 1939 Pat 688 (688) : 185 Ind Cas 336 (DB), *Ram Ranbijaya v. Mt. Bachai*. (Case relating to Art. 145.)

(‘92) 19 Cal 646 (650) (DB), *Bolai Chand v. Sumiruddeen*.

[See however (‘41) 28 A I R 1941 Mad 449 (460) : ILR (1941) Mad 599 : 199 Ind Cas 225 (FB), *Venkateswara Sarma v. Venkatesa Ayyar*. (Per majority of the Full Bench—Abdur Rahman and Krishnaswamy Iyengar, JJ. contra.)]

2. (‘18) 5 AIR 1918 Mad 548 (550, 551) : 41 Ind Cas 581 (DB), *Doraisami Padayachi v. Vaithilinga Padayachi*. (Per Seshagiri Iyer, J.)

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Note 8

date of the *transfer*.^{2a} In the above case, however, the transferee obtained possession of the property, not on the date of the *transfer* but subsequently; so that, at the time specified in the article as the starting point of limitation, the plaintiff had no cause of action at all for a suit for possession against the transferee. It was held that, in the above circumstances, the article was not applicable to the case.³ For a full discussion on this point, see Note 12 to Art. 134.

3. A mortgage decree was obtained under the Civil Procedure Code of 1882. The decree was for the sale of the mortgaged property in default of payment of the mortgaged money within a certain period. On the question of limitation for an application for the execution of the decree, it was held that such a decree was not a decree directing the payment of any amount to be made at a certain date within the meaning of cl. 6 of Art. 179 of the Limitation Act of 1877. As regards the other clauses of the article, cls. 2 to 5 were held not applicable as the circumstances therein mentioned had not arisen in the case. Hence, the only question was as to cl. 1, under which the period of limitation began to run from the date of the decree. It was held that as the decree was not enforceable till the expiry of the period specified therein and that as, therefore, at the date of the decree the decree-holder had no right to apply for execution at all, the article could not apply to the case but that the case was governed by the residuary article, Art. 178 (now Article 181).⁴

The above view, however, has not always been followed. For instance, it has sometimes been held that in such cases, limitation must be held to run from the point of time specified in the article, although at such time the cause of action for the suit may not have arisen at all.⁵ Thus, it has been held that limitation for a suit by a mortgagor to recover possession of immovable property from the transferee from a mortgagee will begin to run under Art. 134 from the date of the transfer although the transferee may have got possession only subsequently, and at the date of the transfer, the mortgagor may not have had any cause of action for a suit for possession at all.⁶ Similarly, it has been held in some cases that limitation for a suit for the profits of immovable property wrongfully received by the defendant begins to run under Art. 109 from the date of the receipt of the profits by the defendant notwithstanding that the plaintiff's right to sue in respect of such profits may only have accrued subsequently.⁷

2a. Under Article 134 as amended by Act I of 1929, limitation runs from the time when the transfer becomes known to the plaintiff — But this amendment will not affect the principles discussed in this Note.

3. ('19) 6 AIR 1919 Mad 972 (983, 986, 987) : 40 Mad 1040 : 43 Ind Cas 31 (FB), *Seeti Kutti v. Kunhi Pathumma*. (Per Srinivasa Iyengar and Seshagiri Iyer, JJ.)

4. ('03) 26 Mad 780 (781, 782, 785, 786): 13 Mad L Jour 12 (DB), *Rungiah Gounden & Co. v. Nanjappa Row*.

5. See ('26) 13 AIR 1926 Cal 65 (66, 67, 73) : 89 I C 1000 (DB), *Sarat Kaminee Dasi v. Nagendra Nath Pal*. (It was observed in this case that the starting point of limitation under the Act does not always coincide with the accrual of the cause of action and that while in some cases the starting point is *posterior* to the accrual of the cause of action, in some instances, the starting point is *anterior* to the accrual of the cause of action — But no instance is given of the latter type.)

6. ('19) 6 AIR 1919 Mad 972 (979, 981): 40 Mad 1040 : 43 I C 31 (FB), *Seeti Kutti v. Kunhi Pathumma*. (Per Wallis, C. J. and Coutts-Trotter, J.)

7. See ('26) 13 AIR 1926 Cal 65 (73) : 89 I C 1000 (DB), *Sarat Kamini Dasi v. Nagendra Nath Pal*.

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Note 8

In a recent Full Bench decision of the Madras High Court,^{7a} the facts were as follows: A, the manager of the mutt, transferred for valuable consideration certain properties belonging to the mutt. After the manager's death, his successor in office brought a suit for the recovery of the properties. It was contended on his behalf that as he was elected to the office only some years after the previous manager's death and as at the time of such death there was no one capable of suing for the recovery of the properties, Art. 134B was not applicable to the case as that article provided that time should run from the date of the death, resignation or dismissal of the previous manager—a point of time at which in the present case the cause of action could not be said to have arisen at all because of the absence of any person capable of suing. The majority of the Full Bench rejected this contention holding that Art. 134B applied to the case. Their decision proceeds on the ground that granting that it is a general principle that limitation can only be deemed to run from the date when the cause of action accrues and that a cause of action cannot exist unless there is a person capable of suing, the Legislature can make an arbitrary starting point irrespective of whether there is a person capable of suing or not. It is submitted with respect that the above decisions are not correct. Abdur Rahman and Krishnaswami Iyengar, JJ., in the above Madras Full Bench case did not agree with the majority and held that Art. 134B did not apply to the case, in accordance with the principle that limitation cannot run before the cause of action accrues.

In some decisions, the view has been taken that in such cases the starting point of limitation under the article must be held to be *postponed* till the accrual of the cause of action. Thus, in the under-mentioned case;⁸ where the plaintiff's right to sue for the profits of immovable property accrued only after the profits had been *received* by the defendant, it was held that limitation for the suit ran under Art. 109 only from the *accrual of the right to sue*, notwithstanding that the article mentions the date of the *receipt* of the profits by the defendant as the starting point of limitation. Similarly, where a purchaser at court auction had a *fresh* cause of action to apply for possession of the property purchased by him *after* the sale had been confirmed, it was held that limitation under Art. 180 ran only from the accrual of such fresh cause of action although the article specifies the *confirmation of the sale* as being the starting point of limitation.⁹ It is submitted that such a view is also not correct as it involves the

7a. ('41) 28 AIR 1941 Mad 449 (460) : ILR (1941) Mad 599 : 199 Ind Cas 225 (FB), *Venkateswara v. Venkatesa Ayyar*.

8. ('24) 11 AIR 1924 Cal 600 (602, 608, 609) : 79 Ind Cas 520 (DB), *Dwijendra Narain Roy v. Joges Chandra De.* (Execution of lease deed in plaintiff's favour—Lease deed compulsorily registrable but not registered till later date—Suit for mesne profits by lessee for prior period—Time runs under Art. 109 only from registration of lease deed when only plaintiff gets right to sue.)
See also Art. 109, Note 16.

9. ('35) 22 AIR 1935 Cal 333 (335) : 62 Cal 66 : 158 I C 191 (DB), *Jateendra Chandra v. Rebatee Mohan Das*.

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importation into the respective articles of words which are not there.

The question whether the point of time specified in the third column of an article is identical with the date of the cause of action is a matter of interpretation of the particular article and depends on the facts of the particular case.

Illustrations.

1. A mortgagee with possession transfers for valuable consideration the mortgaged property to A, who subsequently obtains possession of the property. The mortgagor sues for recovery of possession from A. Such a suit falls within the class of suits described in the first column of Art. 134. Under that article, time begins to run from the date of the *transfer*.^{9a} In the undermentioned Full Bench case,¹⁰ two of the learned Judges¹¹ held that the expression "transfer" in the context refers only to transfer of *possession* so that time, in the above case, would begin to run only from the date on which A obtains possession and the plaintiff's cause of action accrues. The other learned Judges,¹² however, differed and held that time would begin to run under the article from the date on which the *title* is transferred and not from the time when *possession* is transferred, so that, according to them, if the article applies to the case, time would begin to run under the article even before the accrual of the cause of action.

2. A patni taluk was sold for arrears of rent. The sale was subsequently set aside for some irregularity. Thereupon, the landlord sued for the same arrears for which the sale had been held. It was held by the Privy Council that on the sale being set aside, the patni was taken back by the tenant subject to the obligation of paying the arrears for which the sale had been held and that such arrears became "due" within the meaning of S. 32 of Bengal Act X of 1859 when the sale was set aside, so that limitation for the suit began to run under the above section from the date on which the sale was set aside.¹³

3. M purchased certain property from C. The creditors of C attached the property in execution of a money decree obtained against C. Thereupon, M filed a suit for a declaration that the property belonged to him and was not liable for attachment and sale in execution of the decree against C. While an appeal in this suit was pending before the Privy Council, the Government acquired this property and there was an award by the Collector under the Land Acquisition Act. Money awarded by the Collector was distributed by the executing Court to the creditors of C. Eventually the claim of M was decreed by the Privy Council. M then brought a suit against the creditors for recovery of the sums distributed to them. On the interpretation of the words "when the right to sue accrues" in Art. 120 which was held applicable to the case, it was held that the right to sue did not accrue to M until the decision of the Privy Council in the previous suit for declaration and that the suit was not barred by limitation.¹⁴

9. Suits based on different causes of action are governed by different periods of limitation. — It is a general principle of law that limitation applies only to the particular cause of action on

9a. Under Article 134 as amended by Act I of 1929, limitation runs from the time when the transfer becomes known to the plaintiff. But this amendment will not affect the principles discussed in this Note.

10. ('19) 6 AIR 1919 Mad 972 (980, 981, 982, 983) : 40 Mad 1040 : 43 I C 31 (FB), *Seeti Kutti v. Kunhi Pathumma*.

11. Per Abdur Rahim and Seshagiri Iyer, JJ.

12. Per Wallis, C. J., Coutts Trotter and Srinivasa Iyengar, JJ.

13. ('68) 12 Moo Ind App 244 (251, 253) : 14 Suth W R P C 5 : 2 Beng L R (P C) 10 : 2 Suther 173 : 2 Sar 424 (PC), *Surnomoyee v. Shooshee Mokhee*.

14. ('39) 26 AIR 1939 Lah 6 (9) : 182 I C 342 (DB), *Harinder Singh v. Anant Ram*.

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which a suit is based and where such cause of action is not barred by limitation, the fact that the period of limitation has expired with reference to another suit of a similar nature, in respect of the same subject-matter, but based on a different cause of action, does not affect the suit based on the former cause of action. Hence, where the plaintiff is entitled to successive causes of action in regard to the same matter, he will be entitled to an independent period of limitation in respect of each such cause of action. The question, whether the plaintiff is entitled to successive causes of action in regard to a matter, is one of substantive law. The following are some illustrative cases bearing on the question :

- (1) In a suit for compensation for non-delivery of goods purchased and paid for, the cause of action arises on the date on which the failure to deliver takes place and there is no fresh cause of action when the defendant refuses to pay compensation.¹
- (2) Where the *act* of the defendant itself constitutes a legal injury, the mere fact that the plaintiff suffers *damage* subsequently will not entitle him to a fresh cause of action.²
- (3) A promise to pay an existing debt will furnish a fresh cause of action if it is intended to create a fresh obligation.³

See also the undermentioned cases.⁴

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1. (1849) 5 Moo Ind App 43 (69, 70) : 7 Moo P C 85 : 14 Jur 253 : 1 Sar 394 (PC), *The East India Company v. Oditchurn Paul*.
2. See Section 24 Note 1.
3. See ('21) 8 AIR 1921 Cal 67 (69) : 66 Ind Cas 209 : 48 Cal 817, *Narendra Lal v. Tarubala Dassi*. (Verbal promise by client to pay attorney his costs which have become overdue, when money is recovered in certain execution cases — A promise on strength of which attorney has not taken steps to enforce payment is an answer to any objection based on limitation made by client against application by attorney for order for payment.)
4. ('24) 11 AIR 1924 Mad 840 (841, 842) : 84 I C 276, *Parthasarathi Appa Rao v. T. Subba Row*. (Cause of action for suit for account accruing against an agent during his life time — Death of agent does not give fresh cause of action against his legal representative — Following AIR 1915 Mad 596 (DB), *Arunachalam v. Raman*.)
- ('36) 23 AIR 1936 Lah 394 (400) : 17 Lah 403 : 166 Ind Cas 157 (DB), *Dhuman Khan v. Gurmukh Singh*. (Tenant mortgaging property — Landlord although having knowledge of mortgage not taking steps to challenge it — Property brought to sale in mortgage decree — Landlord objecting to sale — Dismissal of objection does not give him fresh period of limitation.)
- ('81) 1881 All W N 70 (70) (DB), *Mohan v. Mohsin Ali*. (A in adverse possession against B — Award declaring B's title does not extend period of limitation for suit for possession by B.)
- ('30) 17 AIR 1930 Lah 284 (285) : 122 I C 225 (DB), *Ghulam Rasul v. Rahim Baksh*. (Declaratory suit — Fresh invasion of plaintiff's rights gives fresh cause of action.)
- ('33) 20 AIR 1933 Bom 276 (284, 287) : 145 Ind Cas 190 (DB), *Sharada Peeth Math, Dwarka v. Rajrajeshwarashram*. (Suit for declaration — Circumstances obviating threat to plaintiff's right — After some time plaintiff's right again in jeopardy — Plaintiff gets fresh cause of action.)
- ('36) 23 AIR 1936 Lah 164 (165) : 161 Ind Cas 709, *Baru Mal v. Daulat Ram*. (Claim barred — Only express promise provides fresh period of limitation under Contract Act, S. 25 (3).)

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Note 10

10. Several persons having distinct causes of action in respect of same matter—Distinct periods of limitation apply.—On the principle stated in Note 9, where two persons are entitled to bring a suit of a similar nature in regard to the same matter but each has a *distinct* cause of action, a distinct period of limitation will apply to the suit by each.¹ But where a cause of action accrues in favour of A and thereafter B becomes entitled to sue on the *same* cause of action he will not be entitled to a fresh period of limitation from the time he becomes so entitled.²

Illustrations.

1. Where a Hindu widow in possession of her husband's estate is dispossessed by a stranger, her cause of action for a suit for possession against the stranger is *distinct* from the cause of action of the reversioner who is entitled to sue for possession after her death.³ In such cases, the reversioner does not derive his right to sue from the widow. The same principle applies to the suit of a person who is adopted by the widow, after her dispossession by the stranger. The adopted son gets a right to sue for possession on his adoption and this right is independent of the widow's right to sue for possession and is not affected by the limitation that

('66) 5 Suth W R 100 (101) : Beng L R Sup Vol (App) 10 (FB), *Sreenath Ghosal v. Kenaram Singh*. (Regulations VII of 1799, VIII of 1819, S. 18 Cl. 4—Cause of action — Ineffectual execution proceedings in summary suit do not give fresh cause of action for regular suits.)

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1. For cases see illustrations that follow.
2. ('43) 30 AIR 1943 P C 83 (88) : ILR (1943) Kar (PC) 69. 207 Ind Cas 553 (PO) *Gopal Das v. Sri Thakurji*. (Cause of action for adverse possession in favour of A — His widow after his death (his heir) has no fresh cause of action, when the property devolves upon her — Principle of S. 9 applies — 20 Cal 560 : 20 Ind App 38 (PC) and AIR 1915 Cal 629 (DB), *Mohendra Nath v. Shamsunnessa*, Rel. on.)
- ('42) 29 AIR 1942 Oudh 303 (305) : 200 Ind Cas 265, *Mata Prasad v. Brij Kishore*. (Where adverse possession commences to run against the last male owner himself, the intervention of the limited estate will not prevent time running and will not enable the reversioner coming after the limited owner to say that he has got a fresh cause of action on the death of the owner of the limited estate.)
- ('41) 28 AIR 1941 Bom 197 (198) : 195 Ind Cas 732, *Annu Bajaba v. Dadu Tukaram*. (Alienation by Hindu widow — Adoption made afterwards — Adopted son dying after attaining majority — Second adoption — Suit by second adopted son to set aside alienation held barred.)
- ('18) 5 AIR 1918 Mad 526 (527, 528) : 41 I C 605 (DB), *Lakshmi Narayana v. Venkata Subbarao*. (Debt due to M — M dying—M's heir has no fresh cause of action.)
- ('09) 1 Ind Cas 906 (908, 909) : 5 Nag L R 28, *Lukhmichand v. Ganpat*. (Where a landlord comes to know of a transfer, time commences to run from the date of the knowledge and a successor landlord cannot compute time from the date of his (successor's) knowledge.)
- (1865) 3 Suth W R Act X Rule 121 (121, 122) (DB), *Mohesh Chunder Chowdhry v. Buneed Khan*. (Son has no new cause of action on succeeding to his father.)
- ('93) 20 Cal 560 (575) : 20 Ind Cas 38 (PC), *Asghar Reza v. Mehdi Hossein*. (Cause of action in favour of A — A's heirs have no fresh cause of action.)
- ('23) 10 AIR 1923 Rang 98 (98) : 79 Ind Cas 284, *F. N. Brown v. G. H. Paul*. (Where the creditor fails to execute decree, the time taken to prove his will cannot be excluded in calculating the period for execution of decree.)
3. For cases, see Notes to Article 141.

may have run out in respect of such right.⁴ But where the cause of action accrued in the life-time of the last full owner himself and limitation began to run in his life-time, it is not interrupted by the intervention of the widow's estate and the person succeeding the widow is not entitled to a fresh cause of action or a fresh period of limitation from the date of his succeeding to the estate.⁵

2. Where *A* is entitled to a life-interest in an estate and *B* is entitled to the remainder, and the cause of action for a suit for possession of such estate accrues in *A*'s life-time, *B* gets a *fresh* cause of action on the termination of *A*'s life-interest and the falling into possession of *B*'s estate.⁶ But where the cause of action accrued in the life time of the last full owner himself, the intervention of *A*'s life-interest will not interrupt the running of limitation nor will *B* have a fresh cause of action on *A*'s death, for *B*'s cause of action, if any, would be one derived from the previous full owner.⁷

3. The cause of action for a suit by a Hindu reversioner challenging an alienation or adoption by a Hindu widow is common to all the reversioners and each reversioner is not entitled to an independent period of limitation.⁸

4. Where a cause of action accrues in favour of the holder of a religious or secular office as such, the succeeding holder also will derive from the last holder of the office such cause of action and will not be entitled to a fresh period of limitation.⁹

See also illustration 1 in Note 7.

4. ('15) 2 AIR 1915 Mad 539 (539, 540) : 25 Ind Cas 692 (DB), *Venkatratnam v. Venkataramiah*.

('05) 2 Cal L Jour 87 (94, 95) : 9 Cal W N 795 (DB), *Harekchand Babu v. Bejoy Chand Mahatab*.

See also S. 2 (8) Note 3 and Arts. 142 & 144 Note 83.

5. ('24) 11 AIR 1924 Lah 292 (292) : 69 Ind Cas 390, *Khilu Ram v. Bhiran Bai*. (Following 12 Ind Cas 453 (DB), *Mansa Ram v. Behari*.)

('26) 13 AIR 1926 Pat 192 (194) : 92 Ind Cas 177 : 5 Pat 441 (DB), *Mt. Batisa Kuer v. Rajaram Pandey*.

('07) 6 Cal L Jour 621 (635) (DB), *Lilabati Misra v. Bishun Chobey*.

('15) 2 AIR 1915 Cal 629 (633) : 27 Ind Cas 954 (DB), *Mohendra Nath Biswas v. Shamsunnessa Khatun*.

See also Section 6 Note 19 and Art. 141 Note 14.

6. ('29) 16 AIR 1929 P C 158 (159, 160, 161) : 56 Ind App 192 : 51 All 367 : 117 Ind Cas 22 (PC), *James Richards R. Skinner v. Naunihal Singh*.

7. ('29) 16 AIR 1929 P C 158 (159, 160, 162) : 56 Ind App 192 : 51 All 367 : 117 Ind Cas 22 (PC), *James Richards R. Skinner v. Naunihal Singh*.

See also Art. 140 Note 2.

8. ('19) 6 AIR 1919 Mad 911 (916, 920, 922) : 41 Mad 659 : 46 Ind Cas 202 (FB), *Varamma v. Gopala Dasayya*.

('21) 8 AIR 1921 Mad 380 (380, 381) : 44 Mad 218 : 60 Ind Cas 98 (DB), *Venkata Sivayya v. Ademma*.

[See (1900) 27 Cal 379 (403) (DB), *Hurnabh Pershad v. Mandil Dass*.]

[See also (14) 28 AIR 1914 Bom 197 (198) : 195 Ind Cas 732, *Annu Bajaba v. Dadu Tukaram*. (Alienation by Hindu widow—Adoption made afterwards—Adopted son dying after attaining majority—Second adoption—Suit by second adopted son held barred.)]

[See however ('44) 31 AIR 1944 Lah 409 (413) : I L R (1945) Lah 231 : 216 Ind Cas 10 (FB), *Ilahi Bakhsh v. Umar Bakhsh*. (Each reversioner will have his own period of limitation and in no case will the one provided for a minor reversioner be affected by that of a major reversioner—AIR 1933 Lah 524 (DB) *Gajndar v. Balwant*, Overruled, Submitted not correct : See S. 6 N 17.)]

See also Art. 120 Note 34 and Art. 125 Note 7.

9. ('21) 8 AIR 1921 Mad 595 (596) : 70 Ind Cas 477 (DB), *Subraminia Gurukkal v. Ammakannu Ammal*. (Where lands constituting emoluments of an office are held by a person not entitled to the office for more than 12 years as owner, he gets

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11. Satisfaction or discharge and revival of cause of action. — Where a cause of action is, through Court or otherwise, satisfied or discharged, limitation stops running in regard to such cause of action, on the fundamental principle that limitation always implies an existing cause of action, and where there is no cause of action, there can be no limitation. In such cases, where the satisfaction or the discharge of the cause of action is nullified by subsequent events, the plaintiff is entitled to a *fresh* cause of action, consequent on such nullification, and a fresh period of limitation in respect of such cause of action.¹ It will be noted that there is no *exception* to the law of limitation involved in such a position. For, limitation has to be determined with reference to each cause of action, and where the plaintiff is entitled to a fresh cause of action, he is also entitled to a fresh period of limitation in respect of such cause of action.

Illustrations.

1. A sale of a patni taluk for arrears of rent is set aside for irregularity and thereupon, the landlord sues for the same arrears. The sale puts an end to his original cause of action for the rent and on the sale being set aside, there is a fresh cause of action in respect of which, the landlord is entitled to a fresh period of limitation.²

absolute and indefeasible right thereto not only as against the then holder of the office, but also as against all the succeeding holders.)

('22) 9 AIR 1922 Mad 406 (407) : 70 Ind Cas 369 (DB), *Madura Devasthanam v. Samia Pillai*.

('18) 5 AIR 1918 Cal 580 (581, 582) : 44 Ind Cas 567 (DB), *Manmotho Nath Laha v. Annoda Prosad Roy*. (Alienation of debutter property by shebait of idol—Suit for possession against transferee—Succeeding shebait has no fresh cause of action.)

('04) 7 Bom L R 135 (136, 137) (DB), *Rama v. Shamrao*. (Adverse possession commenced in the lifetime of one vatandar avails as against the subsequent vatandar—Following 9 Bom 198.)

('20) 7 AIR 1920 Lah 209 (210) : 55 Ind Cas 335 (DB), *Ghulam Muhammad v. Ahmad Khan*. (Adverse possession of land which ala lambardar is entitled to hold—Possession is adverse to any ala lambardar *in esse* or *in posse* and no fresh starting point of limitation is available on appointment of new ala lambardar.)

See also Section 2 (8) Note 6.

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1. ('50) 37 AIR 1950 All 526 (Pr 2), *Sri Niwas Tiwari v. Baleshwar Prasad Bagat*. (Mortgage providing for mortgagee obtaining possession in case of default in the payment of interest—Defaults made but interest subsequently paid and accepted by mortgagee and suit for possession brought more than 12 years after execution of mortgage but within twelve years of last default—Suit in time.)

('43) 30 AIR 1943 Nag 178 (182) : I L R (1943) Nag 422 : 207 Ind Cas 214 (DB), *Prabhakar v. Chandrakant*. (S. 9 contemplates cases where the cause of action continues to exist. Section 9 cannot apply to cases where the cause of action is cancelled by subsequent events.)

('39) 26 AIR 1939 Bom 1 (17) : I L R (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jivaji v. Gurunath Gouda*.

[See also ('50) 37 AIR 1950 Cal 298 (Pr 8) (DB), *Midnapore Zamindari Co. Ltd. v. Nabakumar Singh*. (Under the ordinary law of limitation as enacted in S. 9, the period of limitation can be extended in three classes of cases (a) where injustice has been caused by an act of Court; (b) where the cause of action was satisfied and (c) where the cause of action was cancelled.)]

See cases in foot-notes (2) to (5) below.

2. ('68) 12 Moo Ind App 244 (252, 253, 254) : 11 Suth W R P C 5 : 2 Beng L R (PC) 10 : 2 Suth 173 : 2 Sar 424 (PC), *Mt. Ranee Surnomoyee v. Shooshee Mokhee*.

2. Where after the accrual of a cause of action, the rights of the parties merge into a decree, so as to bar a further suit on their basis, the cause of action is at an end. But where, subsequently, such decree is set aside under circumstances which make a fresh suit in respect of the matter competent, the plaintiff will be entitled to a fresh cause of action and a fresh period of limitation in respect of such cause of action.³

('25) 12 AIR 1925 Cal 1216 (1217, 1218) : 85 Ind Cas 1007, *Bijoy Chand Mahtab v. Nilmoni Lahiri*. (In such cases, limitation in respect of the fresh cause of action is not suspended till decree setting aside sale is confirmed in appeal.)

('20) 7 AIR 1920 Pat 786 (786, 787) : 59 Ind Cas 314, *Midnapore Zamindary Co. Ltd. v. Jaganath Sarangi*. (Suit for apportionment of rent suspends right to recover rent.)

[See also ('21) 8 AIR 1921 Cal 572 (573) : 62 Ind Cas 428 (DB), *Laloo Karikar v. Jagat Chandra*. (Transfer of property of Muhammadan minors for payment of debts by *de facto* guardian—Sale held void and delivery of possession back to minors decreed—Vendee can sue for recovery of debt on the basis of revival of right and his suit will not be barred by limitation.)

('72) 18 Suth W R 59 (60) (DB), *Mohesh Chunder Chakladar v. Gungamonee Dossee*. (Zamindar, being indebted on bond, giving assignment on putnidars for portion of punti rent to be paid to bond-holder — Bond-holder not receiving money suing zamindar who, thereupon, in his turn, suing putnidars for rent—*Held*, zamindar was entitled to fresh period of limitation)]

3. ('35) 22 AIR 1935 Cal 333 (334, 335) : 62 Cal 66 : 158 I C 191 (DB), *Jateendra Chandra v. Rebatee Mohan Das*. (Application for delivery of possession by auction-purchaser—Declaration obtained by another that auction-purchaser had obtained no right—Declaration set aside on appeal—Auction-purchaser is entitled to avail of fresh cause of action for subsequent application for delivery of possession.)

('21) 8 AIR 1921 Lah 71 (71, 72) : 2 Lah 320:64 Ind Cas 454 (DB), *Kartar Singh v. Bhagat Singh*. (Award, suit on—Cause of action ends when decree is passed on award and revives when such decree is set aside.)

[See ('16) 3 AIR 1916 P C 96 (101, 102) : 43 Cal 660 : 33 I C 452 (PC), *Srimati Nrityamoni Dassi v. Lakhan Chandra Sen*. (Affirming 35 Cal 209 (SB), *Lakhan Chunder v. Madhusudan*—Plaintiffs were defendants in former suit —They associated with plaintiff in former suit and asked for adjudication of their rights in that suit—Court referring them to another suit — *Held* limitation for plaintiff's suit remained in suspense for period of that suit — It is submitted that their Lordships were applying S. 14 of the Act to the case and did not proceed on any principle of satisfaction and revival of cause of action.)

('33) 20 AIR 1933 Bom 276 (284, 287) : 145 Ind Cas 190 (DB), *Sharada Peeth Math v. Rajrajeshwarashram*.

('27) 14 AIR 1927 All 446 (450, 451) : 102 Ind Cas 96 : 49 All 565 (DB), *Ram Charan Sahu v. Goga*.]

[See also ('47) 34 AIR 1947 All 256 (261) : ILR (1946) All 633 : 228 Ind Cas 493 (DB), *Murlidhar v. Ram Saran Das*. (Plaintiff prevented from instituting suit on account of decree of Court — Decree subsequently reversed — Plaintiff held had fresh cause of action.)]

[See however ('27) 14 AIR 1927 Mad 597 (597) : 50 Mad 417 : 100 Ind Cas 776 *Satyanarayana Brahman v. M. Seethayya*. (Declaration obtained from trial Court that pronote in A's favour was obtained by fraud and undue influence and was supported by no consideration—Decree set aside in appeal—Nevertheless A has no fresh cause of action for suit on pronote—Declaration obtained from trial Court that pronote in A's favour was obtained by fraud and undue influence and was not supported by consideration—No prayer for injunction nor injunction granted—Decree set aside in appeal—*Held*, nevertheless A had no fresh cause of action for suit on pronote.)]

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3. *A* owed a sum of money to *B*. It was agreed between them that this sum should be treated as part of the consideration for a sale of land which *A* was to execute to *B*. But the parties failed to agree as to certain other terms and a suit brought by *A* for specific performance of the agreement to purchase was dismissed on the ground that no effectual agreement had been made. It was held that this decree brought about a new state of things and imposed a new obligation on *A*, who could no longer allege that he was absolved by *B* being entitled to the land instead of the money. He became bound to pay that which he had retained in payment for his land, the date of the decree being the date on which he incurred this new obligation.⁴

4. Certain disputes between a principal and agent were referred to arbitration and under the award thereon, certain moneys were paid by the agent in satisfaction of the principal's claim. Afterwards, the proceedings were set aside on the ground of fraud and coercion, and the principal had to refund the moneys received by him. Thereupon, the principal sued the agent to enforce the original liability to account. The defendant pleaded limitation. It was held that the former proceedings had put an end to the original cause of action and on their being set aside, the plaintiff got a fresh cause of action in respect of which, his suit was within time.⁵

5. Where a sale is held in execution of a decree and the decretal amount is paid to the decree-holder out of the sale proceeds, his claim to execute the decree is satisfied. If, thereafter, the sale is set aside and he is compelled to refund the amount paid to him, he gets a fresh right to execute the decree and is entitled to a fresh period of limitation in respect of such right.^{5a}

6. On a sale in execution being confirmed, the auction purchaser is entitled to apply for delivery of possession. It has been held that if, subsequently, an application is made to set aside the sale, the effect is the same as if the sale had not been confirmed and the auction-purchaser has no right to apply for possession but that, on the application for setting aside the sale being dismissed and the sale being confirmed again, the auction-purchaser gets a fresh right to apply for delivery of possession and a fresh period of limitation in respect of such application.^{5b}

See also the undermentioned cases.^{5c}

4. ('89) 11 All 47 (53, 54, 56, 57) : 15 Ind App 211 : 5 Sar 260 : 12 Ind Jour 450 (PC), *Basu Kuar v. Dhum Singh*.

5. ('20) 7 AIR 1920 Mad 663 (663, 664) : 43 Mad 845 : 59 Ind Cas 472 (DB), *Muthuveerappa Chetty v. Adaikappa Chetty*.

('30) 17 AIR 1930 Cal 5 (6, 7, 10) : 56 Cal 639 : 120 Ind Cas 710, *Abdul Rahim Oosman & Co. v. Ojamshee Purshottandas & Co.* (Following AIR 1921 Lah 71 : 2 Lah 320 (DB), *Kartar Singh v. Bhagat Singh*.)

5a. For cases, see Notes to Article 182, clause 6.

5b. ('20) 7 AIR 1920 Mad 1 (5, 6, 7) : 43 Mad 185 : 54 Ind Cas 66 (FB), *Muthu Korakki Chetty v. Mahomed Madar Ammal*. (Oldfield, J., dissenting.)

5c. ('44) 31 AIR 1944 All 88 (89, 90) : ILR (1944) All 197 : 212 Ind Cas 621 (DB), *Chanda Devi v. Nathu Singh*. (Decree rendered incapable of execution by subsequent decree of competent Court—Subsequent decree set aside—Decree-holder held had a fresh cause of action for execution from date of decree setting aside subsequent decree.)

('46) 1946 J L R 257 (DB), *Kaluram v. Thakar Phulsingh*. (Disallowance or rejection of claim of person against an estate under the management of Court of Wards by the Court of Wards constitutes a new cause of action for the purpose of the law of limitation. (11 All 47 : 15 Ind App 211 (PC), *Basu Kuar v. Dhum Singh*, Foll.)

('33) 20 AIR 1933 Bom 276 (284, 287) : 145 Ind Cas 190 (DB), *Sharada Peeth Math v. Rajrajeshvarshram*. (Suit for declaration—Circumstances obviating threat to plaintiff's right—After some time, plaintiff's right again in jeopardy—Plaintiff gets fresh cause of action.)

Where the circumstances ensuing after the accrual of a cause of action do not result in the satisfaction or discharge of such cause of action, limitation will not stop running and the plaintiff will not be entitled to any exemption from the ordinary law of limitation, except under any of the special provisions which create exemptions from such law.⁶

Illustrations.

1. A sues the Government for recovery of cess paid under protest (Art. 16) in respect of a certain year. The suit is dismissed in the trial Court but decreed in the appellate Court. These circumstances do not bring about the cancellation and revival of the plaintiff's cause of action for a similar suit against the Government in respect of the cess paid for a subsequent year.⁷

2. A, a stranger, dispossesses B and C, two co-owners, of certain land, and holds the land adversely against them both. Subsequently, B dies and A succeeds to his interest. This does not put an end to C's cause of action against A. The reason is that although A becomes co-owner with C, and one co-owner's possession must be held to be *on behalf of* other co-owners and not *adverse* to them, yet this rule is subject to the exception that where one co-owner *ousts* another, the former's possession is adverse to the latter. In this case, the *ouster* of C by A, which took place when he dispossessed both B and C, is not interrupted by B's interest devolving on A subsequently.⁸

3. A and B are owners of a patni taluk. The taluk is sold for arrears of rent and the surplus sale proceeds are paid to A. B's claim for share of such proceeds is governed by Art. 62. The fact that, subsequently, the patni sale is set aside and again restored in appeal does not affect the running of limitation.⁹

4. A preliminary decree is passed in a mortgage suit in favour of the mortgagee. Afterwards, a decree is passed against both the mortgagor and mortgagee in a suit by a third person negating the title of the mortgagor to the property. This decree is, subsequently, reversed in appeal. In these circumstances, there is no discharge and revival of the mortgagee's claim for a final decree so as to entitle him to a fresh period of limitation from the decree of the appellate Court.¹⁰

5. Where a mortgagee's cause of action for suing to enforce the mortgage has accrued, the cause of action is not affected by the fact that the mortgaged property is submerged under water.¹¹

6. A landlord sued his tenant for possession on the allegation that his tenancy had determined. The suit was dismissed and thereupon the landlord sued for rent. It was held that the landlord's cause of action for suing for rent was

6. ('21) 8 AIR 1921 Cal 596 (596): 64 I.C. 315 (DB), *Janaki Nath v. Bijoy Chand.*

7. (20) 7 AIR 1920 Mad 948 (955, 958, 962): 59 Ind Cas 98 (SB), *Secy. of State v. Zamindarini of Vegayammapeta Estate.*

See also Art. 16 Note 4.

8. ('19) 6 AIR 1919 P C 44 (45, 46, 47): 43 Mad 244: 46 Ind App 285: 53 Ind Cas 901 (PC), *N. Varada Pillai v. Jeevarathnammal.*

[See ('24) 11 AIR 1924 Cal 118 (121, 122): 76 I. C. 511 (DB), *Pankaj Mohan Rai v. Bipin Behari.* (A's possession after he became co-owner would not have been adverse were it not for the fact that he continued to hold the land in the assertion of the same hostile title as he had set up before he became co-owner.)]

9. ('25) 12 AIR 1925 Cal 67 (72, 74): 83 Ind Cas 110 (DB), *Niranka Chandra v. Atul Krishna.*

10. ('25) 12 AIR 1925 Mad 334 (334, 335, 338): 85 Ind Cas 272 (DB), *Ammathayi Ammal v. Sivarama Pillai.*

See also Section 15 Note 11 and Art. 181 Note 4.

11. ('33) 20 AIR 1933 Pat 693 (693, 694): 146 Ind Cas 856, *Raghunath Bhaga v. Meghu Mander.*

See also Art. 132 Note 25.

Section 9
Note 11

in no way affected by his suit for possession and that limitation could not be saved on account of such suit.¹²

7. A, a Hindu widow, alienates certain property belonging to her husband's estate. B, a reversioner, sues during her lifetime for a declaration that the alienation cannot bind the reversionary interest. The suit is dismissed on the ground that B is not the next reversioner, but C. After the death of the widow, C sues the alienee for possession but the suit is dismissed on the ground that he is not a reversioner at all. Thereupon, B's son sues for possession. At the time of instituting the suit more than twelve years have elapsed from the death of the widow. There is no suspension and revival of the right to sue so as to give a fresh right of action on the decree in C's suit.¹³

8. Where a cause of action is furnished by a decree, such cause of action is not affected by an appeal being filed against such decree, and the dismissal of the appeal, therefore, does not cause *revival* of the right so as to furnish a fresh period of limitation.¹⁴ Thus, a patni taluk is sold for arrears of rent. The sale is set aside by a decree, whereupon, the purchaser sues the landlord for the refund of the money paid by him. The cause of action for such a suit arises on the passing of the decree setting aside the sale and is not affected by the fact that the decree is appealed against and is confirmed in appeal.¹⁵

12. ('83) 9 Cal 255 (258, 259) : 9 Ind App 82 : 12 Cal L R 129 : 4 Sar 363 : 6 Ind Jur 546 (P C), *Huro Pershad Roy v. Gopal Das Dutt*.

('21) 8 AIR 1921 Cal 525 (525) : 48 Cal 65 : 57 Ind Cas 992 (DB), *Nagendra Nath Sen v. Sadhu Ram Mandal*.

[But see ('71) 16 Suth W R 79 (80) : 8 Beng L R 537n (DB), *Eshan Chunder Roy v. Khajah Assanoollah*. (Suit for rent—Time during which landlord was suing for ejection of defendant as trespasser must be deducted — Case under Bengal Act X of 1859.)

('72) 17 Suth W R 415 (416) : 8 Beng L R 536 (DB), *Deen Dayal Paramanick v. Radha Kishore Debee*. (Do.)]

13. ('23) 10 AIR 1923 Mad 108 (108, 109) : 70 Ind Cas 446 (DB), *Ranganatha Rao v. Rama Pandithar*.

See also Art. 141 Note 21.

14. ('39) 26 AIR 1939 Mad 892 (894) : 187 Ind Cas 591, *Moidin Kutti v. Subramanya*. (Decree cannot be treated as having been suspended during pendency of application to set aside satisfaction order and of appeal therefrom.)

('27) 14 A I R 1927 Lah 200 (208, 209, 210) : 8 Lah 54 : 102 Ind Cas 523 (DB), *Hari Singh v. Muhammad Said*. (Suit upon *ex parte* foreign judgment — Period during which proceedings to set aside decree were pending cannot be excluded.)

('25) 12 AIR 1925 Cal 1216 (1216, 1217, 1218) : 85 Ind Cas 1007 (DB), *Bijoy Chand Mahtab v. Nilmoni Lahiri*. (Sale of patni for arrears of rent—Sale set aside by decree — Limitation for suit for rent thereafter runs from date of trial Court's decree and not appellate decree confirming it.)

('28) 15 AIR 1928 All 46 (47, 49) : 50 All 211 : 107 Ind Cas 42 (DB), *Salig Ram Misir v. Lachhman Das*. (Decree-holder purchasing property in execution but losing it in separate suit by third party — His fresh application for execution or for revival of execution, if maintainable, must be filed within three years of trial Court's decree.)

('17) 4 AIR 1917 Oudh 91 (91, 92) : 20 Oudh Cas 205 : 41 Ind Cas 858, *Jagdish Singh v. Ram Adhin Singh*. (Application for a decree absolute under O. 34, R. 5 (2), O. P. C.—Under the rule the right to make an application begins as soon as the period limited in the decree expires — Institution of appeal against the decree—Limitation for making an application for a decree absolute is not thereby extended — Following AIR 1915 All 336 : 38 All 21 (DB), *Madho Ram v. Nihal Singh*.)

15. ('18) 5 AIR 1918 P O 151 (152, 153) : 46 Cal 670 : 46 Ind App 52 : 50 Ind Cas 444 (PC), *Juscurn Boid v. Pirthichand Lal*

9. The mere fact that the plaintiff, an alien, is prevented from suing on account of the outbreak of war does not suspend his cause of action.¹⁶

10. The pendency of an application by the judgment-debtor to enter satisfaction of decree does not suspend the decree-holder's cause of action for applying for execution of the decree.¹⁷

11. The institution by the plaintiff of a suit for possession does not suspend his cause of action for a suit for mesne profits.¹⁸

See also the undermentioned cases.¹⁹

12. **Fusion of interests of debtor and creditor.** — It is a general principle of law that when a fusion of the interests of the debtor and the creditor takes place, that is to say, when the interests both of the debtor and creditor become vested in the same person, the debtor must be held to have paid off his debt and hence, such a fusion of interests will amount in law to a satisfaction of the cause of action.¹ When, subsequently, there is a separation of the two interests, the person, on whom the interest of the creditor devolves, will have a fresh cause of action from the date of such separation of interests. Thus, where a mutt is in the position of a tenant and a temple in the position of landlord over such tenant and the same person is trustee both for the temple and the mutt, it must be held that the mutt pays to the temple the rent for the holding as and when it falls

16. ('19) 6 AIR 1919 Cal 706 (707) : 46 Cal 526 : 47 Ind Cas 398 (DB), *Deutsche Asiatische Bank v. Hira Lall Burdhan and Sons*. ("Even if there should be any Common law rule that would avail the plaintiff in such a " case we have here a statutory provision which would override such rule.")

17. ('22) 9 AIR 1922 Mad 79 (80, 82): 45 Mad 466: 70 Ind Cas 324 (DB), *Kuppusami Chettiar v. Rajagopala Iyer*.

18. ('27) 14 AIR 1927 All 446 (447, 451) : 102 Ind Cas 96 : 49 All 565 (DB), *Ram Charan Sahu v. Goga*.

19. ('49) 36 AIR 1949 Mad 255 (256) (DB), *Adhikesavalu v. Munuswami*. (Prior and puisne mortgagees — Mortgages by A in favour of B and then in favour of C—Private sale of mortgaged property by A in favour of B in satisfaction of his mortgage—Suit by C and sale in B's favour held invalid—Suit under S. 101, T. P. Act, by B on his mortgage against C — B could not get fresh cause of action on account of C's suit.)

('39) 26 AIR 1939 Bom 1 (8, 9, 17, 18) : I L R (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jivaji v. Gurunath Gouda*. (A, a stranger, in adverse possession of property against B — A suing B for declaration that B had no right to dispossess A and for injunction restraining B from interfering with his possession — Decision against A—Thereafter, B suing A for possession after more than twelve years of adverse possession by A—Held, that suit was barred by limitation which began to run when A's possession became adverse to B and not from the date of decision in suit by A against B.)

('24) 11 AIR 1924 Lah 40 (40, 41) : 71 Ind Cas 495 : 4 Lah 90 (DB), *Hukam Chand v. Shahab Din*. (A, a mortgagee, entitled to sue mortgagor for possession on certain date — Subsequently mortgagor dispossessed by prior mortgagee — Mortgagor again recovering possession — Held that in the circumstances of the case, A's cause of action was not suspended during the interval.)

('66) 6 Suth W R 269 (275, 276) (DB), *Khelut Chunder Ghose v. Tarachurn Koondoo Chowdhry*. (In a suit to recover possession of land under a mortgage deed, limitation will count as against the mortgagee from the date of default, and the pendency of a foreclosure suit will not prevent limitation from running.)

Section 9 — Note 12

1. ('16) 3 AIR 1916 Oudh 290(292):32 Ind Cas 729, *Abdul Hasan v. Mt. Jagwanta*.

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Notes 12-13

due. When, subsequently, another person becomes a trustee for the temple alone, he gets a fresh cause of action for the recovery of such rent. But his cause of action is not for its recovery as *rent* but as part of the temple property in the hands of the ex-trustee.² Similarly, where a debtor is executor under the will left by the creditor, the law will presume that he pays to the estate the debt due by him and limitation for a suit for the recovery of such debt will cease to run. When, subsequently, the legatee sues the executor for the debt, his cause of action is distinct and is for recovery of his *share in the assets* left by the deceased and not for the recovery of the *debt*. Such cause of action arises when his legacy falls due.³

After the execution of a mortgage, the interest of the mortgagee became vested in a Hindu lady who became entitled to a widow's interest in such mortgage right. The widow then transferred the mortgagee interest to A, in whom was vested also the equity of redemption. Subsequently, after the widow's death, the transfer by the widow was set aside and A sued for redemption. It was held that in computing the period of limitation for such suit, the period during which the mortgagee's interest was vested in A, under the transfer effected by the widow, could not be *excluded* as there was no provision in the Act for such exclusion. It was held further that as the mortgagee's interest, which became vested in A, was only the limited interest of a Hindu widow, there was no *fusion* of the interests of the mortgagor and mortgagee so as to furnish a fresh cause of action on the separation of the two interests.⁴

13. Agreement to refer dispute to arbitration, whether puts an end to cause of action. — Under paras. 18 and 22 of sch. II of the Civil Procedure Code, now repealed by the Arbitration Act, X of 1940, an agreement to refer a matter to arbitration did not *bar* a suit in respect of such matter. Such agreement was merely a ground for *staying* such suit. Hence, where such an agreement was entered into in respect of a cause of action that had accrued, there

2. ('23) 10 AIR 1923 Mad 461 (462) : 72 Ind Cas 5 : 46 Mad 579 (DB), *Nataraja Desikar v. Govinda Rao*.

3. ('18) 5 AIR 1918 Mad 526 (528, 529) : 41 Ind Cas 605 (DB), *Lakshmi Narayana v. Venkata Subba Rao*.

('09) 4 Ind Cas 462 (465) (Cal), *Basir Ali v. Hafiz Nazir Ali*.

('08) 10 Bom L R 346 (349, 350, 351), *Yakub Ebrahim Sayani v. Bai Rahimat-bai*. (Section 10 applied.)

('07) 31 Bom 418 (428, 429) : 9 Bom L R 287, *Narrondas Ramji v. Narrondas Ramji*. (Principle applied where same person was one of the executors both in respect of will of the debtor, as well as that of the creditor.)

[See ('04) 31 Cal 519 (527, 529) : 8 Cal W N 500 (DB), *Administrator-General of Bengal v. Kristo Kaminee Dassee*. (Affirming ('98) 7 Cal W N 476, *Kristo Kamini v. Administrator-General of Bengal*.)]

('06) 33 Cal 1047 (1060, 1061) : 33 Ind App 165 : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 16 Mad L Jour 300 : 1 Mad L Tim 199 : 3 All L Jour 525 : 2 Nag L R 130 (PC), *Maniram Seth v. Seth Rup Chand*. (Principle applied to executor *de son tort*.)]

[But see ('09) 4 Ind Cas 283 (284, 285) (Bom), *Damodar Khimji v. Dayal Mawji*]

4. ('13) 19 Ind Cas 291 (293, 295, 296) : 35 All 227 : 40 Ind App 74 (PC), *Soni Ram v. Kanhaiya Lal*. (On appeal from 32 All 33 (DB), *Shiv Shankar v. Soni Ram*.)

was no *cessation* of such cause of action so as to affect the running of limitation.¹ The legal position is not changed under the Arbitration Act, X of 1940. (See S. 34 of the Act.)

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Notes 13-15

14. Limitation only applies to institution of proceedings and not their continuation. — As seen in Note 32 under section 3, limitation only applies to the institution of proceedings, and not their continuation.

Illustration.

After an execution sale was confirmed, the auction-purchaser applied for delivery of possession. Pending the application, a suit was filed by a third person claiming the property to be his and attacking the execution sale. The suit was decreed in the trial Court but dismissed by the appellate Court. In the meanwhile, the auction-purchaser's application was dismissed "for default." After the termination of the suit by the third party in favour of the auction-purchaser, he again applied for delivery of possession. It was held that, in the circumstances of the case, his subsequent application must be deemed as only an application to *continue* his original application and not as a *fresh* application and therefore the fact that the period of limitation under Art. 180 had expired at the date of the new application did not bar it.¹

15. Repeal of statute and running of limitation. — The rule that time that has once begun to run cannot stop is dependent on the continuance in force of the enactment under which time has been running. If the statutory pressure be removed by the total repeal of the Act, there is nothing to cause time to run against the creditor, unless the Legislature re-enact the old or substitute some new rule of limitation.¹

Suits against express trustees and their representatives.

10.* Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become

Section 10

* Act of 1877 : S. 10.

Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property, shall be barred by any length of time.

Section 9 — Note 13

1. ('17) 4 AIR 1917 Mad 892 (894): 35 Ind Cas 575 : 44 Mad 701 (DB), *Bollapragada Ramamurthi v Thammanna Gopayya*.
- ('21) 8 A I R 1921 Pat 166 (171, 172) : 6 Pat L Jour 273 : 61 Ind Cas 807 (DB), *Shaikh Abdul Rahim v. Mt. Barira*. (The proper test to see whether arbitration proceedings cause right to sue to be in suspense, is whether plaintiff could have brought an action notwithstanding the fact that arbitration proceedings were pending)
- [See however ('18) 4 AIR 1918 Mad 548 (549, 550), 41 Ind Cas 551 (DB), *Doraisami Padayachi v. Vaithilinga Padayachi*. (Prior to enactment of Para. 22, Sch. 2, G. P. O., such an agreement was a bar to a suit and affected the cause of action which revived on failure of the arbitration proceedings.)]

Section 9 — Note 14

1. ('35) 22 AIR 1935 Cal 333 (334, 335, 336) : 62 Cal 66 : 158 Ind Cas 191 (DB), *Jateendra Chandra v. Rebatee Mohan Das*.

Section 9 — Note 15

1. ('76) 1 Bom 295 (303, 304) , 1 Ind Jour 128 (DB), *Abdul Karim v. Manji*.

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vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

^a[For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof.]

a. This paragraph was inserted by S. 2 of the Indian Limitation (Amendment) Act, 1929 (I of 1929). [1-1-1929.]

Synopsis

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| <ol style="list-style-type: none"> 1. Analogous law. 2. Legislative changes. 3. Scope of the section. 4. "Property." 5. "Vested," meaning of. 6. "Trust," meaning of. 7. "Trust for a specific purpose." 8. Form of trust for specific purpose. 9. Alleged trustee must be owner of trust property. 10. Owner of property must be under obligation to hold it for another's benefit. 11. Obligation must arise out of confidence. 12. Trust must be one created by act of parties. See Note 7. | <ol style="list-style-type: none"> 13. Instances of trust for specific purpose. 14. Mortgagee in possession after the mortgage has been discharged is not a trustee. 15. Benamidar is not trustee. 16. Executor or administrator not specific trustee. 17. Trustee de son tort, whether specific trustee. 18. Deposit of money. 19. Deposit of specific moveable property. 20. "Legal representative," meaning of. 21. "Assigns (not being assigns for valuable consideration)." |
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Act of 1871 : S. 10.

Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his representatives for the purpose of following in his or their hands such property, shall be barred by any length of time.

Explanation. — A purchaser in good faith for value from a trustee is not his representative within the meaning of this section.

Act of 1859 : S. 2.

2. No suit against a trustee in his lifetime, and no suits against his representatives for the purpose of following in their hands the specific property which is the subject of the trust, shall be barred by any length of time; but no suit to make good the loss occasioned by a breach of trust out of the general estate of a deceased trustee shall be maintained in any of the said Courts unless the same is instituted within the proper period of limitation according to the last preceding section, to be computed from the decease of such trustee: Provided that nothing herein contained shall prevent a co-trustee from enforcing against the estate of a deceased trustee, any claim for contribution if he shall institute a suit for that purpose within six years after such right of contribution shall have arisen.

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| <p>22. "For the purpose of following in his or their hands such property or the proceeds thereof."</p> <p>23. Suit for account.</p> <p>24. Persons entitled to benefit of section.</p> <p>25. Property comprised in Hindu or Muhammadan religious or charitable endowment, whether</p> | <p>property vested in trust for a specific purpose.</p> <p>26. Property comprised in Parsi religious endowment.</p> <p>27. Limitation for suits for recovery of trust property from strangers.</p> <p>28. Limitation for suits against trustees by operation of law.</p> |
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TOPIC INDICATOR

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| <p>Adverse possession. See Notes 27 and 28.</p> <p>Case covered by S. 10—Article 98 will not apply. See Note 3.</p> <p>Section applies to express trust only. See Notes 6, 7, 11, 13 and 17.</p> <p>Suit for office or removal of trustee. See Note 22.</p> <p>Who are not trustees —</p> <p>Banker of deposit. See Notes 11 and 18.</p> | <p>Directors of company. See Note 9.</p> <p>Government. See Note 9.</p> <p>Guardian and ward or minor. See Note 9.</p> <p>Manager of religious endowment. See Note 9.</p> <p>Receiver. See Note 9.</p> <p>Shebait or mahant or dharmakarta. See Note 6.</p> <p>Solicitors and agents. See Notes 9, 11 and 18.</p> |
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1. Analogous law.—The effect of the analogous provisions of the English statutes of limitation as to suits against express trustees has been summarized in Halsbury's Laws of England¹ as follows :

"The fact that the defendant is an express trustee for the plaintiff will prevent the action from being barred by lapse of time, whether the claim is to recover land, or personal estate, or is in respect of a breach of trust, if the defendant still retains the property or has converted it to his use or if the claim is founded on fraud. In other cases, the existence of an express trust does not prevent the action being barred by lapse of time and in the case of money (including a legacy) charged on land, or arrears of interest on money so charged, or arrears of rent, the mere existence of an express trust does not prevent time running."

2. Legislative changes.

Differences between Acts of 1859 and 1871 :

- (a) The corresponding section (viz., S. 2) of the Act of 1859 referred to a suit against a *trustee*, whereas the section in the Act of 1871 referred to a suit against "*a person in whom property has become vested in trust for a specific purpose.*"
- (b) The section in the Act of 1859 spoke of a suit against a trustee *in his lifetime*. The words "*in his lifetime*" were omitted in the later Act.
- (c) The section in the Act of 1859 as well as that in the Act of 1871 covered suits against *representatives* of the trustee (in addition to suits against *trustees*). But the section in the Act of 1871 contained an explanation to the effect that a purchaser in good faith for value from a trustee was not his representative within the meaning of the section, so that the exemption from limitation under the section would not apply to a suit against such a purchaser. There was no such express provision in the

Section 10 — Note 1

1. Halsbury's Laws of England, Second Edition, Vol. 20, page 749.

Section 10
Notes 2-3

Act of 1859. But, s. 5 of the Act clearly implied that a suit against a purchaser in good faith for value from a trustee was not exempt from limitation. (See S. 5 which is reproduced under Article 134.)

Differences between Acts of 1871 and 1877 :

As seen already, the section in the Act of 1871 covered (in addition to suits against trustees) suits against the *representatives* of the trustee and there was an explanation to the section which excluded from the category of such "representatives" a purchaser in good faith for value from a trustee. In the Act of 1877, the words "legal representatives or assigns (not being assigns for valuable consideration)" were substituted for the word "representatives" which occurred in the Act of 1871, and at the same time, the explanation which occurred in the previous section was omitted. The result of this change was that in the case of suits against transferees of the trust property from the trustee, the section applied only where the transfer was *gratuitous*. The section did not apply if the transfer was for *valuable consideration* irrespective of the question whether the transferee was a transferee in *good faith*. But under the previous law, the section was applicable not only to *gratuitous* transferees but also to transferees for *consideration* who were not transferees in *good faith*.

Differences between Acts of 1877 and 1908 ;

Whereas the previous section referred in terms only to a suit for the purpose of *following the trust property* in the hands of the trustee or his representative, the section was widened so as to include also suits for following the proceeds of trusts property or for an *account* of such property or proceeds. The amendment set at rest the conflict of decisions which obtained under the Act of 1877 as to whether a suit for *accounts* was within the section. (See Note 23.)

Amendment after 1908 :

By Act I of 1929, the second paragraph of this section was added. (See Note 25.)

3. Scope of the section.—This section grants a *total* exemption from the bar of limitation in regard to the suits mentioned therein.¹ The conditions for the applicability of the section are as follows :

Section 10 — Note 3

1. ('48) 35 AIR 1948 P C 168 (174): Pak L R (1949) Lah 1 (PC), *Beli Ram & Bros. v. Mohd. Afzal*.
- ('46) I L R (1946) 2 Cal 447 (481) : 51 Cal W N 383 (409, 410), *Goyal Jiu v. Baldeo Narain*. (Where properties have been conveyed to trustees upon express trust for a deity and the trustees fraudulently put an end to the trust and divide the properties amongst themselves, S. 10 of the Limitation Act applies to a suit to recover the properties.)
- ('26) 13 AIR 1926 Pat 321 (324) : 94 I. C. 433 : 5 Pat 539 (DB), *Mt. Khursaidi Begum v. Secy. of State*.
- (1864) 1864 Suth W R (Gap) 171 (172) (DB), *Buzl Rahim v. Lutafut Hossein*.
- ('82) 6 Mad 54 (59) : 6 Ind Jur 629 (DB), *Virasamy Nayudu v. Subba Rao*.
- ('35) 22 AIR 1935 Nag 35 (42) : 31 Nag L R 188 : 157 Ind Cas 17 (DB), *Ram Swaroop v. Thakur Ramchandraji Mandir*.

- (1) There must be property which has become vested in a person in trust for a specific purpose.
- (2) The suit must be against such person or his legal representatives or assigns (not being assigns for valuable consideration).
- (3) The suit must be for the purpose of following in the hands of such person the trust property or its proceeds or for an account of such property or proceeds.

Article 98 provides the period of limitation for a suit to make good from the estate of a deceased trustee the loss occasioned by a breach of trust. The words of this article may cover a suit against the legal representative of a trustee for following in his hands trust property or its proceeds or for an account of such property or proceeds. But, as the articles in the first schedule must be read subject to the provisions of sections 4 to 25 (*vide* S. 3), where a case is covered by this section, the above article will not apply and the suit will not be barred by any length of time.²

The undermentioned case³ makes a distinction between the meaning of the word "trustee" as used in this section and in Art. 98. Thus, it has been held that though a guardian appointed under the Guardians and Wards Act is not a person in whom the property of the ward is vested for a specific purpose within the meaning of this section he is a trustee within the meaning of Art. 98 and a suit for accounts against the legal representative of the guardian is governed by Art. 98. As regards the applicability of this section to arbitration proceedings see S. 3, Note 27 and the undermentioned case.⁴

4. "Property." — A trust does not necessarily import that the trustee is the owner of the *entire* interest in any property. Even a *limited* interest in property may be subject to a trust, so that such limited interest also may be *property* vested in trust within the meaning of this section. (See Notes 5 and 9.)

The rents of temple land received by the trustees of the temple from the cultivators would be property within the meaning of this section.¹

(11) 11 Ind Cas 447 (449) : 34 Mad 257: 38 Ind App 129 (PC), *Srinivasa Moorthy v. Venkatavarada Iyengar*.

(71) 14 Moo Ind App 289 (305) : 10 Beng L R 19 : 17 Suth W R 41 : 2 Suther 512 : 3 Sar 23 (PC), *Jugutmoheenree Dossee v. Sokheemonee Dossee*.

2. ('28) 15 AIR 1928 Bom 58 (59) : 107 I. C. 705 : 52 Bom 184 (DB), *Chintaman Raoji v. Khanderao Pandurang*. (('08) 32 Bom 394, *Bhurabhai v. Rurmani*, relied on.)

('38) 25 AIR 1938 Nag 90 (33) : I L R (1940) Nag 94 : 176 Ind Cas 57 (DB), *Mt. Sahaudra Bai v. Shree Deo Radha Ballabhji*.

See also Art. 98 Note 1.

3. ('49) 36 AIR 1949 Nag 235 (240) : ILR (1948) Nag 794 (DB). *Mirabai v. Kausalyabai*.

4. ('48) 35 AIR 1948 Nag 334 (337) : I L R (1947) Nag 477 (DB), *Fatechand v. Wasudeo Shrawan*. (It would be incorrect to urge that Ss. 4 to 25 would not apply to arbitration proceedings — Case before the passing of the Arbitration Act 1940.)

Section 10 — Note 4

1. ('43) 30 AIR 1943 Mad 691 (695) : ILR (1944) Mad 284 : 212 Ind Cas 518 (DB). *S. C. V. Devasthanam v. Chidambaram*. (The profits of a land are an accretion

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Note 5

5. "Vested," meaning of. — The expression "vested" in this section must be read along with the words "in trust for any specific purpose" which follow the expression. As will be seen in Note 9, the expression "trust for a specific purpose" necessarily implies the vesting of *ownership* in the alleged trustee.¹ Thus, where the trust is void the property cannot be said to have *vested* in trust for a specific purpose within the meaning of this section.^{1a} (See also Note 17.) But such ownership refers to the particular right or interest which is the subject-matter of the trust. The ownership need not be of the *entire* interest in any property. The subject-matter of trust may be a *limited* interest in property. Thus, a mere *right to possession* may be the subject of a trust and the owner of such a right will be a trustee if such right is vested in him for the benefit of another.² But, where a person in

to the land and stand in precisely the same position as property itself under S. 10 no distinction can be made between the property of the temple and the profits of that property which comes into the hands of the trustees.)

Section 10 — Note 5

1. ('46) 33 AIR 1946 Mad 519 (528) : ILR (1946) Mad 429 (DB), *Official Receiver v. Kulandaivelan*. (Where a banker accepts a deposit of trust money with notice of the trust, he does not become a trustee of the money in the strict sense of that expression and consequently a suit for recovery of the deposit by the cestui que trust will not be governed by S. 10, ('23) 10 A I R 1923 Mad 578 (DB), *Kishtappa v. Lakshmi Ammal*, held not good law.)
- ('43) 30 AIR 1943 Mad 691 (695) : I L R (1944) Mad 284 : 212 Ind Cas 518 (DB), *S. C. V. Devasthanam v. Chidambaram*. (Profits of temple land received by trustees of temple would be property belonging to the temple and not to the trustees and can vest in the trustees as such.)
[See ('39) 26 AIR 1939 Bom 126 (127) : I L R (1939) Bom 154 : 181 Ind Cas 375 (DB), *Malojirao v. Keshav*. (The words "vested in trust" if they do not necessarily imply a transfer of ownership in the strict sense, do, at any rate, imply something more than mere possession and temporary control.)
- ('38) 25 AIR 1938 Cal 673 (676) : I L R (1938) 1 Cal 652 : 181 Ind Cas 190, *Kalipada De v. Hari Dasi Dasi*.]
- 1a. ('42) 29 AIR 1942 P C 64 (66, 67) : 69 Ind App 137 : I L R (1942) Kar (PC) 166 : 203 Ind Cas 1 (PC), *Hem Chand v. Pearey Lal*. (Where a trustee has been in possession for upwards of 12 years, of property under a trust which is void under the law, an action against him by the rightful owner would be barred by limitation under the statute, the reason being that the possession of the trustee is as much adverse to the true owner as that of any trespasser.)
- ('41) 28 AIR 1941 Bom 307 (308) : 196 Ind Cas 821, *Fidahusseini v. Tyabally*. (A person who claims to be an heir of the settlor and claims to be entitled to the property on the ground that the trust deed was void is not a person claiming against a trustee holding the property for an express purpose. To such a case S. 10, Lim. Act does not apply.)
2. ('34) 21 AIR 1934 Cal 87 (89) : 150 Ind Cas 398 : 61 Cal 110 (DB), *Bibhu Bhusan Dutta v. Anadi Nath Dutt*. (While transfer of *proprietary rights* is not intended, mere transferring of management or control is not enough to satisfy the requirements of 'vesting' as contemplated by S. 10; a right to call for a transfer and to possess the property for the purposes of the trust and also power to dispose of it according to the terms of the trust without reference to the owner are the essentials that constitute the 'vesting'.)
- ('23) 10 AIR 1923 Mad 578 (579, 581) : 72 Ind Cas 842 (DB), *Kishtappa Chetty v. Lakshmi Ammal*. (The word 'vested' in S. 10 of the Limitation Act means no more than properly having control of the property.)

possession has no *right* to possession and is in possession merely as the agent or manager of another, he is not the owner of any interest or right in the property and no property can be said to be *vested* in him.³

A guardian of property appointed under the Guardians and Wards Act is not a person in whom the property is vested within the meaning of this section.⁴

6. "Trust," meaning of. — The expression "trust" is used in this section in a technical sense and denotes an obligation which would be a trust in the *strict* sense of the term under the law. Hence, the mere fact that a person is *loosely* called a trustee for the sake of convenience and has obligations analogous to those of a trustee will not make him a trustee under this section.¹ Thus, the *shebait* of an idol, the *mahant* of a *mutt*, the *dharmakarta* of a temple, etc., may be loosely called a trustee (*vide* Religious Endowments Act of 1863) and may have duties and obligations analogous to those of a trustee. Still, they would not necessarily have been trustees under this section but for the special provision enacted in the second paragraph of the section, which makes them "trustees" for the purpose of this section irrespective of the question of their fulfilling the character of a trustee in the strict sense of the term under the law.

The section contemplates a subsisting trust and does not apply to a case where a trust has been created but has been duly revoked.²

For the meaning of the expression "trust," see Note 1 under section 2 clause 11.

('26) 13 AIR 1926 Mad 109 (110, 112) : 91 Ind Cas 671 (DB), *Pachaiyappa Chetti v. Sivakami Ammal*. (('22) 9 AIR 1922 Mad 57 : 45 Mad 415 (DB), *Krishna v. Lakshmi*, distinguished.)

('35) 62 Cal 393 (398), *Mahomed Habeeb Alum v. Anjuman Ara Begum*.

In the above four cases, the facts are also consistent with the view that the ownership of the property itself and not merely a right of possession becomes vested in the alleged trustee.

('72) 4 N W P H C R 33 (34) (DB), *Soomrun Rai v. Mahesh Dutt*.

3. ('47) 34 AIR 1947 Sind 187 (188, 189) : ILR (1947) Kar 109 (DB), *Khemchand v. Girdharidas*. (Minor's property — Defendant merely asked to manage and control such property—No intention to vest property in defendant.)

('34) 21 AIR 1934 Cal 87 (89) : 61 Cal 119 : 150 Ind Cas 398 (DB), *Bibhu Bhusan Dutta v. Anadi Nath Dutt*.

('35) 62 Cal 393 (397), *Mahomed Habeeb Alum v. Anjuman Ara Begum*.

See also Trusts Act, S. 90, illustration (a) which shows that a lessee may be under an obligation in the nature of a trust.

4. ('49) 36 A I R 1949 Nag 235 (240) : I L R (1948) Nag 794 (DB), *Mirabai v. Kaushalyabai*. (Though he is a trustee within the meaning of S. 2 (11).)

Section 10 — Note 6

1. ('22) 9 AIR 1922 P C 123 (130, 131) : 65 Ind Cas 161 : 48 Ind App 302 : 44 Mad 831 (PC), *Vidya Varuthi Thirtha Swamigal v. Baluswami Iyyar*.

('28) 15 AIR 1928 All 689 (694, 696) : 114 Ind Cas 734 (DB), *Rengacharya v. Guru Revti Raman Acharya*.

2. ('09) 1 I. C. 347 (348) (DB) (All), *Syed Zakir Ali v. Mt. Umatul Habib Begum*.

('25) 12 AIR 1925 Pat 68 (89, 92) : 93 Ind Cas 454 (FB), *Harihar Prasad Singh v. Kesho Prasad Singh*.

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Note 7

7. "Trust for a specific purpose." — In *Khaw Sim Tek v. Chuah Hooi Gnoh Neoh*,¹ which was a case under S. 10, Straits Settlements Ordinance, VI of 1896, corresponding to this section, their Lordships of the Privy Council observed as follows :

"A 'specific purpose,' within the meaning of S. 10, must, in their Lordships' opinion, be a purpose that is either actually and specifically defined in the terms of the will or settlement itself, or a purpose which, from the specified terms, can be certainly affirmed."

This was followed in the undermentioned cases.²

It follows from the above that the expression "specific purpose" in this section simply means a purpose which is specified or expressed;³ and is merely a more expanded mode of expressing the idea conveyed by the expression "express trust" in English law,⁴ namely, a trust created *by the act of a party*.

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1. ('22) 9 AIR 1922 P C 212 (214) : 49 Ind App 37 : 102 Ind Cas 832 (PC).
2. ('43) 30 AIR 1943 Mad 691 (694, 695) : I L R (1944) Mad 284 : 212 Ind Cas 518 (DB), *S. C. V. Devasthanam v. Chidambaram*. (The dedication of property to a temple generally, i.e., for conducting of *pujas* and ceremonies and the upkeep of the temple is sufficiently specific to satisfy the requirements of S. 10.)
- ('38) 25 AIR 1938 Cal 673 (676) : I L R (1938) 1 Cal 652 : 181 Ind Cas 190, *Kali Pada De v. Hari Dasi Dasi*.
- ('34) 21 AIR 1934 Cal 87 (89) : 61 Cal 119 : 150 Ind Cas 398 (DB), *Bibhu Bhusan Dutta v. Anadi Nath Dutt*.
- ('27) 14 AIR 1927 Bom 398 (398) : 103 Ind Cas 418 (DB), *Mahomedsa Kadirsa v. Kadirsa Hajisa*.
- ('23) 10 AIR 1923 Mad 667 (670) : 46 Mad 259 : 74 Ind Cas 785 (DB), *Secretary of State v. Radhika Prasad*.
- ('31) 18 AIR 1931 P C 9 (12) : 8 Rang 645 : 130 Ind Cas 609 : 58 Ind App 1 (PC), *Annamalai Chettiar v. Muthukaruppan Chettiar*.
3. ('12) 17 Ind Cas 689 (695) : 37 Bom 447 (DB), *Md. Ibrahim v. Abdul Latif*.
- ('22) 9 AIR 1922 P C 212 (214) : 49 Ind App 37 : 102 Ind Cas 832 (PC), *Khaw Sim Tek v. Chuah Hooi Gnoh Neoh*.
- ('14) 1 AIR 1914 Sind 81 (82) : 8 Sind L R 132 : 27 I. C. 332, *Lekhraj Visumal v. Assamal Tarumal*. ("Will" creates trust in favour of heir of the residue—Obiter.)
- ('79) 4 Cal 455 (465, 470) : 3 Cal L R 315 : 2 Shome L R 153 (DB), *Kherodemony Dossee v. Doorgamoney Dossee*. (Affirming ('78) 2 Cal L R 112, *Kherodemony v. Doorgamoney*.)
4. ('46) 33 AIR 1946 Bom 131 (132, 133, 134) : 1 L R (1945) Bom 1047, *Soonderdas v. Laxmibai*.
- ('41) 28 AIR 1941 Mad 841 (845) : 200 Ind Cas 357, *Palaniappa v. Nachiappa*, (Nattukottai Chetties — Money deposited with person at time of marriage of daughter — Express trust created in favour of children of marriage.)
- ('08) 32 Bom 394 (399) : 10 Bom L R 540 (DB), *Bhurabhai v. Bai Ruxmani*.
- ('30) 17 AIR 1930 All 96 (97) : 124 Ind Cas 18, *Lachhmi Prasad v. Ganesh Din*.
- ('25) 12 AIR 1925 Rang 289 : 3 Rang 206 (DB), *Ma Thein May v. U. Po Kin*, distinguished.)
- ('82) 4 All 187 (189) : 1882 All W N 3 (DB), *Barkat v. Daulat*.
- ('27) 14 AIR 1927 Bom 424 (425) : 103 Ind Cas 225, *Jamnadas Gordhandas v. Damodardas Chunilal*.
- ('21) 8 AIR 1921 Cal 571 (572) : 58 Ind Cas 877 (DB), *Biswambar Halder v. Giribala Dasi*.
- ('29) 16 AIR 1929 Lah 753 (757) : 122 Ind Cas 467 : 11 Lah 325 (DB), *H. P. Robson v. Administrator-General of Punjab*.
- ('23) 10 AIR 1923 Lah 58 (59, 60) : 71 Ind Cas 899 (DB), *The Bank of Multan Ltd. v. Hukam Chand*.

The expression will not apply to a trust arising by *operation of law*.⁵ For, in such cases, the purpose of the trust is not specified but

- (07) 1907 Pun W R No. 173 p. 782 (787) : 1907 Pun Re No. 132, *Gulzari Mal v. Kishan Chand*.
- (32) 19 AIR 1932 Mad 685 (686) : 139 Ind Cas 164 (DB), *Subbiah Chetty v. Visalakshi Achi*.
- (23) 10 AIR 1923 Mad 578 (579, 581) : 72 Ind Cas 842 (DB), *Kishtappa Chetty v. Lakshmi Ammal*.
- (22) 9 AIR 1922 Mad 57 (59) : 45 Mad 415 : 66 Ind Cas 858 (DB), *Krishnan Pattar v. Lakshmi*.
- (29) 16 AIR 1929 Nag 298 (302) : 116 Ind Cas 70, *Gourishankar v. Ibrahim Ali*.
- (18) 5 AIR 1918 Bom 183 (184) : 40 I.C. 19 (DB), *Ramacharya v. Shrinivasacharya*.
5. (46) 33 AIR 1946 Bom 131 (132, 133, 134) : ILR (1945) Bom 1047, *Sonderdas Thakersey v. Bai Laxmibai*. (Section 10 does not apply in the case of a person whom the law looks upon as a trustee because he has to discharge certain obligations in the nature of a trust.)
- (43) 30 AIR 1943 Mad 691 (695, 696) : ILR (1944) Mad 284 : 212 Ind Cas 518 (DB), *S. C. V. Devasthanam v. Chidambaram*. (The rules of equity that a person who received money while in a fiduciary relationship to the person for whom he received it was to be treated as an express trustee cannot be imported into S. 10. (23) 10 AIR 1923 Mad 578 (DB), *Kishtappa v. Lakshmi Ammal* dissent.)
- (22) 9 AIR 1922 Mad 57 (58, 59) : 45 Mad 415 : 66 I C 858 (DB), *Krishnan Patter v. Lakshmi*. (Sale in name of A reciting that it was on behalf of B — Trust is only a constructive one and S. 10 does not apply.)
- (39) 26 AIR 1939 Mad 722 (723) : 189 Ind Cas 316 (DB), *Chandra Kesavalu v. Perumal Chettiar*. (Section has no application to constructive trusts or obligations in the nature of trust where there is no transfer of ownership.)
- (38) 25 AIR 1938 Cal 673 (676) : ILR (1938) 1 Cal 652 : 181 Ind Cas 190, *Kali Pada De v. Hari Dasi Dasi*. (Trusts which have not been declared by any specific words but which the law would imply from the existence of particular facts or fiduciary relations are excluded from the operation of the section.)
- (12) 17 Ind Cas 689 (695) : 37 Bom 447 (DB), *Md. Ibrahim v. Abdul Latif*.
- (14) 1 AIR 1914 Sind 81 (82) : 27 Ind Cas 332 : 8 Sind L R 132, *Lekhraj Visu-mal v. Assamal Tarumal*.
- (79) 4 Cal 897 (917) : 4 Cal L R 193 : 4 Ind Jur 287 (DB), *Greender Chunder Ghose v. Makintosh*.
- (30) 17 AIR 1930 All 96 (97) : 124 Ind Cas 18, *Lachhmi Prasad v. Ganesh Din*, (The words "for any specific purpose" merely indicate an express trust, i. e., a trust that is not constructive or one arising by implication of law or such that there is no doubt as to its specified terms nor any uncertainty as to affirming them.)
- (28) 15 AIR 1928 All 689 (696) : 114 Ind Cas 734 (DB), *Rangacharya v. Guru Reoti Raman Acharya*. (Express trust contemplates the vesting of the property in certain person on trust either declared in explicit terms or otherwise stated in language indicative of the fact that the legal and beneficial ownership is held by different juridical entities. Hence, in absence of any evidence, written or verbal to prove the existence of such express trust, section does not apply.)
- (82) 4 All 187 (189) : 1882 All W N 3 (DB), *Barkat v. Daulat*.
- (08) 32 Bom 394 (399) : 10 Bom L R 540 (DB), *Bhurabhai v. Bai Ruxmani*.
- (95) 19 Bom 352 (359), *Dorabji Jehangir Randiva v. Muncherji Bomanji*.
- (21) 8 AIR 1921 Cal 571 (572) : 58 Ind Cas 877 (DB), *Bishwambar Halder v. Giribala Dasi*.
- (29) 16 AIR 1929 Lah 753 (757) : 122 Ind Cas 467 : 11 Lah 325 (DB), *H. P. Robson v. The Administrator-General of Punjab*.
- (27) 14 AIR 1927 Lah 773 (774) : 105 Ind Cas 721 (DB), *Mt. Kishan Dei v. Ram Chand*. (The defendant took possession of plaintiff's father-in-law's estate, on the death of the said father-in-law — Section 10 did not apply.)

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has to be deduced by applying the provisions of the law to the facts and circumstances of the case.⁶

There is also an alternative way in which the expression "trust for specific purpose" may be identified with an express trust or trust created by act of parties.

In the explanation suggested above, the word "specific" is treated as equivalent to *specified* and the word "purpose" is taken to refer to the person or cause intended to be benefited. A different meaning can be attributed to these two words and the same result may be arrived at. The word "specific" may be taken to have been used in contradistinction with the word "general;" and the word "purpose" may be taken to stand for the *object with which* the trust is created as distinguished from the object which is *intended to be benefited*.^{6a} In this view also, a trust created by act of parties will be a trust for a specific purpose, while a trust arising by operation of law will be a trust for a *general purpose*. The reason is that in the former case, the author's object or the view with which he creates the trust is specific inasmuch as it is directed to a particular person or cause. But, in the case of a trust arising by operation of law, the aim, of the law giving authority is not *specific* in the above sense, it not being conceived

('23) 10 AIR 1923 Lah 58 (59, 60) : 71 Ind Cas 890 (DB), *Bank of Multan Ltd. v. Hukam Chand*. (Section 10, Limitation Act, does not apply to directors of companies as they are not persons in whom the property of the company is vested.)

('07) 1907 Pun W R No. 173 p. 782 (787) : 1907 Pun Re No. 132, *Gulzari Mal v. Kishan Chand*.

('32) 19 AIR 1932 Mad 685 (686) : 139 I C 164, *Subbiah Chetty v. Visalakshi Achi*.

('23) 10 AIR 1923 Mad 578 (579) : 72 Ind Cas 842 (DB), *Kishtappa Chetty v. Lakshmi Ammal*.

('21) 8 AIR 1921 Mad 125 (125) : 44 Mad 277 : 61 Ind Cas 907 (DB), *Rajah Rajeswara Dorai v. Ponnusami Tevar*. (Money paid by trustee to creditor in breach of trust—Creditor receiving with knowledge of breach—Suit to recover money from creditor—Section 10 does not apply.)

('29) 16 AIR 1929 Nag 298 (302) : 116 Ind Cas 70, *Gourishankar v. Ibrahim Ali*. (*N* in possession of property of *K*—Contract by *K* of sale of property to *M*—Subsequently *K* selling it to *N*—*Held N* takes possession in his own rights and not under any express trust for benefit of *M* merely because *N* has notice of his prior contract of purchase.)

('25) 12 AIR 1925 Pat 68 (87) : 93 Ind Cas 454 (FB), *Harihar Prasad Singh v. Kesho Prasad Singh*. (*A* directs *B* to acquire property for him and furnishes some money—Afterwards *A* withdraws from the venture completely—*B* continues his exertions and acquires the property—There is only a constructive trust.)

('21) 61 Ind Cas 393 (393) (DB) (Lah), *Shamsal Nisa v. Yakub Bakhsh*. (It cannot be said that the co-sharers in possession have been holding the profits "in trust for a specific purpose".)

('11) 12 Ind Cas 225 (231, 232) : 36 Bom 214, *Casamali v. Currimbhoy Ebrahim* (('78) 4 Cal 455 (DB) *Kherodemoney v. Doorgamoney* explained.)

6. Lewin's Law of Trusts," 12th Edition, page 1125.

Snell's "Principles of Equity," 12th Edition, page 127.

6a. ('79) 4 Cal 897 (918, 923) : 4 Cal L R 193 : 4 Ind Jur 287 (DB), *Greender Chunder Ghose v. Mackintosh*. (('78) 4 Cal 455 (DB) *Kherodemoney v. Doorgamoney*, followed.)

with reference to any particularised individual or cause but only in a *general* way. For, in providing that a trust shall arise in favour of such and such persons where such and such circumstances exist, it is not the aim of the law giving authority to confer a benefit on any particular individual or cause. The aim is simply to benefit all persons or objects in *general* where certain circumstances exist without any reference to any particular person or object.

But, the former view is the one which has been accepted and followed in the bulk of the decisions bearing on this section.

Illustrations.

1. *A* transfers certain property to *B* without declaring any trust but, at the same time, without intending that the transfer should be for the benefit of *B*. Under these circumstances, *B* will be a resulting trustee for *A* in regard to the property.⁷ The trust will not be one for a *specific purpose* as it would be one arising by operation of law.⁸

2. *A* contracts to sell his immovable property to *B*. *C* buys the property from *A* although he has notice of such a contract. Under these circumstances, the law makes *C* a trustee for *B*.⁹ But as the trust arises by *operation of law* and not by act of parties, it is not a trust for a specific purpose within the meaning of this section.¹⁰

3. Where money which ought to be received by *A* is received by *B*, *B* will only be a *constructive* trustee for *A* under the law in regard to such money. Thus, where on partition of joint family properties between *A* and *B*, a debt due from *C*, a third party, is allotted to *A* but is subsequently received by *B*, the latter will be a *constructive* trustee for *A* in respect of such debt. This section does not apply to such a trust.¹¹

4. Where property is transferred to *A* for a consideration paid by *B* who did not intend to pay such consideration for the benefit of the transferee, *A*, the latter is a *constructive* trustee for *B*, because the law raises a trust in such cases. But such a trust will not be one for a specific purpose under this section.¹² As S. 2 cl. 11 expressly excludes a benamidar from the category of "trustees," *A*, in the above case, will not even be a *trustee* under this Act, though ordinarily he will be a *constructive* trustee.

7. See Trusts Act, Section 81.

('77) 1 All 403 (409) (DB), *Param Singh v. Lalji Mal*.

8. ('36) 23 AIR 1936 Bom 30 (33, 34) : 160 Ind Cas 612 (DB), *Shirimbai Dinshaw v. Navroji Pestonji*. (1889) 42 Ch D 312 *Churcher v. Martin*, relied on.)

9. See Trusts Act, Section 91 and Specific Relief Act, Section 3, Illustration (g).

10. ('29) 16 AIR 1929 Nag 298 (303) : 116 I C 70, *Gourishankar v. Ibrahim Ali*. [See ('31) 18 AIR 1931 P C 196 (202) : 58 Ind App 279 : 10 Pat 851 : 133 Ind Cas 705 (PC), *Chhatra Kumari Devi v. Mohan Bikram Shah*. (Testator contracting with *A* that he will bequeath all his properties to him but afterwards bequeathing them to *B*—*B* is not trustee for specific purpose for *A*.)]

11. ('83) 6 Mad 402 (403) (DB), *Arunanchalla Pillai v. Ramasamy Pillai*.

('96) 24 Cal 309 (315) (DB), *Banoo Tewary v. Doona Tewary*. (If after partition of the family, one of the members collects any money belonging to all the members, he is not a trustee for the others in respect of the money.)

12. ('22) 9 AIR 1922 Mad 57 (58, 59) : 66 Ind Cas 852 : 45 Mad 415 (DB), *Krishna Patter v. Lakshmi*.

('16) 3 AIR 1916 Mad 524 (525) : 28 Ind Cas 495 (DB), *Narayanan v. Rangasami*.

('84) 7 All 25 (27) : 1884 All W N 219 (DB), *Muhammed Habibullah v. Safdar Husain*. (Joint purchase by two persons—One of them paying his share of consideration subsequently—Other not specific trustee.)

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5. *A* is express trustee for *B, C*, with notice of the trust, takes a mortgage of the trust property and receives from *A* interest on the mortgage. *C* is only a constructive trustee for *B* in regard to the interest received by him.¹³

6. Where one of several co-owners of immovable property receives the rents and profits of the property, he is (if a trustee at all) only a constructive trustee for the other co-owners in respect of such rents and profits.¹⁴

7. Where property is held by a donee under a deed of gift voidable on account of its being executed under undue influence it is not a case of property which has become 'vested in trust for a specific purpose' and this section has no application to such a case.^{14a}

See also the undermentioned cases.¹⁵

13. ('21) 8 AIR 1921 Mad 125 (126) : 61 Ind Cas 907 : 44 Mad 277 (DB), *Rajah Rajeswara Dorai v. Ponnusamy Tevar*.

14. ('21) 61 Ind Cas 393 (393) (Lah), *Mt. Shamsul Nisa v. Yakub Bakhsh*.

('21) 8 AIR 1921 Cal 571 (572) : 58 Ind Cas 877 (DB), *Biswambar Halder v. Giribala Dasi*. (Karta of Hindu joint family not express trustee.)

('89) 16 Cal 161 (169) : 15 Ind App 220 : 5 Sar 224 : 12 Ind Jur 416 (PC), *Mahomed Abdur Kadir v. Amtal Karim Banu*. (The sons, by reason of their having managed their late father's estate, should not be regarded as trustees.)

('15) 2 AIR 1915 All 12 (13, 14) : 37 All 233 : 27 Ind Cas 712 (DB), *Amina Bibi v. Najmunissa*. (One heir recovering mortgage money on behalf of all heirs of a deceased person - No specific trust.)

[See however (1864) 1864 Suth WR (Gap) 377 (378) (DB), *Bacharam Chowdhry v. Mahatab Beebee*. (Under Act of 1859 it was held that he was a trustee within Section 2 of the Act.)]

Co-sharer in village in U. P. and Punjab absconding leaving his land — Another co-sharer taking possession of such land — Entry in village papers that the land would be returned to the absconding co-sharer on his return — There is no specific trust :

('79) 2 All 394 (396) (DB), *Piarey Lal v. Saliga*. (Suit against purchaser from co-sharer.)

('79) 2 All 460 (463, 464) (DB), *Kamal Singh v. Batul Fatima* (Do.)

('80) 2 All 493 (495, 496) (DB), *Harbhaj v. Gumani*. (The village administration paper could not be regarded as evidence of a pre-existing trust between co-sharers, nor as an admission of such a trust by such occupiers.)

('81) 3 All 458 (464, 466) (DB), *Sardar Sainey v. Piran Singh*. (Per Spankie, J.)

('82) 4 All 187 (189, 190) : 1882 All W N 3 (DB), *Barkat v. Daulat*.

('09) 3 Ind Cas 599 (599) : 1909 Pun Re No. 85 (DB), *Dhan Singh v. Har Narain*. (1871 Pun Re No. 5 and 1874 Pun Re No. 73 distinguished.)

('76) 1876 Pun Re No. 49, *Jaimal v. Yadu*.

[But see ('74) 1874 Pun Re No. 84, *Haji Ahmad v. Shekh Ahmad*.

('74) 1874 Pun Re No. 73, *Ghodar v. Gurbaksh*.

('71) 1871 Pun Re No. 5, *Ruldo v. Kaisara Singh*.]

14a. ('45) 32 AIR 1945 P O 54 (56) 72 Ind App 21: I L R (1945) Bom 440 : I L R (1945) Kar (PC) 115 : 220 Ind Cas 28 (PC), *Ramchandra v. Larman*.

15. ('17) 4 AIR 1917 Pat 608 (609) : 41 Ind Cas 533 (DB), *Sheo Narain Ojha v. Ram Jatan Ojha*. (Sale of equity of redemption contrary to O. 34 R. 14, O. P. C. — Suit for redemption by mortgagor — Section does not apply.)

(1900) 24 Bom 23 (28, 30) : 1 Bom L R 472 (DB), *Secretary of State v. Sakharam*. (Assumption of the control or possession of a khoti village for nearly fifty years — Suit for the recovery of the possession of the village by Sardesais brought after the period — No specific trust.)

('31) 18 AIR 1931 P C 9 (12) : 58 Ind App 1 : 8 Rang 645 : 130 Ind Cas 609 (PC), *Annamalai Chettiar v. Muthukaruppan Chettiar*. (Mere liability in equity to account for moneys received is not trust for specific purpose.)

('85) 8 Mad 525 (532) : 12 Ind App 120 : 4 Sar 644 : 9 Ind Jur 275 (PC), *Viziaramarazu v. Secretary of State*. (Where a person is convicted for treason and Government takes possession of certain property which was in his possession as

Where, *on the face of the instrument* creating a trust, the purposes specified are not adequate to exhaust the property transferred in trust, it has been held in England that the author of the trust will be taken to have expressed a trust in respect of the balance also that such balance should be held by the trustees for the benefit of the author of the trust or of his heir at law or next of kin, and that consequently, the trust in respect of the balance is also an *express* trust.¹⁶ This view has been followed in this country also and the trust in respect of such balance is regarded as a "trust for a specific purpose" within the meaning of this section.¹⁷

But this principle will not apply where the trust *fails or is avoided* wholly or partly and the purpose expressed is defeated to that extent, with the consequence that a resulting trust arises by

forfeited property but really the property was of some other person, the Government is not a specific trustee with regard to such person.)

('25) 12 AIR 1925 Pat 68 (87) : 93 Ind Cas 454 (FB), *Harihar Prasad v. Kesho Prasad Singh*. (Where a person directs another to acquire property for him (the person directing) and furnishes some money for the purpose, but after sometime he withdraws from the venture completely but the person directed continues his exertions, and as their result, acquires the property, there is only a *constructive* trust and S. 10 does not apply.)

('16) 3 AIR 1916 Mad 415 (417) : 29 Ind Cas 168 (DB), *Ratna Bai v. The Official Assignee of Madras*. (View of Sadasiva Iyer J. in this case that an insolvent is, under statutory provisions, an express trustee for the Official Receiver is not correct.)

('20) 7 AIR 1920 Cal 363 (366, 373) : 47 Cal 377 : 55 Ind Cas 157 (FB), *Uttam Chandra Daw v. Raj Krishna Dalal*. (Sale of equity of redemption contrary to O. 34, R. 14, C. P. C. — Suit for redemption by mortgagor — Section does not apply.)

('27) 14 AIR 1927 Mad 1135 (1136) : 101 Ind Cas 89, *Chinnakannu Padayachi v. Paramasiva Mudaliar*. (Do.)

16. (1838) 1 Dr & Wal 668 : 56 R R 222, *Salter v. Cavanagh*.

(1890) 59 L J Q B 7 (11) : 61 L R 686 : L R 24 Q B D 128, *Patrick v. Simpson*

17. ('49) 36 AIR 1949 Mad 257 (259), *Syed Abbas v. Amir Hamiza*. (Surplus remaining after charitable purposes, to be distributed to descendants — Held there was trust in respect of this surplus also. Distribution of surplus in named proportion was specific purpose. Specific purpose includes a purpose which from the specified terms can be certainly affirmed.)

('77) 2 Bom 388 (415, 416) (FB), *Lallubhai Bapubhai v. Mankuvarbai*. (1 Dr & Wal 668, *Salter v. Cavanagh*, followed.)

('14) 1 AIR 1914 Sind 81 (82) : 8 Sind L R 132 : 27 I C 332, *Lekhraj Visumal v. Assamal Tarumal*. (The principle stated in 1 Dr & Wal 668 accepted but was held not to be applicable to trust created by deeds of composition.)

('97) 21 Bom 646 (664) (DB), *Vundravandas v. Gursondas*.

('10) 8 Ind Cas 635 (636, 637) : 35 Bom 49 (DB) (Bom), *Mojilal Premanand v. Gourishankar Khusha ji*. (21 Bom 646 followed.)

('22) 9 AIR 1922 P C 212 (214) : 49 Ind App 37 : 102 Ind Cas 832 (PC), *Khaw Sim Tek v. Chuah Hooi*.

[Compare S. 81 of the Trusts Act of 1882 and Illustration (b) to that section. The difference between the above Illustration and the case given above in the Note is that in the Illustration the author of the trust has not declared any intention as to the property transferred, whereas in the case given above, the author has clearly declared a trust in respect of the property transferred but has not specified the beneficiary with reference to a portion of the property. Under such circumstances, the inference is made that he *intended* that such portion must be held in trust for himself and his legal representatives.]

Section 10
Notes 7-9

operation of law in favour of the author of the trust or of his heir at law or of his next of kin. Such a trust is purely a creation of law and is, in fact, in *disregard* of the purpose specified by the author of the trust. This section will not apply to such cases.¹⁸

8. Form of trust for specific purpose. — No particular form is necessary to create a trust for a specific purpose.¹ That such a trust has been created can be gathered from facts and circumstances of the case.²

A transaction may be a trust although the trustee himself is partly entitled to the benefit of the trust.³

9. Alleged trustee must be owner of trust property. — A trust being, as has been seen in Note 1 to S. 2, cl. 11, an obligation annexed to the *ownership* of property, unless the alleged trustee is the

18. ('39) 26 AIR 1939 Rang 365 (369) : 1940 Rang L R 136 : 186 I.C. 210 (DB), *Daw Ein v. Daw Chan Tha*. (Trust declared invalid for want of registration—Suit for account of rents of property held under trust—Section does not apply.)
(22) 9 AIR 1922 P C 212 (214) : 49 Ind App 37 : 102 Ind Cas 832 (PC), *Khaw Sim Tek v. Chuah Hooi*.
(79) 4 Cal 455 (465, 470) : 3 Cal L R 315 : 2 Shome L R 153 (DB), *Kherode Monee Dossee v. Doorgamoney Dossee*. (Affirming ('78) 2 Cal L R 112, *Kherodemony v. Doorgamony*.)
(07) 31 Bom 222 (232, 233) : 8 Bom L R 328, *Mathuradas v. Vandrawandas*.
(36) 23 AIR 1936 Bom 30 (34) : 160 Ind Cas 612 (DB), *Shirinbai Dinshaw v. Nawroji Pestonji*.
(97) 21 Bom 646 (664, 665) (DB), *Vundrawandas v. Cursondas*.
(96) 20 Bom 511 (516, 517), *Cowasji Nowroji v. Rustomji Dossabhoy*.
(90) 14 Bom 476 (480, 481), *Nana Lal Lallubhoy v. Harlochand Jagusha*.
(12) 17 Ind Cas 689 (695) : 37 Bom 447 (DB), *Mohamad Ibrahim v. Abdul Latif*.
(('11) 36 Bom 214, *Cassamally v. Currimbhoy*, dissented from.)
(05) 7 Bom L R 324 (329), *Dady v. Advocate General*.
(82) 8 Cal 788 (800, 801) : 11 Cal L R 370 : 7 Ind Jur 17 (DB), *Hemangini Dasi v. Nobinchand Ghose*.
(07) 1907 Pun W R No. 173, p. 782 (787) : 1907 Pun Re No. 132, *Gulzari Mal v. Kishan Chand*.
(82) 4 Mad 404 (409), *Manickavelu Mudali v. Arbuthnot and Co*.
(94) 16 All 256 (258) : 1894 All W N 73 (DB), *Jasoda Bibi v. Permanand*. ('83) (6 All 1 (PC), *Balwant Rao v. Puran Mal* followed.)

Section 10 — Note 8

1. Lewin's "Law of Trusts," 12th Edition, pages 1125, 1126.
(36) 23 AIR 1936 Mad 876 (877) : 169 Ind Cas 362 (DB), *Vairavan Chetty v. Chettichi Achi*. (Hundi issued in defendant's favour for payment of debts of third person—Balance to be paid to third person—Such arrangement constitutes trust for specific purpose.)
(26) 13 AIR 1926 Mad 109 (110, 111) : 91 Ind Cas 671 (DB), *Pachaiyappa Chetty v. Sivakami Ammal*. (Registered instrument is not necessary for creating trust of money or moveable property.)
2. ('25) 12 AIR 1925 Pat 68 (89, 90) : 93 Ind Cas 454 (FB), *Harihar Prasad Singh v. Kesho Prasad Singh*.
(35) 62 Cal 393 (397), *Mahomed Habeeb Alum v. Anjuman Ara Begum*.
(26) 13 AIR 1926 Mad 109 (110, 111) : 91 Ind Cas 671 (DB), *Pachaiyappa Chetty v. Sivakami Ammal*.
3. ('27) 14 AIR 1927 Mad 1134 (1134) : 100 Ind Cas 506, *Kutty Pokker v. Ussan Mayan*. (('23) AIR 1923 Mad 667 (DB), *Secy of State v. Radhika Prasad* and ('18) AIR 1918 Mad 674 (DB), *Imbichi v. Achampat* followed.)
See definition of "trust" in Section 3, Trusts Act, 1882.

owner of the property to which the trust relates, there will be no trust and therefore no trust for a specific purpose.¹ But the subject-matter of a trust need not necessarily be the *entire* interest in any property. There may be a trust even in respect of a *limited* interest or right in property. Thus, even a right of possession may be vested in trust for another's benefit. (see Note 5.) But, it will be noted that even in such cases the trustee is the *owner* of the right which is the subject-matter of the trust. Where the alleged trustee is not the *owner* of the interest which is said to be subject to a trust, there can be no trust.

Illustrations.

1. A person who is merely in possession of property on behalf of another as his manager or agent is not a *trustee* for him in regard to the property.² The reason is that such a manager or agent is not the owner of any *interest* in regard to which he can be said to be a trustee.

Section 10 — Note 9

1. ('40) 27 AIR 1940 Pat 90 (91) : 186 Ind Cas 859 (DB), *Kamiruddin Khan v. Badrunnissa Bibi*.

('29) 16 AIR 1929 P C 77 (80) : 114 Ind Cas 565 (PC), *Hariram v. Madan Gopal* (Trust retains the actual ownership in the trustee.)

('22) 9 AIR 1922 P C 123 (126, 127) : 65 Ind Cas 161 : 48 Ind App 302 : 44 Mad 831 (PC), *Vidya Varuthi v. Balaswami Iyer*.

See also Section 3, Trusts Act, which defines trust as an obligation annexed to ownership of property.

See also Snell's "Principles of Equity," 11th Edition, page 51, where "trust" is defined as a beneficial interest in or beneficial ownership of real or personal property unattended with the legal ownership thereof.

See also Lewin in his treatise on the "Law of Trusts," 12th Edition, page 11, where he defines a trust as a confidence reposed in some other *annexed in privity to the estate of the land*.

See also Salmond's "Jurisprudence," 8th Edition, page 287.

2. See Salmond's "Jurisprudence," 8th Edition, page 287.

('48) 35 AIR 1948 Mad 76 (78) : I L R (1948) Mad 296 (DB), *The Western India Oil Distributing Co. v. Rathnasabapathy*. (Things supplied to agent to be returned on termination of agency—Property in things does not vest in agent but remains in principal.)

('47) 34 AIR 1947 Sind 187 (188, 189) : I L R (1947) Kar 109 (DB), *Khemchand v. Girdharidas*. (Person merely asked to manage and control minor's share in business.)

('41) 28 AIR 1941 Nag 181 (185) : I L R (1942) Nag 92 : 201 Ind Cas 220 (DB), *Shri Mahadeoji v. Baldeo Prasad*. (Property entrusted to A by a specific trustee for safe custody and management and eventual return is not property vested in A for a specific purpose.)

('40) 27 AIR 1940 Pat 90 (91) : 186 Ind Cas 859 (DB), *Kamiruddin Khan v. Badrunnissa Bibi*. (Persons by executing deed entrusting their property to another person for good management with powers to sell—Executants reserving to themselves power to sell or mortgage with manager's consent—Deed held did not vest property in manager as trustee—Suit for rendition of accounts held governed by Article 89 and not by Section 10.)

('38) 25 AIR 1938 Cal 673 (677) : I L R (1938) 1 Cal 652 : 181 Ind Cas 190, *Kali Pada De v. Hari Dasi Dasi*. (Where a person being unable to look after the properties himself left the management to his nephews who continued in management after his death, even if it be supposed that a fiduciary relationship was created under the circumstances after his death, such a relationship can by no stretch of language be deemed a trust for a specific purpose within the meaning of Section 10.)

Section 7 Note 9

2. The guardian of an infant who is in possession of the infant's property on the latter's behalf is not a trustee as he is not the *owner* of the property.³

3. Although the directors of a company are *quasi* trustees they are not trustees of the property of the company within the meaning of this section because the property of the company is not vested in such directors as *owners*.⁴

4. The statutory liability of the Government under the provisions of Bengal Act XI of 1859 to return to the owner of land sold for arrears of revenue the surplus proceeds of such sale, is not the liability of a *trustee* because the surplus sale proceeds do not vest in the Government as owner. The owner of the land continues to be the owner of such proceeds.⁵

5. When a Court of Wards takes charge of an estate, the Government does not become a trustee for the rightful owners because the *ownership* of the estate is not transferred to the Government in such cases.⁶

6. Property comprised in a Hindu or Mahomedan religious endowment is generally vested in the deity or the institution which is regarded as a juristic person capable of owning property. The manager of the endowment, although he may be called a trustee, is not really one in the eye of the law. Hence, a suit against such manager would not have fallen within the scope of this section but for the special provisions contained in the second paragraph of this section which makes such person a trustee for the purposes of this section. (See Note 25.)

(198) 1898 Pun Re No. 34, *The Rajah of Faridkot v. Sardar Gurdial Singh*. (Section 10 does not apply to suit brought against a khazanchi to recover moneys said to have been misappropriated by him from money in his charge—Such money is not vested in trust for any specific purpose with khazanchi.)

The following decisions under the Act of 1859 which seem to lay down a different view are not correct.

(176) 1876 Bom P J 124 (DB), *Bai Chandan v. Dulabhram*.

(1864) 1 Suth W R 126 (127) (DB), *Shaw Gholam Nujjuff v. Toossodduck*.

(168) 10 Suth W R 174 (174) : 1 Beng L R (S N) 11 (d) (DB), *Narain Dass v. Mahatab Chunder*.

3. (149) 36 AIR 1949 Nag 235 (240) : ILR (1948) Nag 794 (DB), *Mirabai v. Kaushalyabai*. (Guardian appointed under the Guardians and Wards Act.)

(125) 12 AIR 1925 Rang 289 (289, 290) : 3 Rang 206 : 86 Ind Cas 297 (DB), *Ma Thein May v. U. Po Kin*. ((194) 18 Bom 119 (DB), *Kathiawar Trading Co. v. Virchand* followed.)

(137) 24 AIR 1937 Bom 334 (334 (335, 336) : 170 I C 647 : ILR (1937) Bom 636 (DB), *Kisandas Larmandas v. Godavaribai Govinddas*. (Court guardian is not express trustee—At the most he is a constructive trustee.)

[See also (115) 2 AIR 1915 All 121 (122) : 28 I C 861 (DB), *Mt. Munna Kunwar v. Venaik Ram*. (Doubted if time would run at all in favour of guardian.)]

[But see (115) 2 AIR 1915 Low Bur 132 (133) : 26 Ind Cas 700, *Maung Yin v. Ma Saw Myaing*. (Position of holder of certificate under Minors Act (Bengal Act 40 of 1858) is that of express trustee.)]

4. (138) 25 AIR 1938 Mad 60 (62) : 180 Ind Cas 462 (DB), *Venkatasubramania Ayyar v. Sivagurunatha Chettiar*.

(131) 18 AIR 1931 Mad 58 (59, 60) : 128 I C 477 : 54 Mad 153 (DB), *Narasimha Aiyangar v. Official Assignee of Madras* ((126) AIR 1926 Mad 109 (DB), *Pachaiyappa v. Sivakami*, distinguished.)

(124) 11 AIR 1924 Lah 435 (437) : 5 Lah 27 : 79 I C 740 (DB), *Daulat Ram v. Bharat National Bank Ltd., Delhi*.

(194) 18 Bom 119 (130, 131) (DB), *Kathiawar Trading Co. v. Virchand Dipchand*.

(123) 10 AIR 1923 Lah 58 (59, 60) : 71 I C 899 (DB), *The Bank of Multan Ltd. v. Hukam Chand*.

5. (191) 18 Cal 234 (240, 241) (DB), *Secy. of State v. Fazal Ali*. (Overruled in 20 Cal 51 (FB) on another point.)

(193) 20 Cal 51 (57, 60) (FB), *Secy. of State v. Guru Proshad Dhur*.

6. (182) 5 Mad 91 (105, 106) (FB), *Viziamarazu Virabahu v. Secy. of State*.

7. The manager of a Hindu joint family is not a trustee for the other members of the family as the shares of the latter are not vested in the manager as owner though he is entitled to manage the whole property.⁷ (See also Note 10.)

8. A receiver of property appointed by a Court is not a trustee as the title to the property does not vest in him and his possession is on behalf of the rightful owner.⁸

See also the undermentioned cases,⁹ and Notes 18 and 19.

10. Owner of property must be under obligation to hold it for another's benefit. — It is of the essence of a trust that a person who is the owner of property must be under an *obligation* to

7. ('21) 8 AIR 1921 Cal 571 (572) : 58 Ind Cas 877 (DB), *Biswambhar Halder v. Giribala Dasi*.

[See also ('40) 27 AIR 1940 Cal 51 (53) : ILR (1940) 1 Cal 183 : 186 Ind Cas 546 (DB), *Benoy Krishna v. Atul Krishna*. (Suit for accounts against karta of Dayabhaga joint family by a junior cosharer — S. 10 is not applicable.)]

8. ('42) 29 AIR 1942 Cal 483 (485) : ILR (1942) 1 Cal 577 : 202 Ind Cas 389 (DB), *Ram Chandra v. Baidynath*.

('26) 13 AIR 1926 Cal 385 (392, 393) : 52 Cal 914 : 90 I C 851 (DB), *Eastern Mortgage & Agency Co. v. Muhammad Fazlul Karim*.

[See also ('36) 23 AIR 1936 Mad 170 (170, 171) : 161 I C 843, *Sitaramaswamy v. Mahalakshamma*. (Receiver appointed by private arrangement between parties to litigation.)]

9. ('45) 32 AIR 1945 Sind 57 (68, 69) : ILR (1945) Kar 40 (DB), *Shamdas v. Gurmukhsing*. (Suit for declaration that certain properties were public, religious or charitable trust — Defendant found to have entered into possession as trespasser — Suit held governed by Art. 120 — Neither S. 10 nor S. 23 held applicable.)

('44) 31 AIR 1944 Oudh 139 (146) : 19 Luck 515 : 216 Ind Cas 276 (DB), *Ata Husain v. Husain Ali*. (Suit for declaration against defendants as rival beneficiaries and not as trustees — S. 10 does not apply — Art. 120 applies.)

('39) 26 AIR 1939 Bom 126 (128) : ILR (1939) Bom 154 : 181 I C 375 (DB), *Malojirao v. Keshav*. (*Ajhat gumastas* appointed for the purpose of collecting fees and emoluments and paying those over to the plaintiff, *Deshmukh* of the villages, are not trustees for specific purpose as the money collected does not vest in them.)

('39) 26 AIR 1939 Mad 722 (723) : 189 I C 316 (DB), *Chandra Kesavalu v. Perumal Chettiar*. (Vendor leaving a portion of purchase money in the hands of vendee for the purpose of paying the same to his minor son after he attains majority — There is no trust as the money does not vest in the vendee.)

('38) 25 AIR 1938 Mad 295 (297, 298), *Seshagiri Rao v. Venkataramayya Appa Rao Bahadur*. (The statutory right conferred on zamindar by S. 34, cl. (6) of the Madras Regulation (28 of 1802) to manage the property of the defaulting tenant until the amount due is discharged does not create the relationship of a trustee and *cestui que trust* between them as there is no transfer of the tenure and no right of disposal over the land.)

('25) 12 AIR 1925 Pat 68 (89) : 93 I C 454 (FB), *Harihar Prasad v. Kesho Prasad*.

('11) 9 I C 391 (393) : 38 I A 23 : 33 All 125 : 14 Oudh Cas 95 (PC), *Muhammad Bakar v. Muhammad Bakar Ali Khan*. (Land claimed by X as malik — Y claiming to be entitled to possession till certain dues of his were paid — Land settled with Y in accordance with possession and X directed to redeem by paying the dues — Y held was not a trustee.)

('37) 24 AIR 1937 Bom 433 (441) : 171 Ind Cas 844 (DB), *Vithalrao v. Baswant Bisto*. (Mere assumption of management by Sovereign power on default of watan-dar to pay fixed judi is not tantamount to vesting in trust for specific purpose.)

('37) 24 AIR 1937 Mad 787 (787) : 177 Ind Cas 163, *Secy. of State v. Lokanatha*. (Magistrate appointing some one to cultivate land attached under S. 146, Cr. P. C., and to deposit sale proceeds of the crops in treasury — Government though not trustee is stake-holder.)

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hold such property for the benefit of another. Thus, it has been held that the mere fact that a Hindu husband dies desiring his widow to adopt a son, does not impose any *obligation* on the widow to hold her husband's estate for the benefit of the son to be adopted by her.¹ Similarly, it has been held that merely because a property is purchased in the name of a Hindu idol from funds belonging to the purchaser, he is not under an *obligation* to hold the property for the benefit of the idol.²

Where A transfers his estate to B in trust for himself (i. e., A) for the purpose of discharging his debts, B is a trustee only for A and not for A's *creditors*, and is under no obligation to hold the estate for *their* benefit.³

11. Obligation must arise out of confidence. — A trust denotes an obligation based on *confidence*. Hence, an obligation based on *contract*¹ cannot give rise to a trust.

Illustrations.

1. A contract for the sale of immovable property creates an obligation annexed to the ownership of property.^{1a} But such obligation being based on *contract* and not confidence, does not give rise to a trust.²

2. A enters into a contract with B for the payment of a certain sum of money to C. This does not give rise to a *trust* in favour of C. Thus, where A mortgages or sells his immovable property to B and a part of the consideration is left with B under a contract that the latter should pay it to A's creditors, no trust is created and the latter cannot sue B for the amount as there is no privity of contract between B and them.³

3. The liability of a Muhammadan husband to pay dower to his wife is based on *contract* and consequently the husband is not a trustee for such dower.⁴

4. The relationship between a debtor and creditor is based on *contract* and hence the debtor is not a trustee for the creditor.⁵

Section 10 — Note 10

1. ('69) 2 Beng L R (A C) 313 (314) (DB), *Gobinda Chandra v. Anand Mohan*.
 2. ('69) 11 Suth W R 13 (14) : 2 Beng L R (A C) 155 (DB), *Brojo Sundari Debia v. Rani Luchmee Koonwaree*.
 3. ('98) 25 Cal 642 (647, 648) : 2 Cal W N 469, *William Robert Fink v. Maharaj Bahadur Singh*.
- See also Note 22.

Section 10 — Note 11

1. (1880) 29 W R (Eng.) 269 (273) : L R 5 Q B D 518 : 50 L J Q B 90 : 44 L T 454 : 45 J P 420, *Wilson v. Lord Bury*.
- 1a. See Section 40, Transfer of Property Act.
2. ('76) 2 Cal 323 (326) (DB), *Ahmed Muhamed v. Adjein Dooply*. (Sale of shares.)
3. ('39) 26 AIR 1939 Mad 722 (723) : 189 Ind Cas 316 (DB), *Chandra Kesavalu v. Perumal Chettiar*. (Vendor leaving a portion of purchase money with the vendee for the purpose of paying it to his minor son after attaining majority—Vendor undertaking to pay interest on same—Held that there was no trust and the transaction was in the nature of a loan.)
- ('19) 6 AIR 1919 Pat 344 (345) : 51 Ind Cas 320, *Mukhi Singh v. Kishun Singh*.
- ('11) 9 Ind Cas 988 (989) (Cal), *Deb Narain Dutt v. Ram Sadhan Mandal*.
4. ('69) 11 Suth W R 212 (214) : 2 Beng L R (A C) 306 (DB), *Meer Meher Ali v. Mt. Amanee*.
5. (1880) L R 5 Q B D 518 (530, 531) : 29 W R (Eng.) 269 (273) : 50 L J Q B 90 : 44 L T 454 : 45 J P 420, *Wilson v. Lord Bury*. (The plaintiffs had deposited a certain sum with the company of which the defendants were the directors.)

5. A banker is ordinarily not a trustee for his customer in respect of the latter's moneys in the hands of the banker, the reason being *inter alia* that the relationship between the parties is based on *contract* and not confidence.⁶ (See Note 18.)

6. An agent is not a trustee for his principal in respect of the latter's moneys that may come into his hands, the reason being that the agent's obligations to his principal are based on contract and not confidence.⁷

7. A company does not hold the dividends declared on shares in trust for the share-holders. The right of the share-holders to recover such shares is based on *contract*.^{7a}

Every trust implies an obligation based on confidence. Such confidence may be *actually* reposed by one party in another and accepted by him or it may be raised by *implication of law*.⁸ In the former case, the trust would be one arising by *act of parties* or a trust for a specific purpose within the meaning of this section. In the latter case, the trust will be one arising by *operation of law* and will be outside the purview of this section. See Note 7.

It may also be noted that every obligation in respect of property which is based on confidence and not on contract need not give rise to a trust. Thus, in the undermentioned case,⁹ where the defendant was appointed by private arrangement between the parties to a suit to collect the income of the suit property to be handed over to the successful party in the end, it was held in the circumstances of the case that there was no *contract* of agency and that the defendant was only in the position of a receiver or administrator. At the same time it was held that there was no properly constituted *trust* so as to attract the operation of this section.

12. Trust must be one created by act of parties. — See Note 7.

('25) 12 AIR 1925 Nag 115 (116, 117) : 81 Ind Cas 505 (DB), *Bhaiyalal v. Rai Beharilal*.

('14) 1 AIR 1914 Mad 171 (173, 174) : 22 Ind Cas 936 (DB), *Rajammal v. Lakshammal*. (A mere deposit of moveables or money by A with B would not make B the trustee of A on an express trust.)

[See ('05) 32 Cal 799 (813) : 9 Cal W N 443, *Chandra Kally Deby v. Edmund-pelly Chapman*. (Officers charged with payment of Government debts are not trustee.)]

6. ('46) 33 AIR 1946 Mad 519 (528) : ILR (1946) Mad 429 (DB), *Official Receiver v. Kulandaivelan*.

(1880) 29 W R (Eng) 269 (273) : L R 5 Q B D 518 : 50 L J Q B 90 : 44 L T 454 : 45 J P 420, *Wilson v. Lord Bury*.

7. ('39) 26 AIR 1933 Bom 126 (128) : ILR (1939) Bom 154 : 181 Ind Cas 375 (DB), *Malojirao v. Keshav*. (Plaintiff, Deshmukh of villages entitled to fees and emoluments from revenues thereof — Defendants who were *ajahat gumastas* appointed by Peshwas, making collections for plaintiff — Collections made not paid to plaintiff since 1922 Plaintiff suing to recover collection Held that S. 10 did not apply as defendants were to be regarded as agents of plaintiff and no fiduciary relation existed between them.)

('25) 12 AIR 1925 Nag 115 (116, 117) : 81 Ind Cas 505 (DB), *Bhaiyalal v. Rai Beharilal*.

7a. ('24) 11 AIR 1924 Mad 721 (722) : 79 I C 947, *Gurunatha Rama Seshayya v. Sri Tripurasurdari Cotton Press, Bezwada*.

8. Lewin's "Law of Trusts," 12th Edition, page 12.

9. ('36) 23 AIR 1936 Mad 170 (170, 171) : 161 Ind Cas 843, *Sitaramaswami v. Mahalakshamma*.

Section 10
Note 13

13. Instances of trust for specific purpose.—The following are some instances of a trust for a specific purpose as explained in Note 7 above :

- (1) On the occasion of a betrothal, the bridegroom's father made over a sum of money to the keeping of the bride's father as a fund constituting her *palla* or dowry in accordance with the usual practice of the caste. It was held that a trust was created for a specific purpose, viz., for the provision of the customary dowry of the betrothed girl.¹
- (2) Where a Hindu widow who was the natural guardian of her minor sons handed over a sum of money to her brother for the benefit and education of her sons, it was held that she constituted the brother a trustee for a specific purpose.²
- (3) One of the terms of a family arrangement was that a certain sum should be set apart from the family funds for the payment of the debts of a certain member, v. It was also arranged that a sum of money should be placed with D who should discharge the debts and pay the balance to v. A hundi was given to D under the above arrangement and the hundi was cashed by him. It was held that D was constituted a trustee of the money for the specific purpose of paying the debts of v and the balance to v himself.³
- (4) Where a father executed a settlement deed by which he gave certain properties to his son and directed him to pay a certain amount to the settlor's daughters, it was held that there was a specific trust in favour of the daughters.⁴
- (5) A hands over certain sums of money to B in order that the latter should carry on a money-lending business in his own name, but for the benefit of A. This constitutes a trust for a specific purpose.⁵
- (6) Where a person, in anticipation of his death, handed over his property to the defendant and directed him to pay certain specified debts out of such property and to apply the surplus for the support of his family, it was held that a specific trust was created for the benefit of the creditors whose debts were specified.⁶
- (7) On the dissolution of a partnership between L and B, "it was arranged that the 3/16ths of the said L in the three anna share of

Section 10 — Note 13

1. ('08) 32 Bom 394 (399, 400) : 10 Bom L R 540 (DB), *Bhurabhai Jamnadas v. Bai Ruxmani*. (The expression "trust for a specific purpose" was used like "express trust.")
2. ('28) 15 AIR 1928 Bom 58 (58) : 52 Bom 184 : 107 I. C. 705 (DB), *Chintaman v. Khanderao*. (('08) 32 Bom 394, *Bhurabhai v. Ruxmani*, relied on.)
3. ('36) 23 AIR 1936 Mad 876 (877) : 109 Ind Cas 362 (DB), *Vairavan Chetty v. Chettichi Achi*.
4. ('34) 21 AIR 1934 Mad 273 (273) : 148 Ind Cas 685, *Nachimuthu Ammal v. Muthusamy*. (('14) A I R 1914 Mad 95 : 38 Mad 788, *Sundararaja v. Lakshmi-ammal*, relied on.)
5. ('26) 13 AIR 1926 Mad 109 (110, 112) : 91 Ind Cas 671 (DB), *Pachaiyappa Chetty v. Sivakami Ammal*. (('22) AIR 1922 Mad 57 : 45 Mad 415 (DB), *Krishnan v. Lakshmi*, distinguished.)
6. ('90) 17 Cal 620 (628, 629) (DB), *Suddasook Kootary v. Ram Chunder*.

the commission earned in the H mill should be continued and that the said R should receive the said three anna share of the commission as aforesaid and on receipt thereof hold 3/16ths for L." It was held that this created a trust for a specific purpose.⁷

- (8) In the undermentioned case,⁸ the East India Company on taking over the properties of a Native Raj entered into an agreement with the creditors of the Raj whereby the Company agreed to pay their debts and to set apart a sufficient portion of the revenues of the place for the payment of the debts. It was held that in the circumstances of the case, the above arrangement created a trust for a specific purpose.

See also the undermentioned cases.⁹

7. ('07) 31 Bom 418 (426, 427) : 9 Bom L R 287, *Narrondas Ramji v. Narrondas Ramji*. ((1893) 2 Q B 390, *Soar v. Ashwell*, followed.)

8. ('23) 10 AIR 1923 Mad 667 (670) : 46 Mad 259 : 74 Ind Cas 785 (DB), *Secy. of State v. Radhika Prasad*.

9. ('40) 27 AIR 1940 P C 45 (46) : ILR (1940) 1 Cal 415 : I L R (1940) Kar (PC) 109 : 67 Ind App 129 : 187 Ind Cas 108 (PC), *Gadadhar Mullick v. Official Trustee of Bengal*. (S, a testator by his will appointed his son R and two other persons A and B to be executors and trustees of his will and bequeathed all the properties after providing for the maintenance of his widow—One moiety of the property was to be in trust for his son R upon his attaining 21 years of age and the other moiety in trust for the male issues of R—In case R died without male issues the moiety was to go to a certain trust fund—In case R died issueless before attaining 21 years of age his moiety was also to go to the trust fund—Held, that there was a trust for specific purpose.)

('38) 25 AIR 1938 Cal 336 (337) : I L R (1938) 2 Cal 81 : 176 I. C. 681, *Kalipada Bhattacharjee v. Kali Kumar Pal*. (Money entrusted for the specific purpose of investment.)

('15) 2 AIR 1915 Bom 282 (283, 284) : 39 Bom 572 : 31 Ind Cas 277, *Secretary of State v. Bapuji*. (Money due from Satara Government to plaintiff—Satara Government taken over by British Government—Amount credited in favour of plaintiff in Government account books—Held, from this and other facts that there was a trust for a specific purpose in plaintiff's favour.)

('23) 10 AIR 1923 Nag 90 (91), *Namdeo v. Keshee*. (Village pasture lands enjoyed by the khatedars as trustees for the villagers.)

('27) 14 AIR 1927 Mad 1134 (1134) : 100 Ind Cas 506, *Kutti Pokkar v. Ussan Mayan*. (A partition took place between members of a family; one of the parties receiving property of a higher value in consideration of his undertaking to pay a certain sum of money to a widow and daughter in the family and the document further providing that in case he failed to do so, he and the properties allotted to his share should be liable for the amount—In a suit to enforce the obligation, held that a charge was created and inasmuch as the obligation annexed to specific property arose out of a confidence reposed in and accepted by the owner, the person who undertook the obligation was a trustee and the party to whom the payment was due was a *cestui que trust*.)

('20) 7 AIR 1920 P C 203 (209) (PC), *Somasundaram Chetty v. Arunachallam Chetty*. (Held on construction of document that it created trust for specific purpose.)

('24) 11 AIR 1924 All 884 (886, 887) : 47 All 17 : 84 Ind Cas 631 (DB), *Behari Lal v. Shiv Narain*. (A providing by will that half the property should go to B and the other half should be in the custody and management of B or other persons who got the property from B but that the income arising from such half of the property should be devoted to certain religious objects—Held, that the persons who got the property as heirs of B after B's death, were express trustees.)

Section 10
Note 14

14. Mortgagee in possession after the mortgage has been discharged is not a trustee. — Section 2 cl. (11) expressly excludes from the definition of “trustee” a mortgagee in possession after the mortgage has been discharged. Hence, this section will not apply to a suit against such mortgagee. Even if such mortgagee had not been excluded from the definition of trustee by S. 2 cl. (11), he would only be a *constructive* trustee and not an express trustee or a trustee for a specific purpose¹ and therefore this section would not have applied to him.

Although in the Act of 1859 there was no definition corresponding to S. 2 cl. (11) and although S. 2 of the Act only used the word “trustee,” it was held under that section that a mortgagee in possession after the mortgage had been discharged was not a “trustee” within the meaning of the section.²

See also Article 105.

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- (’74) 21 Suth W R 415 (416) (DB), *Syed Shah Alleh Ahmed v. Mt. Bibbee Nuseebun*. (Property vested in a person, partly for charitable purposes and partly for the benefit of others.)
- (’24) 11 AIR 1924 Mad 920 (920) : 85 Ind Cas 508, *Muhammad Mathir Rowthan v. Kasa Rowthan*. (Acknowledgment of trust for specific purpose.)
- (’70) 7 Bom H C R A C 149 (152) (DB), *Vithal Viswanath Prabhu v. Ramachandra Sadashiv Kirkire*. (Immovable property made over to defendant to sell and pay to plaintiff.)
- (’77) 1877 Bom P J 195, *Harihar v. Shidheshvar*. (Partition decree—One member of the family becoming trustee of shares of the other members of the proceeds of property in his possession not actually divided by metes and bounds.)
- (1900) 2 Bom L R 418 (419) (DB), *Girdhariji v. Shamabetti*. (Disposition which vests the possession of house in S for a specific purpose, namely, to realise the rents and after deducting outlays and expenses to keep half of the balance herself and pay the other half over to N for the purpose of performing services to the deity.)
- (’91) 14 Mad 61 (63) (DB), *Sethu v. Krishna*. (Property given by maternal grandfather to plaintiff’s father in trust for plaintiff.)
- (’88) 11 Mad 274 (277, 278) (DB), *Sethu v. Subramanya*. (A dharmakarta of a pagoda is a trustee.)
- (’05) 2 All L Jour 247 (251, 252) : 1905 All W N 89 (DB), *Mitra Lal Sahi v. Rajib Lochan Sahai*. (Property made over to A in trust to be restored on demand to the *cestui que trust*.)
- (’69) 12 Suth W R 319 (319, 320) : 3 Beng L R (AC) 409 (DB), *Rakhal Das Madak v. Madhusudan Madak*. (Do.)
- (’18) 5 AIR 1918 Lah 351 (352) : 45 Ind Cas 325 : 1918 Pun Re No. 66, *Mt. Seoti v. Bhagirath*. (When land is assigned for a fixed term, a suit for its recovery on expiry of the term is governed by S. 10.)
- (’10) 6 Ind Cas 781 (781) (DB) (Mad), *M. D. Tirumalai v. Rama Subbier*. (Suit by Kattalai manager for recovery of share of tasdik amount from temple trustee who received it from Government in trust for Kattalai.)
- (’27) 14 AIR 1927 Bom 398 (398, 399) : 103 I. C. 418 (DB), *Mahomedsa Khadirs v. Khadersa*. (Trust to manage devasthanam lands and pay surplus to others.)

Section 10 — Note 14

1. See Notes under S. 2 clause 11.

[See also (’19) 6 AIR 1919 Cal 309 (311) : 52 Ind Cas 902 (DB), *Kshetra Nath v. Durgapada Mandal*.]

2. (’68) 9 Suth W R 187 (189) : Beng L R Sup Vol 901 (F B), *Baboo Lall Doss v. Jamal Ali*.

See also Section 2 (11) Note 3.

15. Benamidar is not trustee. — Section 2 cl. (11) expressly excludes a benamidar from the definition of "trustee." Hence, a benamidar is not a trustee for a specific purpose within the meaning of this section.¹ Even in the absence of the provision excluding a benamidar from the definition of "trustee," he would only be a *constructive* trustee and not a trustee for a specific purpose² and hence this section would not have applied to him.

Although the Act of 1859 did not contain any definition corresponding to S. 2 cl. (11), and S. 2 of the Act only used the word "trustee," it was held that the section did not apply to a "benamidar."³

16. Executor or administrator not specific trustee. — It is well settled that the executor of a will is not as *such* a trustee for a specific purpose within the meaning of this section.¹ The reason is that although an executor is in law the owner of the deceased testator's properties and holds such properties for the benefit of others such as creditors of the deceased and legatees, the position and obligations of the executor arise by *operation of law* and not by act of parties. Thus, although a testator may appoint a certain person

Section 10 — Note 15

1. ('50) I L R (1950) Nag 877 (889) (DB), *Lala Kisan Lal v. Sheo Shankar*.
- ('41) 28 AIR 1941 Mad 767 (768) : 200 Ind Cas 249 (DB), *Devarajulu Naidu v. Jayalakshmi Ammal*.
- ('22) 9 AIR 1922 Mad 57 (59):45 Mad 415: 66 Ind Cas 858 (DB), *Krishnan Fatter v. Lakshmi*.
2. See Note 3 under S. 2 clause 11.
3. ('69) 11 Suth W R 72 (76) : 2 Beng L R (AC) 284 (DB), *Uma Sunduree Dossee v. Dwarka Nath Roy*.

Section 10 — Note 16

1. ('44) 31 AIR 1944 Nag 377 (379, 380) : I L R (1944) Nag 817 (DB), *Satyabhamabai Gore v. Murlidhar Pathak*. (For an executor to be considered as holding property in trust for a specific purpose an express trust must be created by the will itself.)
 - ('38) 25 AIR 1938 Pat 600 (602) : 17 Pat 350 : 181 I. C. 283 (DB), *Hemangini Devi v. Anil Krishna Banerjee*.
 - ('27) 14 AIR 1927 Bom 424 (425) : 103 Ind Cas 225, *Jamnadas Goverdhandas v. Damodhardas Chunilal*.
 - ('10) 8 Ind Cas 189 (190) (Bom), *Gajanan Vinayak v. Waman Sham Rao*.
 - ('26) 13 AIR 1926 Cal 1 (52) : 93 I. C. 385 (DB), *Prayag Kumari Devi v. Shiva Prosad Singh*. (Executor is constructive trustee.)
 - ('09) 1 Ind Cas 289 (301) (DB) (Cal), *Baroda Prosad v. Gajendra Nath*.
 - ('79) 4 Cal 897 (919, 924):4 Cal L R 193:4 Ind Jur 287 (DB), *Greenchunder Ghosh v. Mackintosh*. (('76) 2 Bom 388 (FB), *Lallubhai v. Mankuvarbai*, distinguished.)
 - ('75) 14 Beng L R 21 (45, 46) (DB), *Gopal Narain v. Muddomutty Gupte*.
 - ('29) 16 AIR 1929 Lah 753 (757) : 122 I. C. 467:11 Lah 325 (DB), *H. P. Robson v. Administrator-General of Punjab*. (*A fortiori* executor *de son tort* is not specific trustee.)
 - ('15) 2 AIR 1915 Mad 1184 (1188) : 27 Ind Cas 849, *Ramanathan v. Ragammal*.
 - ('10) 5 Ind Cas 832 (833) (Mad), *Nagarathnammal v. Namasivaya Mudali*.
 - ('36) 23 AIR 1936 Bom 30 (34) : 160 Ind Cas 612, *Shirinbai v. Nawroji*.
 - ('79) 4 Cal 455 (465, 470) : 3 Cal L R 315 (DB), *Kherodemoney Dossee v. Doorgamoney Dossee*. (Affirming ('78) 2 Cal L R 112, *Kherodemoney v. Doorgamoney*.)
- See also Snell's "Principles of Equity", 11th Edition, page 152.
Lewin's "Law of Trusts", 12th Edition, page 1126.

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Note 16

as executor, the properties of the testator vest in the executor by operation of law and not by the act of the testator.² Similarly, the obligations of the executor in favour of legatees and creditors of the testator arise by force of law and not by the act of the testator.³

But, where a testator appoints a person as executor and also *bequeaths* to him certain properties, directing him at the same time to pay out of such properties certain specified legacies or debts, the executor will be a trustee for a specific purpose.⁴ So also where an executor under a will is expressly called a trustee and is entrusted with the testator's property for certain definite purposes he will be a trustee for a specific purpose.^{4a}

Where a debtor of the testator becomes the executor under his will, the executor will be a *constructive* trustee in regard to such debts for the persons interested in the debt.⁵ Hence, he will not be a trustee for a specific purpose in regard to such debt.

2. See Succession Act (1925), Section 211.

3. See Succession Act (1925), Sections 325 and 328.

4. ('40) 27 AIR 1940 P C 45 (46) : I L R (1940) 1 Cal 415 : ILR (1940) Kar (PC) 109 : 67 Ind App 129 : 187 Ind Cas 108 (PC), *Gadadhur Mullick v. Official Trustee of Bengal*. (S, a testator by his will appointed his son R and two other persons A and B to be executors and trustees of his will and bequeathed all the properties after providing for the maintenance of his widow. One moiety of the property was to be in trust for his son R upon his attaining 21 years of age and the other moiety in trust for male issues of R, but in case R died without any issue the moiety was to go to the trust fund known as Rupchand Dhar Trust estate—Held that R was a trustee for specific purpose.)

('81) 7 Cal 772 (775, 776) : 9 Cal L R 327 (DB), *Anund Moye Dabi v. Grish Chunder Myti*. (*Scott v. Jones*, 4 C & F 382 and *Williamson v. Naylor*, 3 Y & C; Ex., 208, followed.)

('03) 30 Cal 369 (384, 386) : 7 Cal W N 358 (DB), *Nistarini Dassee v. Nundo Lal*. (Affirmed on appeal in ('05) 33 Cal 180 : 32 Ind App 193 (PC), *Behari v. Nistarini*.)

('05) 29 Bom 267 (280, 281, 282) : 7 Bom L R 45, *Moosabhoy v. Yakubhai*. (Will validating and confirming prior trust deed—Executor not appointed trustee but directed to carry out the provisions of the trust deed—Held he was express trustee.)

('76) 2 Cal 45 (56), *Treepoorasoodery Dossee v. Dabendra Nath Tagore*.

('10) 9 Ind Cas 951 (953) (Bom) (DB), *Jehangir Dadabhai v. Kaikhusru Kavasha*. [See ('01) 25 Bom 429 (432) : 3 Bom L R 45 (DB), *Ramdhan v. Manibhai*.]

[See also ('38) 25 AIR 1938 Mad 60 (64) : 180 Ind Cas 462 (DB), *Venkatashubramania Ayyar v. Sivagurunatha Chettiar*. (Where persons named as executors in a will were not merely executors but were charged with the duty of managing the property and pay one-third of the income to charity and two-third of the income to the charity after a certain event, it was held that the executors were trustees.)]

4a. ('42) 29 AIR 1942 Sind 145 (150) : ILR (1942) Kar 392 : 208 Ind Cas 230, *Gopaldas v. Hemandas*.

5. ('09) 4 Ind Cas 283 (285) (Bom), *Damodar v. Dayal Mowji*.

See Section 87, Trusts Act.

The view expressed in the following cases that there is a trust for a specific purpose is not correct.

('08) 10 Bom L R 346 (351), *Yakub Ibrahim Sayani v. Bai Rahimatbai*.

('09) 4 Ind Cas 462 (464, 465) (Cal), *Basir Ali v. Hafiz Nazir Ali*.

A person to whom letters of administration to the estate of a deceased person have been granted is not a trustee for a specific purpose, although the estate vests in him under the law for the benefit of others.⁶ The reason is that the rights and obligations of such a person arise by operation of law and not by act of parties.

See also Article 123 Note 8.

17. Trustee de son tort, whether specific trustee. — A person who by mistake or otherwise assumes the character of a trustee when it really does not belong to him is a trustee *de son tort*.¹ Thus, where A transfers certain property to B in trust for C, and D, a stranger, dispossesses B and begins to hold the property with the professed object of doing so for the benefit of C, D becomes a trustee *de son tort* and is subject under the law to all the liabilities to which the trustee is liable. But, a trustee *de son tort* is not a trustee for a *specific purpose* within the meaning of this section. The reason is that his obligation to hold the property for the benefit of the *cestui que trust* does not arise out of the *intention* of the author of the trust but as a matter of *law*. Hence, this section cannot apply to a suit against a trustee *de son tort*. But, there is a conflict of decisions on the point. The Allahabad² and Bombay³ High Courts and the Chief Court of Oudh^{3a} and the Madras High Court in the undermentioned case^{3b} hold that the section does not

6. ('17) 4 AIR 1917 Pat 74 (76) : 2 Pat L Jour 642:40 I. C. 860 (DB), *Janardhan Prosad v. Mt. Jankibati Thakurain*.

('10) 5 Ind Cas 832 (833) (Mad), *Nagarathnammal v. Namasivaya Mudali*.

('29) 16 AIR 1929 Lah 753 (757):122 Ind Cas 467:11 Lah 325 (DB), *H.P. Robson v. Administrator General of Punjab*. (Suit by administrator against executor *de son tort*.)

See also cases in foot-note (1) above.

Section 10 — Note 17

1. Person by mistake or otherwise assuming the character of trustee when it really does not belong to him and so becoming a trustee *de son tort*, may be called to account by the *cestui que trust* for the moneys he received under colour of trust: Lewin's "Law of Trusts," 12th Edition, page 231.

2. ('41) 28 AIR 1941 All 1 (8):ILR (1940) All 815 : 193 I. C. 697 (DB), *Dharam Narain v Suraj Narain*. (Suit for account against trustee *de son tort*—Article 120 applies.)

('24) 11 AIR 1924 All 884 (887) : 47 All 17 : 84 Ind Cas 631 (DB), *Behari Lal v. Shiva Narain*.

3. ('25) 12 AIR 1925 Bom 148 (150) : 88 Ind Cas 975 (DB), *Girjabai Shivdeorao v. Narayanrao Ganpatrao*.

[But see ('05) 29 Bom 267 (280, 283) : 7 Bom L R 45, *Moosabhoy v. Yakubhai* (*Soor v. Ashwell* (1893) 2 Q B 390 followed.)]

3a. ('37) 24 AIR 1937 Oudh 373 (377) : 13 Luck 344 : 168 Ind Cas 593 (DB), *Chandrika Bakhsh Singh v. Bhola Singh*. (('20) AIR 1920 Cal 558 (DB), *Dhanpat v. Mohesh*, distinguished.)

3b. ('46) 33 AIR 1946 Mad 116 (117, 118) : ILR (1946) Mad 423 : 224 Ind Cas 21 (DB), *Hussain Ali v. Baquir Ali*. (Part of estate of deceased Muhammadan sold by one of heirs and proceeds handed over to third party for distribution among heirs — Suit by unpaid heir for his share of proceeds — S. 10 does not apply as no trust is created by vendor heir's handing over of proceeds to third person.)

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Notes 17-18

apply to such a suit, while the contrary view is held by the Calcutta⁴ and Madras High Court in the undermentioned cases.⁵ It is submitted that the latter view is not correct.⁶

18. Deposit of money.—A deposit of money by A with B under which B is constituted the owner of the money and is entitled to use it for his own purposes, subject only to the liability of returning an equivalent sum to the depositor, does not amount to a *trust*, as there is no obligation to use the money for the depositor's benefit.¹ The relationship of a banker and customer is ordinarily of the above kind and hence, a banker is not a trustee for the customer in regard to the customer's money in his hands.² (See Note 11.)

4. ('38) 25 AIR 1938 Cal 673 (677) :ILR (1938) 1 Cal 652:181 I. C. 190, *Kalipada De v. Hari Dasi Dasi*. (The existence of a trust must be first established before the section can be applied to trustees *de son tort*.)

('20) 7 AIR 1920 Cal 558 (560) : 57 Ind Cas 805 (DB), *Dhanpat Singh v. Mohesh Nath Tewari*.

('24) 11 AIR 1924 Cal 160 (163) : 74 Ind Cas 373 (DB), *Peary Mohan Mookerjee v. Manohar Mookerjee*. (Obiter.)

[See ('25) 12 AIR 1925 Cal 1244 (1245) : 89 I. C. 133 (DB), *Ananta Dew Adhikar Goswami v. Joydeb*. (Setting up a new idol in place of old, on old trust property, does not constitute a person a trustee *de son tort* and S. 10 does not apply.)]

5. ('16) 3 AIR 1916 Mad 57 (63) : 28 Ind Cas 290 : 38 Mad 260 (DB), *Kaliba Mavulviya v. Saran Bivi Saila*. (Per Sadasiva Iyer, J)

('13) 21 Ind Cas 421 (423) (DB) (Mad) *Subramaniya Iyar v. Subba Nayudu*. (Suit on behalf of *devasthanam* which was properly represented by the legal trustee against a former trustee, whether the latter's right to the office was legally valid or otherwise, the section applies and defendant cannot rely on bar of limitation.)

6. See Illustration (b) to S. 94, Trusts Act, which shows that the Act treats such a case as not a case of trust at all.

Section 10 — Note 18

1. ('14) 1 AIR 1914 Mad 171 (173, 174) : 22 Ind Cas 936 (DB), *Rajammal v. Lakshammal*.

('19) 6 AIR 1919 Lah 322 (323) : 47 Ind Cas 592 : 1919 Pun Re No. 4, *Dalipa v. Labhu Ram*.

('32) 19 AIR 1932 Mad 685 (686) : 139 Ind Cas 164 (DB), *Subbiah Chetty v. Visalakshi Achi*.

[See also ('48) 35 AIR 1948 Cal 207 (208), *Tarak Nath v. Rajani Kanta*. (A depositing money with B—Agreement that amount would carry interest and to the amount of interest B would add certain amount making aggregate of Rs. 250 which was to be spent in performance of Durga Puja — Amount to be divided between parties if B was unable to perform puja — Successor of A suing successor of B for his share on basis of agreement — S. 10 held inapplicable — Art 115 applied.)]

See also Notes under Article 60.

2. ('46) 33 AIR 1946 Mad 519 (528) :ILR (1946) Mad 429 (DB), *Official Receiver v. Kulandivelan*.

('14) 1 AIR 1914 Mad 171 (173, 174) : 22 Ind Cas 936 (DB), *Rajammal v. Lakshammal*.

('09) 1 Ind Cas 712 (714) : 32 Mad 68 (DB), *Official Assignee of Madras v. G. Smith*.

('89) 16 Cal 25 (31) (DB), *Ishur Chunder Bhaduri v. Jibun Kmari Bibi*.

(1880) 29 W R (Eng.) 269 (273) : 45 J P 420 : 50 L J Q B 90 : L R 5 Q B D 518, *Wilson v. Lord Bury*.

Where money is deposited with a solicitor or other person already standing in a fiduciary relationship to the depositor and it is intended to vest the ownership in the depositary, the parties may be presumed to intend that the depositary should hold the money for the benefit of the depositor and hence, a trust for specific purpose may arise in such cases.³

A deposit of money with another as security for some purpose does not make the depositary the *owner* of the money and hence, he is not a trustee for the depositor.⁴

Where money was left with the defendant for being paid to a third person, it was held that the money did not *vest* in the defendant and, therefore, he was not a trustee.⁵

19. Deposit of specific moveable property. — Where moveable property is deposited by one person with another for a specific purpose on the understanding that it must be returned to the depositor in specie, the depositary is not thereby constituted a trustee for a specific purpose. The reason is that the depositary is not made the *owner* of the property deposited.¹ Moreover, the obligation of the depositary is based on *contract* and not on confidence. (See Note 11.)

20. "Legal representative," meaning of. — The expression "legal representative" in this section refers to the person who succeeds to the *private* estate of a deceased trustee and not to a person who succeeds to his *office* as trustee.

Illustration.

A is a trustee of two trusts, X and Y. A dies, and upon his death, B is appointed trustee of trust X and not of trust Y. B is not the legal representative of A within the meaning of this section. If B, notwithstanding the fact that he is not trustee with reference to trust Y, gets into possession of the properties of Y, such properties are not properties in the hands of the *legal representative* of A,

3. (1893) L R 2 Q B 390 (394, 395); 4 R 602 : 69 L T 585 : 42 W R 165, *Soar v. Ashwell*.

[See however ('14) 1 AIR 1914 Mad 171 (173) : 22 Ind Cas 936 (DB), *Rajammal v. Lakshammal*. (The relation between son-in-law and father-in-law is not similar to the relation between solicitor and his client.)]

4. ('19) 6 AIR 1919 Cal 519 (520) : 52 Ind Cas 65 (DB), *Nanda Lal Bose v. Ashutosh Ghose*. (Savings Bank pass-book deposited as security for filling the post of gumasta to manager of Court of Wards—Manager having no authority to withdraw amount without gumasta's consent is not a trustee.)

('10) 8 Ind Cas 370 (371) : 13 Oudh Cas 286, *Sakhawat Ali v. Baldeo Sahai*. (Money deposited with lessor as security to ensure payment of rent payable under a contract of lease.)

5. ('04) 1 All L Jour 422 (423), *Mukhta Prasad v. Gajraj Singh*.

[See also ('36) 23 AIR 1936 Bom 412 (414, 415) : 165 Ind Cas 1001 (DB), *Annappa Ramchandra v. Krishna Narayan*.

Section 10 — Note 19

1. ('19) 6 AIR 1919 All 102 (103) : 55 Ind Cas 45 : 41 All 643 (DB), *Kalyan Mal v. Kishen Chand*.

[But see ('27) 14 AIR 1927 Oudh 614 (615) : 101 Ind Cas 427, *Akbar Singh v. Raj Bahadur Singh*. (Moveable property entrusted to supurdar—Held on construction of supurdanama that trust for specific purpose was created.)]

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the former trustee of Y. Hence, a suit against B for recovery of such properties on behalf of trust Y, will not be governed by this section.¹

21. "Assigns (not being assigns for valuable consideration)." — This section applies, *inter alia*, to suits against assigns who are not assigns for valuable consideration. In other words, this section applies, *inter alia*, to suits against gratuitous transferees of the trust property.¹ It does not apply to suits against transferees for consideration, such suits being expressly excluded from the operation of the section.² As to the period of limitation applicable to such suits, see Articles 134 to 134C.

The assigns contemplated by this section are not only the assigns from the trustee but also assigns from the transferee or assignee from the trustee.^{2a}

Section 10 — Note 20

1. ('17) 4 AIR 1917 Mad 706 (706) : 34 Ind Cas 945 (DB), *Manikkam Pillai v. Thannikachalam Pillai*.

Section 10 — Note 21

1. ('50) 54 Cal W N 960 (969, 970) (DB), *Palanibala Debi v. Kalipada Chakravarty*.
 ('43) 30 AIR 1943 Pat 289 (296) : 22 Pat 133 : 208 Ind Cas 129 (DB), *Biseshwar v. Sashinath*. (The object of inserting the words "valuable consideration" is to distinguish the case of a transferee who is a mere volunteer and in whose favour no equity could be brought to play and to hit only those transferees who are in possession of the trust property without having paid any consideration for it.)
 ('40) 27 A I R 1940 P C 45 (46) : I L R (1940) 1 Cal 415 : I L R (1940) Kar (P C) 109 : 67 Ind App 129 : 187 Ind Cas 108 (PC), *Gadadhur Mullick v. Official Trustee of Bengal*.
 ('19) 6 AIR 1919 Lah 410 (411) : 1919 Pun Re No. 109 : 53 Ind Cas 577, *Jamiat Singh v. Mt. Raji*.
 ('82) 1882 Bom P J 252 (DB), *Gavrishankar v. Durga Shankar*.
 ('14) 1 AIR 1914 Mad 708 (710) : 38 Mad 1064 : 24 Ind Cas 369 (DB), *Venkatachella Reddiar v. Collector of Trichinopoly*.
 [See also ('22) 9 AIR 1922 P C 123 (128, 134) : 365 Ind Cas 161 : 48 Ind App 302 : 44 Mad 831 (PC), *Vidya Varuthi v. Baluswami Ayyar*. (Shebait—Lease by, for no necessity is not valid beyond his life.)]
 2. ('50) 54 Cal W N 960 (969, 970) (DB), *Palanibala Debi v. Kalipada Chakravarty*.
 ('40) 27 AIR 1940 Cal 228 (232) : 190 Ind Cas 405, *Srikissen Khanna v. Tarachand Ghanshyamdas*. (Lease.)
 ('23) 10 AIR 1923 P C 175 (177, 178) : 50 Ind App 295 : 46 Mad 751 : 74 Ind Cas 492 (PC), *Subbaiya Pandaram v. Mohamad Mustapha Maracayar*. (Purchaser in execution sale will be an assignee for valuable consideration.)
 ('09) 4 Ind Cas 449 (451) : 36 Cal 1003 : 36 Ind App 148 (PC), *Abhiram Goswami Mohant v. Shyama Charan Nandi*.
 ('25) 12 AIR 1925 All 822 (822) : 89 Ind Cas 483 (DB), *Hulasi v. Narain Das*.
 ('12) 16 Ind Cas 53 (55) (Mad) (DB), *Narsaya Udpa v. Venkataramana Bhatta*. (Trust property permanently leased to the defendant on condition of paying yearly rent.)
 ('23) 10 AIR 1923 Cal 1 (5, 7) : 74 Ind Cas 630 : 50 Cal 49 (DB), *Charu Chandra Pramanik v. Nahush Chandra Kundu*. (Time runs from date of assignment.)
 [See ('41) 28 AIR 1941 P C 1 (6) : I L R (1941) Kar (PC) 1 : 67 Ind App 448 : ILR(1941) Mad 175 : 192 Ind Cas 1 (PC), *Firm O. Rm. O. M. Sp. v. Nagappa*. (Trust funds deposited in Bank—Bank applying funds to trustee's private debts due to Bank—Suit against Bank—Art. 120 applies and not Art. 36—Question of applicability of S. 10 not raised.)]
 See also Article 134 Note 6.
 2a. ('43) 30 AIR 1943 Pat 289 (296) : 22 Pat 133 : 208 Ind Cas 129 (DB), *Biseshwar Dass v. Sashinath Jha*.

The mere fact of a transfer being for *valuable consideration* is enough to exclude from the section a suit against the transferee. The question as to the transferee having taken the transfer with *notice of the trust* is not material for the purposes of this section.³

Under the corresponding provisions in the Acts of 1859 and 1871, the exemption from limitation under the section applied not only to suits against a *gratuitous* transferee of the trust property but also to suits against transferees for *consideration* who were not transferees in *good faith*. Under the present Act and the Act of 1877, the question of *good faith* is not material in determining whether a suit against a transferee of the trust property is governed by the section. The fact that the transfer is one for *consideration* is enough to take the case out of this section. Hence, the decisions⁴ under the previous Acts as to whether *notice of the trust* would affect the question of the good faith of the transferee are only of academic interest now.

The assignment for valuable consideration referred to in this section will include *every* kind of transfer of the trust property for consideration. Thus, a mortgage,⁵ a lease,⁶ an exchange⁷ or a purchase

3. ('23) 10 AIR 1923 P C 175 (177, 178) : 50 Ind App 295 : 46 Mad 751 : 74 Ind Cas 492 (PC), *Subbaiya Pandaram v. Mahomad Mustapha Marcayar*. (Affirming ('18) AIR 1918 Mad 974 (DB), *Subbaiya v. Md. Mustapha*.)

('06) 33 Cal 511 (527, 528) : 3 Cal L Jour 306 : 10 Cal W N 738 (DB), *Shyama Charan v. Abhiram Goswami* (Reversed in ('09) 36 Cal 1003 : 36 Ind App 148 (PC), *Abhiram v. Shyama Charan*, on another point.)

('05) 2 Cal L Jour 546 (552, 553) (DB), *Ram Kanai Ghosh v. Raja Sri Hari Narayan Singh*, ('85) 9 Bom 475 (DB), *Baivakhan v. Bhiku*, (cited in support)

('24) 11 AIR 1924 Oudh 44 (45) : 26 Oudh Cas 197 : 77 Ind Cas 737, *Gomti Misra v. Deota Din*

('14) 1 AIR 1914 Mad 708 (710) : 24 Ind Cas 369 : 38 Mad 1064 (DB), *Venkatachella Reddiar v. Collector of Trichinopoly*.

[See however ('40) 27 AIR 1940 Cal 228 (232) : 190 Ind Cas 405, *Srikissen Khanna v. Tarachand Ghanshyamdas*. (It was held in this case that where trust property is leased by trustee in derogation of the trust Section 10 does not apply if the lessees are assigns for valuable consideration and are not aware that the property was affected by any possible trust when the lease was executed — Note: The observation as to the lessee's want of knowledge was unnecessary.)]

See also Article 134 Note 10.

4. ('79) 2 All 394 (396) (DB), *Piarey Lal v. Saliga*. (1871 Act.)

('79) 2 All 460 (465) (DB), *Kamal Singh v. Batul Fatima*. (Do.)

('76) 1 Bom 269 (279, 280), *Maniklal Atmaram v. Manchershhi Dinsha*. (Do.)

('66) 5 Suth W R 120 (121) (DB), *Luteefun v. Bego Jan*. (1859 Act.)

('66) 5 Suth W R 238(240)(DB), *Mt. Khyroonissa v. Saleehoonissa Khatoon*. (Do.)

5. ('98) 20 All 482 (485) : 1898 All W N 123 (FB), *Behari Lal v. Md. Muttaki*.

('36) 23 AIR 1936 Lah 784 (784) : 165 Ind Cas 48 (DB), *Dwarka Das v. Rikhi Ram*.

6. ('40) 27 AIR 1940 Cal 228 (232) : 190 I. C. 405, *Srikissen v. Tarachand*.

('12) 16 Ind Cas 53 (55) (Mad), *Narsaya Udpa v. Venkataramana Bhatta*. (Lessee holding in consideration of paying annual rent is assign for valuable consideration.)

[See ('22) 9 AIR 1922 P C 123 (134) : 65 Ind Cas 161 : 48 Ind App 302 : 44 Mad 831 (PC), *Vidya Varuthi v. Baluswami Ayyar*. (Permanent lease for a quit rent of Rs. 24 per annum. Held that it would be ridiculous to hold that the rent reserved was "valuable consideration.")]

7. ('07) 30 Mad 316 (317) : 17 Mad L Jour 149 (DB), *Rajagobalan v. Somasundara Thambiran*. (An exchange is nevertheless a transfer for valuable consideration because the consideration subsequently fails.)

Section 10
Notes 21-22

in execution⁸ will be an assignment for consideration within the meaning of this section. See also the undermentioned cases.⁹

22. "For the purpose of following in his or their hands such property or the proceeds thereof." — The expression 'following trust property' necessarily implies that in order to bring a suit within the expression, the object of the suit must be to restore to the trust, property which rightfully belongs to it but which has been improperly removed from it.¹

Illustrations.

1. Where certain properties are disposed of on trust by a testator but the testator's heirs sue the trustee for such properties on the ground that the trust is void and that therefore, they, the heirs, are entitled as on intestacy to the properties, the section does not apply.² The reason is that the suit proceeds on a

8. ('23) 10 AIR 1923 P C 175 (177, 178) : 74 Ind Cas 492 : 50 Ind App 295 : 46 Mad 751 (PC), *Subbaya Pandaram v. Muhammad Mustapha*. (Affirming ('18) AIR 1918 Mad 974, *Subbaiya v. Md. Mustapha*.)

('26) 13 AIR 1926 Cal 913 (914, 915) : 95 Ind Cas 644 (DB), *Manindra Narain v. Executors to the estate of late Bhutan Chandra*. (('22) AIR 1922 P C 123 : 48 Ind App 302 : 44 Mad 831 (PC), *Vidya Varuthi v. Baluswami Ayyar*, distinguished.)

('88) 15 Cal 703 (705, 706) (DB), *Chintamani Mahapatro v. Sarupse*.

9. ('43) 30 AIR 1943 Pat 289 (296) : 22 Pat 133 : 208 Ind Cas 129 (DB), *Biseshwar Dass v. Sashinath Jha*. (The transfer of a portion of the *math* and the properties appertaining thereto by one *mahant* in favour of another *mahant* in settlement of a *bona fide* dispute between the two *mahants* to the office of the *mahant* of the *math* is a transfer for a valuable consideration.)

('18) 5 AIR 1918 Bom 183 (183, 184) : 46 Ind Cas 19 (DB), *Ramacharya v. Srinivasacharya*. (Gift of temple property in consideration of services to be performed is assignment for consideration.)

Section 10 — Note 22

1. ('42) 29 AIR 1942 Sind 145 (150) : ILR (1942) Kar 392 : 208 Ind Cas 230, *Gopaldas v. Hemandas*. (What S. 10 contemplates is a breach of an express trust by a trustee, a diversion of trust property or the proceeds thereof to purposes not specified in the trust or a conversion of trust property or the proceeds thereof and a suit for the recovery of such property or proceeds for the benefit of the trust so that such property or proceeds may be utilized for the purposes of the trust.)

('38) 25 AIR 1938 Cal 673 (677) : ILR (1938) 1 Cal 652 : 181 Ind Cas 190, *Kali Pada De v. Hari Dasi Dasi*.

('83) 6 All 1 (9) : 10 Ind App 90 : 13 Cal L R 39 : 4 Sar 435 : 7 Ind Jur 329 (PC), *Balwant Rao v. Puran Mal*.

('34) 21 AIR 1934 Cal 87 (89, 90) : 61 Cal 119 : 150 Ind Cas 398 (DB), *Bibhu Bhusan v. Anadi Nath*.

('27) 14 AIR 1927 Bom 398(398) : 103 Ind Cas 418 (DB), *Mahomedsa v. Khadirsa*.

2. ('41) 28 AIR 1941 Bom 307 (308) : 196 Ind Cas 821, *Fidahusseini v. Tyabally*.

('22) 9 AIR 1922 P C 212 (214, 215) : 49 Ind App 37 : 102 Ind Cas 832 (PC), *Khaw Sim Tek v. Chuah Hooi Gnoh Neoh*.

('96) 20 Bom 511 (517, 518), *Cowasji N. Pochkhanawalla v. R. D. Setna*.

('08) 32 Bom 364 (371, 373) : 10 Bom L R 117, *Ayshabai v. Ebrahim Haji Jacob*.

('05) 7 Bom L R 324 (329), *Dady v. Advocate-General*.

('12) 17 Ind Cas 689 (694, 695) : 37 Bom 447 (DB), *Md. Ibrahim v. Abdul Latif*.

('94) 16 All 256 (258) : 1894 All W N 73 (DB), *Jasoda Bibi v. Parmanand*.

('79) 4 Cal 455 (465) : 3 Cal L R 315 : 2 Shome L R 153 (DB), *Kherodemoney Dossee v. Doorgamoney Dossee*. (Affirming ('78) 2 Cal L R 112, *Kherodemoney v. Doorgamoney*.)

denial of the specific trust created by the testator. Assuming that on failure of the trust created by the testator there is a resulting trust in favour of his heirs, such a trust would only be a constructive trust and not a trust for a specific purpose. (See Note 7.) Hence, the claim of the heirs against the trustee in such a case would not be within the section.

2. Where the trust properties have not been removed from the purposes of the trust but the plaintiff only sues for the establishment of his own right to the office of trustee or to control the management of the trust, the section will not apply.³ In such a case the trust properties have not been removed from the trust at all and there is no occasion for a suit for their restoration to the trust. In other words, there is no question of following trust properties in such cases.

3. Where the suit is not for recovery of any property from the trustee but only for removal of the trustee and the appointment of fresh trustees, the suit not being one for following trust property the section will not apply.⁴ In the undermentioned cases,⁵ however, it was held that where such a suit is based on

('36) 23 AIR 1936 Bom 30 (34) : 160 Ind Cas 612 (DB), *Shirinbai Dinshaw v. Navroji Pestonji*. (1889) 42 Ch D 312, *Churcher v. Martin*, relied on.)

('34) 21 AIR 1934 Cal 87 (90) : 150 Ind Cas 398 : 61 Cal 119 (DB), *Bibhu Bhusan v. Anadi Nath*. (Suit on ground that purpose for which trust was created has been completed and that plaintiff is entitled to the property on such completion.)

3. ('83) 6 All 1 (10) : 10 Ind App 90 : 13 Cal L R 39 : 4 Sar 435 : 7 Ind Jur 329 (P C), *Balwant Rao v. Puran Mal*.

('19) 6 AIR 1919 P C 62 (68, 69) 43 Mad 253 : 46 Ind App 204 : 53 Ind Cas 288 (PC), *Arunachallam Chetty v. Venkatachalapathy Guruswamigal*.

('21) 8 AIR 1921 P C 97 (100) : 43 Mad 665 : 47 Ind App 191 : 56 Ind Cas 730 (PC), *Ambalavana Pandara Sannadhi v. Sri Minakshi Sundareswara Devasthanam of Madura*.

('98) 21 Mad 278 (286, 287) (DB), *Alagirisamy Naicker v. Sundareswara Iyer*.

('97) 20 Mad 398 (403) (DB), *Ranga Pai v. Baba*. (A suit between co-trustees does not come within Section 10.)

('84) 7 Mad 337 (338) (DB), *Kannan v. Nilakandan*.

('84) 7 Mad 417 (418) (DB), *Karimshah v. Nattan*.

('18) 5 AIR 1918 Pat 570 (573, 575) : 3 Pat L Jour 327 : 47 I. C. 290 (DB), *Nathe Pujari v. Radha Binode Naik*.

('05) 27 All 513 (515) : 1905 All W N 69 : 2 All L Jour 304 (DB), *Jadunath Prasad v. Girdhar Das*.

('28) 15 AIR 1928 Cal 670 (674) : 112 Ind Cas 496 : 55 Cal 903, *Aurabindo Nath v. Manorama Debi*.

('93) 16 Mad 456 (459) (DB), *Sankaran v. Krishna*.

('91) 14 Mad 153 (162) (DB), *Nilakandan v. Padmanabha*. (Affirmed on appeal to the Privy Council in ('94) 18 Mad 1 (P C), *Nilakandhen v. Padmanabha*.)

('87) 10 Mad 375 (477) (DB), *Gnanasambanda Pandara Sannadhi v. Kandaswami Tambiran*.

('15) 2 AIR 1915 Mad 1003 (1009, 1021) : 26 Ind Cas 841 (DB), *Ambalavana Pandara Sannadhi v. Minakshi Sundareswara Devasthanam*.

[But see ('24) 11 AIR 1924 Mad 125 (125, 126) : 74 I. C. 120 (DB), *Shanmugappa v. Sangarayya Chetty*. (Section 10 applies to a suit by one of two co-trustees against the other for joint possession and joint management of the trust property — Submitted view not correct.)]

See also Article 120, Note 4 and Article 124, Note 2.

4. ('83) 6 All 1 (9, 10) : 10 Ind App 90 : 13 Cal L R 39 : 4 Sar 435 : 7 Ind Jur 329 (P C), *Balwant Rao v. Puran Mal*.

('83) 5 All 294 (296) : 1883 All W N 40 (DB), *Muhammad Baksh v. Mahomed Ali*. (Suit for removal of trustee — Compromise decree — Suit to set aside decree is not within section.)

5. ('91) 14 Mad 1 (8) (DB), *Sathappayyar v. Periasami*.

('83) 12 Cal L R 370 (374), *Sreenath Bose v. Radha Nath Bose*.

('22) 9 AIR 1922 Mad 394 (397) : 69 I. C. 15 (DB), *Gopu Nataraja v. Rajammal*.

Section 10 Note 22

the ground that the defendant has been misappropriating trust property, the suit is really for preventing a misapplication of trust funds and for the *protection* of the trust property and hence would be a suit for following trust property. It is submitted that such a view is not correct, as a prevention of misapplication of trust property is not the same thing as recovering for the trust what has been misapplied.

4. Where there is no question of restoring trust properties to the trust but the suit is only by the plaintiff as a *third* person against the trustee as representing the trust for recovery of moneys due to the plaintiff out of trust funds, the section does not apply. Thus, a suit against the trustee for remuneration for services rendered by the plaintiff in connection with the purposes of the trust is not within the section.⁶ Similarly, where *A* transfers properties to *B* in trust for *himself* for the purpose of liquidating his debts, there is no trust in favour of *A's* creditors. Hence, a suit by such creditors against *B* (assuming such a suit will lie) will not be governed by this section.⁷ See also the undermentioned cases.⁸

5. A suit for recovering from the trustee trust property misappropriated by him⁹ or for charging certain properties with certain alleged specific

6. ('26) 13 AIR 1926 Pat 205 (205, 206) : 94 Ind Cas 826: 5 Pat 249 (DB), *Baidyanath Jiu v. Har Dutt Dwari*. (Suit to recover remuneration as *dwaris* of temple is not covered by S. 10.)

7. ('98) 25 Cal 642 (648) : 2 Cal W N 469, *William Robert Fink v. Maharaj Bahadur Singh*.

See also Note 10.

8. ('45) 32 AIR 1945 Sind 57 (70) : I L R (1945) Kar 40 (DB), *Shamdas v. Gurmukhsingh*. (Section 10 contemplates the following or pursuit of concrete property. Where the suit is not under S. 92, Civil P. C. but under S. 42, Specific Relief Act for a declaration that certain property is trust property, S. 10 does not apply. Suit is governed by Art 120.)

('42) 29 AIR 1942 Sind 145 (150, 151) : I L R (1942) Kar 392 : 208 Ind Cas 230, *Gopaldas v. Hemandas*. (Where the plaintiff in a suit against the persons appointed executors under a will and trustees of the testator's estate, seeks a money decree in satisfaction of a legacy alleged to have been bequeathed to him under the will, he cannot be said to be suing to recover any property for the benefit of the trusts created under the will.)

('38) 25 AIR 1938 Pat 600 (602) ; 17 Pat 350 : 181 Ind Cas 283 (DB), *Hemangini Devi v. Anil Krishna Banerjee*. (Suit for recovery of arrears of annuity under will against executor is governed by Art. 123 - S 10 does not apply to such suit.)

('01) 3 Bom L R 422 (424) (DB), *Anant v. Kashinath*. (Suit for recovery of share in the balance of the income after meeting expenses of worship of idol for which trust has been created. Section does not apply.)

('73) 19 Suth W R 35 (36, 37) (DB), *Mohamaya Dossee v. Bindoo Bashinee*. (Do.)

9. ('46) I L R (1946) 2 Cal 447 (481):51 C W N 383, *Sree Gopal Jiu v. Baldeo Narain*. (Properties conveyed to trustees upon express trust in favour of deity—Trustees fraudulently putting an end to trust and dividing them amongst themselves—Suit for recovery of properties—Section 10 applies.)

('42) 46 Cal W N 865 (872) (DB), *Amiya Krishna Khan v. Debendra Lal Khan*. (Suit against legal representatives of deceased trustee for moneys misappropriated. Suit is in essence a suit to follow trust property in the hands of the legal representative of the trustee.)

('08) 32 Bom 394 (401, 402) : 10 Bom L R 540 (DB), *Bhurabhai Jamandas v. Bai Ruxmani*. (Suit for recovery of money misappropriated by trustee and applied to other objects unconnected with the trust—Suit is within this section.)

('28) 15 AIR 1928 Bom 58 (58, 59) : 107 Ind Cas 705 : 52 Bom 184, *Chintaman Raoji v. Khanderao Pandurang*.

('88) 11 Mad 274 (279, 280), *Sethu v. Subramanya*. (Suit for sums misappropriated by former dharmakarta.)

('13) 21 Ind Cas 421 (423) (DB) (Mad), *Subramani Iyer v. Subba Naidu*. (Do.)

trusts¹⁰ is within the section.

23. Suit for account. — A suit for *following* trust property implies that the property sought to be followed is in the hands of the defendant. Where the property sought to be recovered is not in the hands of the defendant and it is sought to make him liable on the footing that certain property came into his hands and that he is liable to account for such property and to make good such portion of it as he does not duly account for, the suit would not be one for *following* trust property but one for *accounts*. Such a suit is expressly included in this section.¹

The corresponding section in the Act of 1877 did not expressly apply to a suit for accounts but only applied to a suit for following trust property. Hence, there was a conflict of decisions as to whether this section applied to a suit for *accounts* against the trustee or his representative, some cases holding that the section applied to such suits² and other cases holding to the contrary.^{2a} The amendment of the section in the present Act gives effect to the former view.

(‘94) 18 Bom 551 (562), *Advocate-General of Bombay v. Bai Punjabai*. (Trustees misapplying funds to other trusts — Suit for recovery of such moneys is within section.)

10. (‘82) 8 Cal 766 (768) : 6 Ind Jur 635, *Hurro Coomaree v. Tarini Churn*.

Section 10 — Note 23

1. (‘43) 30 AIR 1943 Mad 691 (695) : I L R (1944) Mad 284 : 212 Ind Cas 518 (DB), *S. C. V. Devasthanam v. Chidambaram*. (The application of the section is not limited to tracing actions.)

(‘20) 7 AIR 1920 Cal 558 (560):57 I. C. 805 (DB), *Dhanpat Singh v. Mohesh Nath Tewari*.

(‘24) 11 AIR 1924 Cal 160 (163):74 Ind Cas 373 (DB), *Peary Mohan Mookerjee v. Manohar Mookerjee*. (Obiter.)

(‘22) 9 AIR 1922 Mad 409 (409, 412):70 I. C. 87 (DB), *Doraivelu v. Audikesavalu*.

(‘16) 3 AIR 1916 Mad 720 (723, 726):39 Mad 365:28 I. C. 221 (DB), *Chidambara Mudaliar v. Krishnaswamy Pillai*. (Decree may be given to trustee if the accounts should turn out to be in his favour.)

(‘28) 15 AIR 1928 Bom 58 (58, 59) : 52 Bom 184 : 107 I. C. 705 (DB), *Chintaman v. Khanderao*. (Suit for account and refund of the amount is not barred by lapse of time.)

[But see (‘38) 25 AIR 1938 Nag 30 (33) : ILR (1940) Nag 94 : 176 I. C. 57 (DB), *Mt. Sahaudra Bai v. Sri Deo Radha Ballabhji*. (The view expressed in this case that this section cannot apply at all where the trust property or its proceeds are not in the hands of the defendant is not correct.)]

2. (‘82) 8 Cal 766 (768), *Hurro Coomaree Dossee v. Tarini Churn Bysack*. (A suit for the purpose of charging certain properties with the trust and for an account is a suit to follow trust property and is not barred by any lapse of time.)

(‘84) 8 Bom 432 (468, 469), *Thakersey v. Hurbhum Nursey*.

(‘88) 11 Mad 274 (279, 280) (DB), *Sethu v. Subramanya*. (Suit against dharmakarta of temple to recover money misappropriated.)

(‘03) 30 Cal 369 (384, 386) : 7 Cal W N 353 (DB), *Nistarini Dasi v. Nando Lal Bose*. (Affirmed on appeal in (‘05) 33 Cal 180 : 32 Ind App 193 (PC), *Behari v. Nistarini*.)

[See (‘10) 8 Ind Cas 189 (189, 190) (Bom), *Gajanan v. Waman*. (If the plaintiff is admittedly following trust property then he cannot be excluded from the benefit of this section merely because he frames his suit as one for accounts.)]

2a. (‘86) 10 Bom 242 (246, 247, 248), *Shapoorji Nowroji Pochaji v. Bhikaji*. (Suit for an account against an executor or his representative.)

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But, the section is limited to suits for account in regard to property which *has become* vested in trust for a specific purpose. Hence, a suit to enforce the liability of the trustee or his representative for property which never came into his hands but which would have come into his hands but for his wilful default or negligence will not be within the section.³

It has been held that a suit for account is not maintainable against the legal representative of a deceased trustee as the legal representative does not stand in a fiduciary relationship which a suit for accounts involves.⁴ A contrary view has been taken in the under-mentioned cases.⁵ See also the undermentioned case.⁶

24. Persons entitled to benefit of section. — There is no restriction as to the persons who are entitled to the benefit of the section. A suit of the kind defined in the section by whomsoever brought will be governed by the section.¹ It is not necessary that the plaintiff must be a *beneficiary* under the trust.^{1a} Thus, a suit by one

('08) 32 Bom 364 (371, 373):10BomLR117, *Ayshabai v. Ebrahim Haji Jacob*. (Do.)
(80) 5 Cal 910 (914) : 6 Cal L R 195(DB), *Saroda Pershad v. Brojo Nath*.

('09) 1 Ind Cas 289 (301, 302) (DB) (Cal), *Baroda Prasad Banerjee v. Gajendra Nath Banerjee*. (('82) 8 Cal 766, *Hurro Coomaree v. Tarini Churn*, distinguished.)

3. ('40) 27 AIR 1940 Rang 207 (211) : 1940 Rang L R 273 : 193 Ind Cas 61 (DB), *Official Trustee v. Mrs. Raeburn*. (A claim for an account of an interest which the trustee ought to have earned for the trust funds but failed to earn is not governed by the section but by Art. 120.)

('38) 25 AIR 1938 Mad 353 (356) : ILR (1938) Mad 586 : 174 Ind Cas 459 (DB), *Subbiah Thevar v. Samiappa Mudaliar*.

('18) 5 AIR 1918 Mad 624 (625, 626):42 I. C. 544:41 Mad 319 (DB), *Tholasingam Chetty v. Vedachalla Aiyah*.

('36) 23 AIR 1936 Bom 30 (34, 35) : 160 Ind Cas 612 (DB), *Shirimbai v. Navroji*.

('22) 9 AIR 1922 Mad 409 (409, 412):70 I. C. 87 (DB), *Doraivelu v. Audikesavalu*.

('94) 18 Bom 401 (423, 424), *Advocate-General of Bombay v. Moulvi Abdul Kadar*.

('85) 9 Bom 373 (399, 400), *The New Fleming Spinning and Weaving Co., Ltd. v. Kessowji Naik*. (Director's want of vigilance in not seeing to the agent's fulfilment of his duty — S. 10 not applicable.)

('97) 21 Bom 257 (264, 267) (DB), *Sayad Hussein Miyan v. Collector of Kaira*.

4. ('42) 46 Cal W N 865 (869) (DB), *Amiya Krishna v. Debendra Lal*.

5. ('49) 36 AIR 1949 Nag 235 (240) : ILR (1948) Nag 794 (DB), *Mirabai v. Kaushalyabai*. (Article 98 held applicable to a suit for accounts against legal representative of a deceased guardian appointed under the Guardians and Wards Act.)

('43) 30 AIR 1943 Mad 691 (695) : I L R (1944) Mad 284 : 212 Ind Cas 518 (DB), *S. C. V. Devasthanam v. Chidambaram*. (Section 10 applies to a case where the trustee of the legal representative is asked to account for money that was in his hands as trustee.)

6. ('47) ILR (1947) 1 Cal 48 (89), *Kanailal Ghoshal v. Purnendu Nath*. (Contention that suit was for accounts and that such suit did not lie against the legal representatives — Held that the suit was not one for accounts but for following trust property and was covered by section.)

Section 10 — Note 24

1. ('36) 23 AIR 1936 Mad 876 (877, 878):169 I. C. 362 (DB), *Vairavan Chetty v. Chettichi Achi*. (Money paid to A in trust for payment of debts of B — B can sue for accounts of such money and his suit will be within section.)

1a. See however ('42) 29 AIR 1942 Sind 145 (150): ILR (1942) Kar 392 : 208 Ind Cas 230, *Gopaldas v. Hemandas*. (The plaintiff must be a beneficiary so interested in the trust as to entitled him to institute a suit.)

co-trustee against another² or by a present trustee against a past trustee³ will be within the section.

Section 10
Notes 24-25

25. Property comprised in Hindu or Muhammadan religious or charitable endowment, whether property vested in trust for a specific purpose. — Before the decision of the Privy Council in *Vidya Varuthi v. Baluswami*,¹ there was a conflict of decisions on the question whether property comprised in a Hindu or Muhammadan religious or charitable endowment was property vested in trust for a specific purpose within the meaning of this section.² The above decision of the Privy Council set at rest this conflict and decided that there is no *trust* at all in such cases.³ The

2. ('20) 7 AIR 1920 Cal 558 (560) : 57 I. C. 805 (DB), *Dhanpat Singh v. Mohesh Nath Tewari*.

[But see ('27) 14 AIR 1927 Bom 424 (425, 426) : 103 Ind Cas 225, *Jamnadas v. Damodardas*. (Not correct.)]

3. ('95) 18 Mad 266 (272, 273) : 4 Mad L Jour 223 (DB), *Sathianama Bharathi v. Saravanabagi Ammal*. (Grant by the head of the mutt to his brother for his maintenance — Suit by a successor to recover the land.)

('88) 11 Mad 274 (279, 280), *Sethu v. Subramanya*. (Suit against dharmakarta of temple to recover money misappropriated.)

('13) 21 Ind Cas 421 (423) (DB) (Mad), *Subramania Iyer v. Subba Naidu*.

Section 10 — Note 25

1. ('22) 9 AIR 1922 P C 123 (126, 127) : 65 Ind Cas 161 : 48 Ind App 302 : 44 Mad 831 (PC).

2. *Cases holding that manager is trustee.*

('19) 6 AIR 1919 Mad 571 (571) : 52 I. C. 914 (DB), *Deivasikamani v. Valliammal*.

('13) 21 Ind Cas 421 (423) (Mad), *Subramania Iyer v. Subba Naidu*.

('88) 11 Mad 274 (277, 278) (DB), *Sethu v. Subramaniya*.

('83) 6 Mad 54 (59) : 6 Ind Jur 629 (DB), *Virasami v. Subba Rau*.

('83) 12 Cal L R 370 (374), *Sreenath Bose v. Radha Nath Bose*.

('05) 2 Cal L Jour 546 (550, 551) (DB), *Ram Kanai Ghosh v. Hari Narain Singh*.

('04) 31 Cal 314 (317) (DB), *Jagamba Goswami v. Ram Chandra Goswami*.

('03) 27 Bom 363 (369, 372) : 4 Bom L R 743, *Dattagiri v. Dattatraya*. (('98) 20 All 482 (FB), *Behari Lal v. Muhammad*, followed.)

('18) 5 AIR 1918 Cal 580 (580, 581) : 44 Ind Cas 567 (DB), *Monmotho Nath v. Annoda Prosad Roy*.

('16) 3 AIR 1916 P C 256 (257) : 43 Cal 707 : 43 Ind App 73 : 33 Ind Cas 583 (PC), *Ram Parkash Das v. Anand Das*.

[See also ('19) 6 AIR 1919 P C 62 (68, 69) : 43 Mad 253 : 46 Ind App 204 : 53 I. C. 288 (PC), *Arunachellam v. Venkatachalapathy*. (Trustee in loose sense.)]

Case holding manager of endowment was not trustee.

('74) 21 Suth W R 415 (416) (DB), *Syed Shah Alleh Ahmed v. Mt. Bibee Nusseebun*.

3. ('43) 30 AIR 1943 Mad 691 (694) : ILR (1944) Mad 284 : 212 Ind Cas 518 (DB), *S. C. V. Devasthanam v. Chidambaram*. (*Dharmakartha* of a temple is not the trustee of its property. Gift of land could however be made to the manager to be held in trust for the temple.)

('41) 28 AIR 1941 All 1 (8) : I L R 1940 All 815 : 193 Ind Cas 697 (DB), *Dharam Narain v. Suraj Narain*.

('23) 10 AIR 1923 P C 44 (46) : 71 Ind Cas 646 : 50 Ind App 84 : 50 Cal 329 (PC), *Abdur Rahim v. Narayan Das*. (Mutawalli or manager is not trustee.)

('34) 21 AIR 1934 P C 77 (79) : 56 All 111 : 61 Ind App 50 : 147 Ind Cas 887 (PC), *Allah Rakhi v. Shah Muhammad Abdur Rahim*. (Do.)

('28) 15 AIR 1928 All 689 (693, 696) : 114 I. C. 734 (DB), *Rangacharya v. Guru Revati Raman Acharya*.

Section 10
Note 25

reasoning on which the decision proceeded was, that where property was dedicated to a Hindu idol or *mutt* or to a Muhammadan *wakf*, the property vested in the idol or the institution or God directly and the *shebait*, *mahant*, *mutawalli* or other person who was in charge of the institution was simply a manager on behalf of the institution and that, as a trust implied an obligation annexed to the *ownership* of property, there was no *trust* in such cases. Where, however, in a suit under S. 539 of the Code of Civil Procedure 1882 (corresponding to S. 92 of the present Code) the Court appointed the High Priest of a temple a trustee of the temple properties it was held by their Lordships of the Judicial Committee that the High Priest was a trustee within the meaning of this section.^{3a} The second paragraph of this section has been added by Act I of 1929 in order to get over the effect of the above decision and to extend the applicability of this section to suits with reference to property comprised in Hindu and Muhammadan religious or charitable endowments. The effect of the provision is that although under the *general law* there may be no trust for a specific purpose in such cases, *for the purposes of this section*, property comprised in Hindu, Muhammadan or Buddhist religious or charitable endowments should be treated as property vested in trust for a specific purpose and the manager of such property should be treated as a trustee thereof.⁴

('28) 15 AIR 1928 All 134 (136): 108 Ind Cas 452 : 50 All 265 (DB), *Jaisth Madho v. Gat Ashram Narainji*.

('22) 9 AIR 1922 Lah 271 (272, 273): 65 Ind Cas 722, *Diwan Singh v. Sham Das*. ('22) A I R 1922 P C 123 : 48 Ind App 302 : 44 Mad 831 (PC), *Vidya Varuthi v. Baluswami*, followed.)

('28) 15 AIR 1928 Cal 130 (135) : 105 Ind Cas 647 : 55 Cal 448 (DB), *Mt. Rukeya Banu v. Mt. Nazira Banu*.

('26) 13 AIR 1926 Cal 568 (575): 94 I. C. 235 (DB), *Gangaprosad v. Kuladananda*.

('34) 21 AIR 1934 Mad 542 (543) : 152 Ind Cas 345, *Krishna Kudva v. Sri Venkataramana Temple*.

('27) 14 AIR 1927 Mad 614 (617) : 50 Mad 567 : 101 Ind Cas 420 (DB), *Nelliappa Achari v. Punnaivanaum Achari*. (Case under S. 92, Civil P. C.)

('26) 13 AIR 1926 Mad 769 (770): 49 Mad 543: 96 Ind Cas 371 (DB), *Rama Reddy v. Ranga Dassan*.

('26) 13 AIR 1926 Pat 239 (240): 5 Pat 341 : 93 Ind Cas 303 (DB), *Badri Narayan Singh v. Kailash Gir*.

('34) 21 AIR 1934 Oudh 96 (96, 97) : 9 Luck 384 : 147 Ind Cas 607 (DB), *Chinkan Pande v. Durga Bharathi*.

[See also ('45) 32 A I R 1945 All 121 (133) : I L R (1945) All 75 : 222 Ind Cas 196 (DB), *Obedullah v. Abdul Jalil*. (Where certain properties were claimed by legal representatives of a *mutwalli* adversely to the *waqf* by reason of having completed their title by twelve years' adverse possession prior to the amendment, S. 10, as amended, could have no application and the suit by the subsequent *mutwalli* brought after the amendment for recovery of the *waqf* properties would fail.)]

3a. ('41) 28 A I R 1941 P C 130 (132) : 21 Pat 96 : 68 Ind App 130 : I L R (1941) Kar (PC) 176 : 196 Ind Cas 696 (PC), *Baidyanathji v. Urmila Devi*. (('38) A I R 1938 Pat 273 (DB), *Urmila v. Baidyanathji*, reversed.)

4. ('48) 35 AIR 1948 P C 168 (174): Pak L R (1949) Lah 1 (PC), *Beli Ram & Bros. v. Mohd. Afzal*. (Where a valid *waqf* is created, the *wakif* cannot subsequently revoke the *waqf* and deal with the property as its owner. Where he does so, he commits breach of trust and does not set up title adverse to the trust.)

('35) 22 A I R 1935 Mad 483 (485) : 157 Ind Cas 181 (DB), *Manickammal v. Murugappa Gramani*.

As to the retrospective effect of the provision, see the under-mentioned cases.⁵

It is only the *manager* of the religious endowment that is a trustee under the second paragraph of the section. A person to whom such manager entrusts endowed property for safe custody and management is not a trustee.^{5a}

Where property is specifically transferred to a person to be held by him in trust for an idol or religious institution, there is clearly a trust for a specific purpose even without recourse to the special provision contained in the second paragraph of this section.⁶

See also Art. 134 Note 5 and Art. 134A to Art. 134C Note 5.

5. ('45) 32 AIR 1945 All 121 (133) : I L R (1945) All 75 : 222 Ind Cas 196 (DB), *Obedullah v. Abdul Jalil*. (Amendment is not retrospective — Waqf — Legal representatives of mutwalli completing adverse possession of waqf property before amendment — S. 10, as amended cannot apply — Suit by subsequent mutwalli to recover possession must fail.)

('43) 30 A I R 1943 Mad 691 (696) : I L R (1944) Mad 284 : 212 Ind Cas 518 (DB), *S. C. V. Devasthanam v. Chidambaram*. (Section 10 or its amendment does not create any vested right. It, in effect, says that the periods of limitation laid down in the other provisions of the Lim. Act shall not apply in certain cases to person in whom property has vested in trust for a specific purpose. It does not create any right in the property or take away any right in it. The trustee who retains or misappropriates temple funds never acquires any right to them. Suit against trustee barred before amendment. Amendment cannot revive it.)

('43) 30 A I R 1943 Pat 289 (295, 296) : 22 Pat 133 : 208 Ind Cas 129 (DB), *Biseshwar Dass v. Sashinath Jha*. (Where the right of the plaintiff had become barred by limitation before the amending Act of 1929 was passed, the mere institution of the suit after 1929 cannot have the effect of reviving the right.)

('38) 25 AIR 1938 Pat 273 (274) : 176 Ind Cas 209 (DB), *Urmila Debi v. Baidyanatha Jee*. (Act I of 1929 not retrospective — AIR 1934 P C 77 : 61 Ind App 50 : 56 All 111 (PC) followed.)

('34) 21 AIR 1934 P C 77 (78) : 61 Ind App 50 : 56 All 111 : 147 Ind Cas 887 (PC), *Allah Rakhi v. Shah Mohamed Abdur Rahim*. (Act I of 1929 not applicable to suit instituted before coming into force of Act but pending at such date.)

('35) 22 AIR 1935 Mad 483 (485) : 157 Ind Cas 181, *Manickammal v. Murugappa*. (Act I of 1929 applicable to all suits instituted after coming into force of Act although endowment was created before.)

5a. ('41) 28 AIR 1941 Nag 181 (185, 186) : I L R (1942) Nag 92 : 201 Ind Cas 220 (DB), *Shri Mahadeoji v. Baldeo Prasad*.

6. ('22) 9 AIR 1922 P C 123 (130) : 65 Ind Cas 161 : 48 Ind App 302 : 44 Mad 831 (PC), *Vidya Varuthi v. Baluswami*.

('18) 5 AIR 1918 Bom 183 (183, 184) : 46 I. C. 19 (DB), *Ramacharya v. Shrinivasacharya*.

('23) 10 AIR 1923 Cal 1 (7) : 50 Cal 49 : 74 Ind Cas 630 (DB), *Charu Chandra v. Nahush Chandra*.

('18) 5 AIR 1918 P C 37 (40) : 45 I. C. 818 (PC), *Basudeo Roy v. Jugal Kishwar*. (('16) AIR 1916 P C 256 : 43 Cal 707 : 43 Ind App 73 (PC), *Ram Parkash v. Anand* referred.)

('27) 14 A I R 1927 Bom 398 (398, 399) : 103 Ind Cas 410 (DB), *Mahomedsa Khadirsa v. Khadirsa Hajisa*. (('22) A I R 1922 P C 212 : 49 Ind App 37 (PC), *K. Sim Tek v. C. H. Gnoh Neoh*, followed.)

('08) 1908 Pun W R No. 123, p. 418 (420, 422) : 1908 Pun Re No. 127 (FB), *Har Gian Dev v. Baldeo Dass*.

Section 10
Notes 26-28

26. Property comprised in Parsi religious endowment. —

In the undermentioned case¹ it was held that the *vahivatdars* of a *Parsi anjuman* were trustees for a specific purpose within the meaning of this section.

27. Limitation for suits for recovery of trust property from strangers. — This section only applies to suits against trustees, their legal representatives or assigns (not being assigns for valuable consideration). Hence, the exemption from limitation under this section is confined to suits against such persons and does not apply to suits against *other* persons who may have improperly got into possession of trust property. Thus, suits against transferees for consideration (Note 21) and strangers who have acquired possession by dispossessing the trustee are subject to the ordinary law of limitation.¹

Trustees of Hindu religious institutions from one continuous representation of the idol or institution and hence, when limitation for a suit for recovery of trust property from a stranger has commenced to run during the lifetime of one trustee, there is no fresh start of limitation when he dies and another trustee succeeds to the office. See Articles 142 and 144 Note 49.

28. Limitation for suits against trustees by operation of law. — As seen already, this section does not apply to suits against trustees by operation of law. Hence, such suits are not exempt from the bar of limitation. But, where a constructive trustee purports

Section 10 — Note 26

1. ('34) 21 AIR 1934 Bom 1 (4, 5) : 149 Ind Cas 317 (DB), *Jamshedji Pestonji v. Dorabji Kuverji*. (('22) AIR 1922 P C 123 : 48 Ind App 302 : 44 Mad 831 (PC), *Vidya Varuthi v. Baluswami*, distinguished.)

Section 10 — Note 27

1. ('35) 22 A I R 1935 Mad 483 (485) : 157 Ind Cas 181 (DB), *Manickammal v. Murugappa Gramani*.
('96) 23 Cal 536 (545) (DB), *Nilmony Singh v. Jagabandhu Roy*.
('05) 32 Cal 129 (140, 141) : 31 Ind App 203 : 6 Bom L R 765 : 1 All L Jour 585 : 8 Cal W N 809 : 3 Sar 698 (PC), *Jagadindra Nath Roy v. Hemanta Kumari Debi*.
('94) 18 Bom 507 (511, 512) (DB), *Vithalbowa v. Narayan Daji Thite*.
('23) 10 AIR 1923 Cal 142 (144, 145) : 50 Cal 292 : 74 Ind Cas 793, *Anandachandra Chakravarty v. Broj Lal Singh*. (Adverse possession on behalf of another trust.)
('29) 16 AIR 1929 All 315 (318) : 51 All 621 : 116 Ind Cas 433 (DB), *Dasami Sahu v. Param Shameshwar*. (Property dedicated to Hindu idol can be acquired by adverse possession.)
('26) 13 AIR 1926 All 392 (393, 394) : 48 All 348 : 93 Ind Cas 652 (DB), *Chitar Mal v. Panchulal*. (Do.)
('93) 20 AIR 1933 Cal 295 (302) : 60 Cal 54 : 144 Ind Cas 792 (DB), *Surendrakrishna Roy v. Ishwar Bhubaneshwari Thakurani*. (('22) AIR 1922 P C 123 : 48 Ind App 302 : 44 Mad 831 (PC), *Vidya Varuthi v. Baluswami* followed.)
[See also ('41) 28 AIR 1941 P C 1 (6) : 67 Ind App 448 : I L R (1941) Mad 175 : I L R (1941) Kar P C 1 : 192 Ind Cas 1 (P C), *Firm O. Rm. O. M. Sp. v. Nagappa Chettiar*. (Suit against Bank in which trust funds were invested — Article 120 applies.)]

See also Articles 142 and 144 Notes 47 and 80.

to be in possession of property *on behalf* of the person for whose benefit he is constructive trustee, his possession is not *adverse* to the latter and under Art. 144, limitation for a suit for possession against the constructive trustees will not begin to run so long as he purports to hold the property in the above manner.¹ Further, where the suit against the constructive trustee is based on a breach of the constructive trust, every fresh breach will give a new cause of action for the suit.²

Section 10 — Note 28

1. See the following cases :

- ('14) 1 AIR 1914 Mad 477 (480, 481) : 14 Ind Cas 168 (171) : 37 Mad 373 (DB), *Pattaikara Manakkal Kuppen v. Munde Kottil*.
- ('99) 21 All 329 (340) : (1899) All W N 106 (DB), *Muhammad Munawar Ali v. Rasulan Bibi*. (The waqf having failed, the mutwalli held the property as trustee for those entitled.)
- ('83) 7 Bom 34 (38, 39) (DB), *Dadoba v. Krishna*. (While there substituted any contract, express or implied, between the parties in and out of possession to which the possession might be referred as legal and proper, it could not be pronounced adverse.)
- ('79) 2 All 361 (364, 365) (DB), *Durga Prasad v. Asa Ram*.
- ('23) 10 AIR 1923 Mad 153 (158) : 74 I. C. 27 (DB), *Abuvakkar v. Kunhikuttili*. (Eldest male member of Thavazhi being also Karnavan — Possession by, cannot be adverse to tarwad.)
- ('30) 17 AIR 1930 Mad 563 (565, 567) : 125 I. C. 227, *Kalatty Mudali v. Mangapathy Mudali*.
- ('99) 23 Bom 659 (664, 665) : 1 Bom L R 118 (DB), *Jugal Kishore v. Lakshmandas*. ((1877) 2 App Cas 544, *Aberdeen Town Council v. Aberdeen University* and (1848) 16 Sim 297, *Rackhan v. Siddall*, applied.)
- ('97) 24 Cal 77 (81) (DB), *Sheo Shankar Gir v. Ram Shewak Chowdhri*. (The possession of manager cannot be treated as adverse to the endowment.)
- ('11) 12 Ind Cas 225 (233, 234) : 36 Bom 214, *Casamalli Jairajbhoy Peerbhoy v. Currimbhoy Ebrahim*. (('78) 4 Cal 455 (DB), *Kherodemoney v. Doorgamoney*, explained and discussed.)
- ('21) 8 AIR 1921 Mad 528 (529) : 63 I. C. 104 (DB), *Seerangathuni v. Vaithilinga Mudaliar*. (Possession by receiver appointed by Court.)
- ('90) 13 Mad 402 (403, 404), *Vidapuratti v. Vallabha*. (('85) 9 Mad 244 (DB), *Madhva v. Narayana*, distinguished.)
- ('12) 13 Ind Cas 599 (603) : 36 Mad 418 (DB), *Ambalam Pakkiya Udayan v. Right Revd. J. M. Bathe*.
- ('10) 8 Ind Cas 578 (590) (DB) (All), *Fakhr-ud-din v. Kifayat-ul-lah*. (The members of a family, under whose management a waqf property is placed, cannot acquire title to such property by adverse possession.)
- ('11) 11 Ind Cas 447 (448) : 34 Mad 257 : 38 Ind App 129 (PC), *Srinivasa Moorthy v. Venkata Varada Iyengar*. (A person who has accepted the position of trustee cannot be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust.)
- ('83) 20 A I R 1933 Cal 295 (304, 305) : 60 Cal 54 : 144 I. C. 792 (DB), *Surendra Krishna Roy v. Ishwar Bhuvaneshwari*. (A person who has accepted the position of a shebait of an idol cannot change the character of his possession into one which is adverse to the idol by repudiating the claim of the idol.)
- See also Arts. 142 and 144 Note 46.

2. ('99) 23 Bom 659 (664, 665) : 1 Bom L R 118 (DB), *Jugal Kishore v. Lakshmandas*.

Section 11
Note 1

11.* (1) Suits instituted in ^a[India] on contracts entered into in a foreign country are subject to the rules of limitation contained in this Act.

(2) No foreign rule of limitation shall be a defence to a suit instituted in ^a[India] on a contract entered into in a foreign country, unless the rule has extinguished the contract and the parties were domiciled in such country during the period prescribed by such rule.

a. The words as contained in the section originally were "British India". For these words, the words "the Provinces" and "the States" were substituted by A. C. A. O., 1948 and A. O., 1950 respectively. Recently for "the States" the word "India" was substituted by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Sch. [1-4 1951].

Pakistan Adaptation — Substitute the words "the Provinces" for the words "British India." — (P.) A. C. A. O., 1949.

Synopsis

1. Suits on foreign contracts — *Lex fori*.
2. Applicability to execution applications.

TOPIC INDICATOR

Questions of limitation — Matters of procedure governed by *lex fori*. See Note 1.
Suit on foreign judgment. See Note 1.

1. Suits on foreign contracts — *Lex fori*. — It is a general principle of international law that a contract with reference to its form, validity, interpretation and the rights and liabilities of the parties to it, is governed by the *lex loci contractus*, or the law of the place where the contract is made, that is, the law which the parties have agreed or intended shall govern the contract or which they may be presumed to have so intended,¹ while all matters of *procedure* are governed only by *lex fori*, or the law of the forum in which the action is brought.² Questions of limitation of actions are thus governed only by the *lex fori* as they are essentially matters relating to procedure.³

* Acts of 1877 and 1871.

Section 11 of Act of 1877 and Ss. 11 and 12 of Act of 1871
were same as above.

Act of 1859.

No corresponding provision.

Section 11 — Note 1

1. Halsbury's Laws of England (Hailsham Edition), Vol. VI, pp. 261 and 263. ('76) 1 Cal 330 (334):3 Ind App 61:3 Sar 597 (PC), *Maung Shoay Att v. Ko Byaw*.
2. Halsbury's Laws of England (Hailsham Edition), Vol. VI. p. 351. (1835) 2 Bing (N C) 202 (210, 211, 212) : 42 R R 598 : 2 Scott 304 : 1 Hodges 206 : 2 Dowl P O 781 : 132 E R 80, *Huber v. Stiener*.
3. ('50) 37 AIR 1950 Kutch 58 (Pr 10), *Dhanji Arjan v. Ramji Mavji*. (Suit in Kutch on promissory note executed in Sind — Law applicable is that of Kutch.) ('50) 1950 Ker L T 54 (69, 72) (DB), *Kurien Kurien v. Lazar Paul*. (Where a suit is instituted in a Court in Cochin on a promissory note executed in Travancore the three years' period of limitation obtaining in Cochin will apply.)

In *Huber v. Steiner*,⁴ Tindal, C. J., observed as follows :

"So much of the law as affects the rights and merit of the contract, all that relates '*ad litis de isionem*' is adopted from the foreign country; so much of the law as affects the remedy only, all that relates '*ad litis ordinationem*,' is taken from the '*lex fori*' of that country where the action is brought; and that in the interpretation of this rule, the time of limitation of the action falls within the latter division, and is governed by the law of the country where the action is brought, and not by the *lex loci contractus* is evident from many authorities . . . Such being the general rule of law, a distinction has been sought to be engrafted on it by the learned counsel for the defendant, that 'where the statutes of limitation of a particular country not only extinguish the right of action, but the claim or title itself, *ipso facto*, and declare it a nullity after the lapse of the prescribed period, that in such case the statute may be set up in any other country to which the parties remove, by way of extinguishment.' It does indeed appear but reasonable that the part of the *lex loci contractus* which declares the contract to be absolutely void at a certain limited time, without any intervening suit, should be equally regarded by the foreign country as the part of the *lex loci contractus* which gives life to and regulates the construction of the contract."

This section merely reproduces the principles stated above. Thus, the mere fact that a suit on a foreign contract is not barred under that law will not enable the plaintiff to bring the suit on the claim barred in this country, as a person suing in this country should in matters of procedure "take the law as he finds it" here.⁵ Similarly, it is no defence to rely on a foreign rule of limitation providing for a shorter period, even though the contract is made in the foreign country, for the reason that the rights of the parties not having been extinguished by the foreign rule of limitation are enforceable by the law of this country. If, however, the rights of the plaintiff have become *extinguished* under the foreign rule of limitation, the rights no longer being available to the plaintiff, are not enforceable in India (sub-s. (2))⁶

(1851) 5 Moo Ind App 234 (267) : 8 Moo P C 4 : 1 Sar 423 (PC), *Her Highness Ruckmaboye v. Lullo bhoy Mootichund*.

('16) 3 AIR 1916 Low Bur 67 (68) : 35 Ind Cas 741, *S. King v. D. J. Buchanan*.

('18) 5 A I R 1918 Mad 580 (585) : 40 Mad 1069 : 42 Ind Cas 294 (FB), *Peirce Leslie & Co., Ltd., Cochin v. E. J. Perumal*.

('16) 3 A I R 1916 Bom 200 (201, 202) : 36 Ind Cas 369 : 40 Bom 504 (DB), *Nabibhai Vazibhai v. Dayabhai Amulakh*.

('81) 5 Ind Jur 288 (291).

(1880) 49 L J C P 781 (782) : L R 5 C P D 429 : 29 W R 306 : 44 J P 735, *Alliance Bank of Simla v. Carey*

(1830) 10 B & C 903 (912) : 34 R R 595 (599) : 9 L J K B 213, *British Linen Co. v. Drummond*.

(1870) L R 4 Ch App 735 (738) : 39 L J Ch 170 : 20 L T 464 : 17 W R 419, *Pardo v. Bingham*.

(1870) 38 L J Q B 331 (334) : L R 4 Q B 653 : 10 B & S 644 : 20 L T 947 : 17 W R 967, *Harris v. Quine*.

4. (1835) 2 Bing (N C) 202 (210, 211, 212) : 42 R R 598 (605, 606) : 2 Scott 304 : 1 Hedges 206 : 2 Dowl P C 781 : 132 E R 80.

5. (1830) 34 R R 595 (599) : 10 B & C 903 : 9 L J K B 213, *British Linen Co. v. Drummond*.

6. See Halsbury's Laws of England (Hailsham Edition), Vol. VI, p. 355.

[See also ('50) 37 A I R 1950 Kutch 58 (Pr 10), *Dhanji Arjan v. Ramji Mavji*, (The liability which has already expired by the law in the country of the origin cannot be revived by migration.)

Section 11
Notes 1-2

Where the plaintiff obtains judgment in a foreign Court on a claim which though not barred under the foreign law, would be barred under the Indian Limitation Act, and brings a suit on that *judgment* in an Indian Court, it would be no defence to rely on the plea of limitation as the foreign judgment is valid according to the *lex fori* and is conclusive. It could be impugned only on any of the grounds enumerated in s. 13 of the Civil Procedure Code.⁷ The result would be the same even if the contract had been made originally in India.⁸

2. Applicability to execution applications. — The section is, in terms, applicable only to *suits*. The principle on which it is based is, however, of universal application. Hence, an application for execution of a decree of a Native Indian State in an Indian Court under s. 44 of the Civil Procedure Code, is governed only by the Indian Limitation Act.¹ In the undermentioned case² a decree of the District Court of Mysore was transferred for execution to the High Court of Madras but was returned unexecuted owing to there being an attachment on the decree. On an application again to transfer the decree to the original side of the Madras High Court, the Mysore Court transmitted the decree holding that an application for transfer of the decree was a *step-in-aid* of execution and therefore the execution of the decree was not barred. The question arose whether the Madras High Court, in applying the Indian law of limitation, was entitled to go behind the order of the Mysore Court holding that an application for transfer of the decree is a *step-in-aid* of execution and to decide (following a previous Full Bench decision of the Madras High Court³ as to the interpretation of Art. 182 cl. (5)) that it is not

7. ('24) 11 A I R 1924 All 161 (162) : 46 All 119 : 79 Ind Cas 332 (DB), *Gangaprasad v. Ganeshilal*.

(1865) 4 Suth W R 107 (108, 109) (DB), *Boloram Gooy v. Kameenee Dossee*.

('16) 3 AIR 1916 Low Bur 67 (68) : 35 Ind Cas 741, *King v. Buchanan*.

('79) 2 Mad 400 (406) : 4 Ind Jur 229 (DB), *Nallatambi v. Ponnusamy*.

('08) 2 Sind L R 51 (52), *Sir Henry Seymore King v. M. B. Braganza*.

8. ('79) 2 Mad 400 (406) : 4 Ind Jur 229 (DB), *Nallatambi v. Ponnusamy*.

Section 11 — Note 2

1. ('83) 9 Cal 181 (182) : 11 Cal L R 34 : 5 Shome L R 135 (DB), *Mon Mohun Buksee v. Gunga Soondery Dabee*.

('16) 3 AIR 1916 Bom 200 (201, 202) : 36 Ind Cas 369 : 40 Bom 504 (DB), *Nabibhai Vazirbhai v. Dayabhai Amulakh*.

('68) 10 Suth W R 10 (12) : Beng L R Supp Vol 970 (FB), *T. Leake v. W. Daniel* [See ('87) 14 Cal 570 (571) (DB), *Hukum Chand v. Gyanendar Chander*. (Law of limitation applied in this case is the law contained in S. 58 of Bengal Act VIII of 1869.)]

See also Section 3 Note 8.

2. ('23) 10 A I R 1923 Mad 72 (73 to 76) : 45 Mad 1014 : 69 Ind Cas 932 (DB), *Srinivasa Iyengar v. Narayana Rao*.

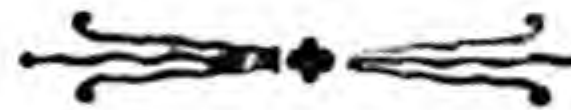
3. ('18) 5 A I R 1918 Mad 580 (584, 585) : 40 Mad 1069 : 42 Ind Cas 294 (FB), *Peirce Leslie & Co., Ltd., Cochin v. E. J. Perumal*. ("It is the British Court, that has to decide whether the conditions postulated by the Art. 182 are fulfilled and on this principle it will do so in accordance with its own law and without reference to other Codes which may include the provisions regarding the executability and methods of execution of decrees different from those in our own.")

a step-in-aid of execution. Schwabe, C. J., observed :

"The question to be considered is whether according to that system of law (Mysore), the step taken is or is not a step-in-aid of execution and in my judgment the law to be considered is that of the place where the application is made. It follows that it is the law of Mysore that has to be considered. By S. 13 of the Civil Procedure Code, a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties. There has in this case been a foreign judgment on this matter directly adjudicated upon between the same parties, namely that according to the law of Mysore this is a step-in-aid of execution and I think that under that section it is not open, whatever this Court might have said in such cases, to an unsuccessful party to the application in Mysore to contend here that the law of Mysore is otherwise. It follows that as the step is to be a step which according to the law of Mysore is a step in-aid, in my judgment we are bound to hold that this application to transmit the papers here was a step-in-aid of execution of the decree."

See also Note 95 to Article 182.

Section 11
Note 2



PART III.

COMPUTATION OF PERIOD OF LIMITATION.

Section 12

12.* (1) In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

(4) In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

*Act of 1877 : S. 12.

Exclusion of day on which right to sue accrues. In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

Exclusion in case of appeals and certain applications. In computing the period of limitation prescribed for an appeal, an application for leave to appeal as a pauper, and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed against or sought to be reviewed, shall be excluded.

Where a decree is appealed against or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

Act of 1871 : S. 13.

Exclusion of day on which right to sue accrues. In computing the period of limitation prescribed for any suit, the day on which the right to sue accrued shall be excluded.

Exclusion in case of appeals and certain applications. In computing the period of limitation prescribed for an appeal, an application for leave to appeal as a pauper, an application to the High Court for the admission of a special appeal, and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed against or sought to be reviewed, shall be excluded.

In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

Act of 1859.

No corresponding provision.

*Synopsis***Section 12**

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope of the section. 3. Sub-section (1). 4. Sub-sections (2) to (4) — Applicability to proceedings not referred to in the Act. 5. Applicability of sub-sections (2) to (4) to proceedings under special or local laws. 6. Exclusion of day of pronouncing judgment. 7. Exclusion of time for copies. 8. In respect of what documents exclusion should be made. 9. Exclusion, where copies are obtained by stranger or for a different purpose. 10. "Time requisite," meaning of. 10a. Day of copy application and day on which copy is ready to be excluded. 11. Delay caused by application for copies made to wrong person. 12. Delay caused by defective application for copies. 13. Delay caused by separate application for copies of judgment and decree. 14. Delay in furnishing folios, stamps, etc. 15. Delay in taking delivery of copy. 16. Supply for folios before they are called for by Court. 17. Application struck off for non-compliance and subsequently revived. 18. Delay caused by despatch of copies by post. 19. Delay caused by getting a vernacular copy of decree or judgment. | <ol style="list-style-type: none"> 20. Copies of same documents obtained on two different occasions — Time requisite to obtain which copy to be excluded. 21. Application for copy on date of judgment. 22. Application for copy mislaid by office. 23. Time between the date of the application for copies and the date of notice of requisition for stamp and folios for copies. 24. Holidays intervening between dates of judgment and copy application. 25. Interval between the judgment and the signing of the decree, if and when can be deduced. 25a. Delay caused by getting order varied and settled. 26. One common judgment in two suits filed in two appeals against judgment. 27. Appeal from a judgment on review — Copy of original judgment. 28. Application for leave to appeal to the Privy Council. 28a. Application for leave to appeal in forma pauperis. 29. Application for review. 30. Application to set aside award. 31. Filing of an appeal with a copy of judgment or decree alone. 32. Appeal in criminal cases. 33. Finding as to "time requisite" cannot be attacked in second appeal. 34. Evidentiary value of dates endorsed on certified copies. 35. Copies in appeals from orders. 36. Section 5 and "time requisite." |
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TOPIC INDICATOR

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| <p>Acknowledgment of debt. See Note 3.</p> <p>Application and copying fees sent by post. See Notes 9 and 14.</p> <p>Application by prisoner for copies. See Note 32.</p> <p>Application for revision—Section does not apply. See Note 4.</p> <p>Application under S. 66 (3) Income-tax Act. See Note 5.</p> <p>Computation of time in whole days and not in hours. See Note 14.</p> | <p>Copy obtained by another party or stranger. See Note 9.</p> <p>Court closed when copy ready. See Note 15.</p> <p>Letters Patent Appeal. See Note 5.</p> <p>Purpose of copy immaterial. See Note 9.</p> <p>Time for copy excluded even if copy not necessary. See Note 7.</p> <p>Time for copies necessary but not referred to in section can be excluded under S. 5. See Note 8.</p> <p>Time requisite Question one of fact. See Notes 10 and 33.</p> |
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Section 12
Notes 1-2

1. Legislative changes.

- (1) In sub-section (2) the words "an application for leave to appeal" have been substituted for the words "an application for leave to appeal as a pauper" occurring in the Act of 1877. The effect of the change is to extend the provision to all applications for leave to appeal, such as applications for leave to appeal to the Privy Council, and applications for leave to appeal in insolvency matters.¹ The decisions under the Act of 1877 holding that the section does not apply to applications for leave to appeal to the Privy Council are no longer law.²
- (2) Under the Act of 1871, only the time for obtaining a copy of the *decree* could be excluded.³ Under the later Acts, time requisite for obtaining copies of the *decree and judgment* can be excluded in computing the period of limitation for an appeal or application for review.

2. Scope of the section. — As has been seen in Note 2 to S. 6, the scheme of the Act is that, as a general rule, suits and other proceedings instituted after the lapse of the period prescribed by the first schedule should be barred, subject to several classes of exceptions recognized by the various sections in the body of the Act. One of such classes is that which provides for excluding certain periods in computing the period of limitation prescribed.

This section is the first of the five sections (namely 12 to 16) which deal with the exclusion of time in reckoning the period of limitation, and provides for the exclusion of —

- (1) the day from which the period of limitation is to be reckoned — sub-section (1). See Note 3.
- (2) the time requisite for obtaining copies of certain documents in certain cases — sub-sections (2) to (4). See Note 4.

This section is one of the sections which, by virtue of S. 29 sub-s. (2), apply for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local

Section 12 — Note 1

1. ('15) 2 AIR 1915 All 335 (336) : 38 All 82 : 31 Ind Cas 906 (DB), *Ram Sarup v. Jaswant Rai*.
[See ('95) 1895 Pun Re No. 33, *Mt. Moti Begam v. Mt. Satara Begam*. (Application for leave to appeal as pauper.)]
2. ('06) 28 All 391 (392) : 1906 All W N 55 : 3 All L Jour 165 (DB), *Shib Singh v. Gandharp Singh*.
('78) 1 All 644 (646) (DB), *Jawahir Lal v. Narain Das*. (Spankie, J., dissenting.)
('95) 19 Bom 301 (302) (DB), *Moroba Ramchandra v. Ghansham Nilkant*.
('92) 15 Mad 169 (169) (DB), *Anderson v. Periaswamy*.
('87) 10 Mad 373 (374) (DB), *Lakshmanan v. Periaswamy*.
3. ('75) 24 Suth W R 105 (105, 106) : 15 Beng L R 272 (FB), *Jagarnath Singh v. Shewratian Singh*. (But Court may admit after limitation if it finds there is sufficient cause)
('74) 21 Suth W R 308 (309) : 15 Beng L R 273 (Note), *Horil Pattuck v. Bhowaneeram*. (Appellant cannot claim to deduct as of right time spent in obtaining copy of judgment.)

law, in so far as and to the extent to which they are not expressly excluded by such special or local law.

Section 12
Notes 2-3

The section does not apply to proceedings in foreign Courts inasmuch as the Act itself extends only to the Provinces.¹

3. Sub-section (1). — The word "from," as a general rule, excludes the day from which the time is to be reckoned except where the context requires the contrary rule to be adopted.¹ This rule is applicable whenever time has to be computed from a day specified, whether such time is fixed for the performance of contracts or is prescribed by law for the doing of an act or for the institution of proceedings in Courts of law. In *Webb v. Fairmaner*,² where goods were sold on the 5th of October to be paid for in two months from the date of sale, it was held that in computing the period of two months the 5th of October should be excluded and that an action for the price could not be commenced until after the expiration of the 5th of December. Baron Parke, in delivering the judgment in the case, relied on the observations of Sir W. Grant, M. R., in *Lester v. Garland*,³ to the following effect :

"Upon the technical reasoning, I rather think, it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point ; so that any act done in the compass of it is no more referable to any one than to any other portion of it ; but the act and the day are co-extensive ; and, therefore, the act cannot properly be said to be passed until the day is passed."

The learned Baron also observed as follows :

"So also, in *Pellew v. Inhabitants of Wonsford*,⁴ the time was held to be exclusive ; and a very reasonable rule was laid down by Lord Tenterden, which is a very good test to apply, viz., by reducing the time to one day, in which case the party would clearly be entitled to the whole of the next day after the injury was done, otherwise he might have no time at all in which to give notice."

As to the computation of time generally in matters dealt with in the Acts of the Legislature, s. 9 of the General Clauses Act, 1897, adopts the above-mentioned general rule as follows :

"In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word 'from' and, for the purpose of including the last in a series of days or any other period of time, to use the word 'to'."

Sub-section (1) of s. 12 of this Act is also based upon the said general rule and applies to *suits, appeals and applications* referred

Section 12 — Note 2

1. ('27) 14 AIR 1927 Lah 200 (208) : 8 Lah 54 : 102 Ind Cas 523, *Hari Singh v. Mahomed Said*. (('10) 35 Bom 139 (DB), *Chanmalapa v. Abdul* and ('25) A I R 1925 Nag 321, *Emperor v. Mahhdeo*, relied on.)

Section 12 — Note 3

1. Wharton's Law Lexicon.
2. (1838) 3 M & W 473 (477) : 6 D P C 549 : 7 L J Ex 140 : 49 R R 690 (691, 692, 693).
3. (1808) 15 Ves 248 (257) : 10 R R 68.
4. (1829) 9 B & Cr 134 (143, 144) : 7 L J (OS) M C 84 : 4 M & Ry 130.

Section 12
Note 3

to in the Act. Thus, where time is to be computed from the date of the cause of action, the day on which such cause of action arises is to be excluded.⁵ If, in respect of a cause of action, there is an acknowledgment within the meaning of S. 19 of this Act, the day of the acknowledgment is to be excluded.⁶ See also the undermentioned cases.⁷

5. ('50) 37 AIR 1950 Pat 206 (Pr 4) (DB), *Batuk Prasad v. Rudra Das*. (Under S. 8 three years must be computed from the date of cessation of minority and not date of attainment of majority—Date from which period has to be reckoned has to be excluded.)

('73) 19 Suth W R 94 (94) (DB), *Durshun Lall Sahoo v. Asmutoonnissa*.

(1865) 4 Suth W R 105 (105) (DB), *Rumonee Soonduree Dossia v. Puncha Nun Bose*.

('87) 10 Mad 292 (294) (DB), *Ganapati v. Sitharama*.

('71) 6 Beng L R 292 (295), *Moonshi Abdul Ali v. Tarachand Ghose*.

('25) 90 Ind Cas 827 (828) (DB) (Cal), *Kumud Charan Roy v. Sambhu Chandra*.

('69) 4 Mad H C R 409 (410), *Chinna Comarappa Setti v. Ramaswamy Setti*.

[See also (1892) L R 1 Q B 161 (164) : 40 W R (Eng) 63 : 65 L T 677 : 56 J P 262 : 61 L J M C 63, *Radcliffe v. Bartholomew*. (Day on which offence was committed to be excluded in computing time within which complaint to be made.)]

[But see (1864) 1864 Suth W R (FB) 45 (46) : Marsh 138 : 1 Hay 301 (FB), *Hurro Soonderee Debee v. Kally Mohun*.]

6. ('23) 10 AIR 1923 Nag 143 (143) : 71 I. C. 556, *Jainarayan Bapu v. Vithoba*. See also Note 37 to S. 19.

7. ('38) 25 A I R 1938 Bom 447 (447) : I L R (1938) Bom 734 : 178 Ind Cas 78, *Ramchandra Govind v. Laxman Savlaram*. (Judgment-debtor's asked to deposit money within fifteen days from certain date — That date has to be excluded — Uniform interpretation to be given to judicial order and to statute.)

('04) 31 Cal 745 (751) (DB), *Upendra Chandra Singh v. Mohri Lal Marwari*. (Mortgage bond on 17-3-1899 stipulating for payment within six months — Held that in reckoning the period of six months date on which bond was executed must be excluded.)

('85) 1885 Bom P J 251 (DB), *Waman v. Mahadu*. (In computing limitation for suit on bond, date specified for payment cannot be excluded — Decision is not right in view of the clear language of the section.)

('88) 12 Bom 617 (619) : 13 Ind Jur 270 (DB), *Venkubai v. Lakshman*. (Bond payable in two years — Day of bond to be excluded in reckoning two years.)

('76) 1876 Pun Re No. 38, *Dulla Mall v. Bolaki*. (Stipulation to pay in one year.)

('76) 24 Suth W R 463 (464) (DB), *Kamehurn Dey v. Inna Sheik*. (In computing limitation for suit on bond, day specified for payment is to be excluded.)

('69) 6 Bom H C R A C 51 (53) (DB), *Lakshuman Sakharan v. Ranu Sidoji*. (Date on which contract is made is to be excluded.)

('68) 3 Agra H C R 319 (319) (DB), *Muhtab v. Ramdayal*. (Date of bond to be excluded in computing time for its performance.)

('69) 4 Mad H C R 330 (331) (DB), *In re Palaniandi Pillay*. (Day mentioned in bond for re-payment—Exclusion of day.)

('24) 11 AIR 1924 Lah 709 (710) : 78 I. C. 87 (DB), *Akhtar Beg v. Haq Nawaz*. (Where cause of action arose on 17-2-13 in the case of breach of contract not in writing and registered, a suit filed on 17th February 1916 is in time.)

('12) 18 Ind Cas 574 (575) : (1912) 1 Upp Bur Rul 146, *Nga Po Yin v. Mi Shan Nu*. (Pronote of 7th May 1907 — Time commences to run on the expiration of the 7th May 1907.)

('71) 6 Beng L R 292 (295), *Abdul Ali v. Tarachand Ghose*. (Date of execution of promissory note to be excluded.)

('22) 9 AIR 1922 Nag 261 (262) : 69 Ind Cas 527, *Narayan Patel v. Abdulgani*. (Suit under S. 160, C. P. Land Revenue Act.)

4. Sub-sections (2) to (4) — Applicability to proceedings not referred to in the Act. — Sub-sections (2) to (4) apply only to one or some of the following proceedings¹ :

**Section 12
Note 4**

- (1) appeals
- (2) applications for leave to appeal
- (3) applications for review of judgment
- (4) applications to set aside an award.

Having regard to the words of the Preamble of this Act, namely, "Whereas it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts," it is clear that this section directly applies only to the applications and appeals *referred to in the Act*.² Thus, the word 'appeal' will refer to appeals referred to in the Act and will include appeals from the original side of the High Court which are dealt with in Arts. 151 and 156 of the first schedule.³ Appeals from *appellate* side of the High Court

('78) 2 Bom 673 (675) (DB), *V. K. Gujar v. V. D. Barve*. (Application for restitution - Day from which period is to be reckoned should be excluded.)

('74) 22 Suth W R 68 (68) (DB), *Kasheenath Shaha v. Jogendra Nath Baboo*. (The day on which the order under S. 246, Civil Procedure Code, 1859, was passed must be excluded in computing the period of year allowed by that section.)

(1864) 1864 Suth W R Gap 321 (321) (DB), *Petumber v. Kuroona Moyee*. (Do.)

(1865) 4 Suth W R Act X Rul 30 (30) (D B), *Radha Monee v. Bungshee Mohun*. (Suit to set aside an order - Day on which order was passed must be excluded.)

('72) 18 Suth W R 454 (454) (DB), *Bijoy Gobind Deb v. Muddin Ram Pal*. (Application for retrial of suit - Date of dismissal of suit to be excluded.)

('27) 14 A I R 1927 Bom 633 (635) : 106 Ind Cas 36 : 52 Bom 126, *In re Hyderbhai*. (Computation of twenty-one days under S. 9, Presidency Towns Insolvency Act, from date of attachment - Date of attachment should be excluded.)

('83) 13 Cal L R 153 (156), *Deb Narain Singh v. Ishan Chunder Malo*. (Date on which money became due on bond to be excluded.)

('68) 10 Suth W R 5 (5) : 1 Beng L R (S N) 1a (DB), *Braja Behari v. Kamal Ray*. (In computing the period of three years under S. 20, Act XIV of 1859, day on which application is made must be excluded.)

('77) 2 Cal 336 (340) (FB), *Dhonesur Kooer v. Roy Gooder Sahoy*.

[See ('12) 13 Ind Cas 900 (901, 902) (DB) (Cal), *Gopal Lal v. Bahorni*. (Order to pay deficit court-fee within a week - Date of order to be excluded when computing period.)

('80) 6 Cal 325 (328) (FB), *Kashikant Bhattacharji v. Rohinikant Bhattacharji*.]

Section 12 — Note 4

1. ('32) 19 AIR 1932 All 598 (599) : 54 All 282 : 149 Ind Cas 111, *Kashi Parshad v. Notified Area, Mahoba*. (Section does not apply to application under Land Acquisition Act.)

('26) 93 Ind Cas 1023 (1023) (Lah), *Mohan Lal v. Sher Muhammad Khan*. (Application under O. 9, R. 9, Civil Procedure Code - Time spent in obtaining copy of order dismissing suit for default cannot be excluded.)

('96) 18 All 215 (219) : 1896 All W N 39 (DB), *Wall v. Howard*. (Proceeding under S. 214, Companies Act, 1882, not being either an appeal or application.)

2. ('17) 4 AIR 1917 Low Bur 17 (17, 18) : 38 I C 563, *K. Hill v. M. M. Greenberg*. (Application not referred to in the Act at all is not governed by the Act and consequently by Section 12.)

('95) 18 Mad 484 (485) (DB), *Thurai Rajah v. Jainilabdeen Rowthan*. (Application to declare appeal admitted to Privy Council is not application for leave to appeal - Section 12 does not apply.)

3. ('41) 28 A I R 1941 Lah 257 (259, 260) : 1 L R (1941) Lah 191 : 195 Ind Cas 452 (FB), *Punjab Co-operative Bank v. Punjab Cotton Press, Co.* (Appeal from

Section 12
Note 4

are not dealt with by this Act, and are not directly governed therefore by s. 12. But it has been held by the Patna High Court that the word 'prescribed' in this section must mean 'prescribed by any law' and not 'prescribed by the Limitation Act.'^{3a} Consequently it has been held that the section will apply to Letters Patent appeals under cl. 10 of the Patna High Court even though no period is prescribed by this Act.^{3b} The section applies to *criminal* appeals.^{3c} An application for leave to appeal in *forma pauperis* is an application for leave to appeal and will be governed by this section.⁴ An application for *revision* is not an application for which any limitation is provided for in this Act (Art. 181 being held inapplicable to such applications), nor is it an application of the kind specified in the section. But as a matter of practice, in computing the period fixed by the practice of the High Court for such applications, the time taken for obtaining a copy of the order sought to be revised is excluded.⁵ The Madras High Court has

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- order of single Judge of High Court in exercise of original jurisdiction governed by Art. 151. Time requisite for obtaining copy of order can be excluded even though such copy is not required to be filed by rules of High Court—('35) A I R 1935 Lah 328 : 16 Lah 448 (FB), *Jog Dhian v. Hussain* and ('21) AIR 1921 Lah 26 : 2 Lah 127, *Dyal Singh v. Budha Singh*, Overruled.)
- ('28) 15 AIR 1928 P C 103 (103) : 109 Ind Cas 1 : 6 Rang 302 : 55 Ind App 161 (P C), *Jijibhoy N. Surty v. T. S. Chettiyar Firm.* (Assumed.)
- ('22) 9 A I R 1922 P C 352 (352) : 49 Ind App 307 : 68 Ind Cas 900 : 49 Cal 999 (PC), *Pramatha Nath Roy v. William Arthur Lee.* (Do.)
- ('35) 22 A I R 1935 Rang 65 (66, 67) : 12 Rang 525 : 154 I C 852 (FB), *Mackenzie and Co., Ltd. v. Ah Win.* (Time for copy of decree can be allowed.)
- 3a.** ('47) 34 A I R 1947 Pat 329 (331, 332) : 26 Pat 157 (SB), *Lalit Kuari v. Mahaprasad Narain Singh.*
- 3b.** ('47) 34 A I R 1947 Pat 329 (331, 333) : 26 Pat 157 (SB), *Lalit Kuari v. Mahaprasad Narain Singh.*
- 3c.** ('92-96) 1 Upp Bur Rul 129 (129), *Nga Po Thaung v. Queen-Empress.*
('92-96) 1 Upp Bur Rul 130 (130), *Bagawathi v. Queen-Empress.*
- 4.** ('44) 31 AIR 1944 Mad 430 (431), *Mahalakshamma v. Thirunavukkarasu.* (Not only time taken in obtaining copy of decree but also time required for obtaining copy of judgment should be excluded.)
- ('23) 10 AIR 1923 Lah 684 (684) : 77 Ind Cas 908, *Ashraf Ali v. Rameshwar Nath.* (The petitioner in computing the period prescribed under Article 130 is entitled to deduct the time taken in obtaining copies of the judgment and decree appealed against.)
[See ('09) 4 Ind Cas 896 (897) : 1909 Pun Re No. 94 (DB), *Hari Singh v. Gurbakhsh Singh.* (So assumed.)]
- 5.** ('50) 37 AIR 1950 Ajmer 1 (Prs. 3, 4), *Bhuralal v. Kasim.* (('42) AIR 1942 Oudh 392, *Kallu Mal v. Municipal Board, Nawabganj,* Rel. on.)
('42) 29 A I R 1942 Oudh 392 (393) : 200 Ind Cas 608, *Kallu Mal v. Nawabganj Municipality.* (Oudh Chief Court Rules Chap. XII, R. 5 requires that copy of order should be filed along with revision application — Time taken for obtaining copy of order to be excluded in considering whether application for revision is unduly delayed.)
('34) 21 AIR 1934 Pesh 9 (10) : 147 Ind Cas 1138 (DB), *Sainditta Ram v. Chhata Ram.* (Revision against appellate order — Time necessary for obtaining copies of trial Court's judgment is not excluded.)
[See ('06) 1906 Pun L R No. 146, p. 481 (481) : 1907 Pun W R No. 74, *Mehar Singh v. Gurbachan.* (Copy of judgment or decree not necessarily to be filed in Court.)]

held that the term 'appeal' in the section should be liberally construed and will include a proceeding in the nature of a revision petition.^{5a} An application for execution not being an application specified in the section this section has no application to it.^{5b}

Where a decree for pre-emption fixed a period for the plaintiff's depositing an amount into Court, it was held that the plaintiff could not claim to extend the time for the deposit on the ground that it was necessary to obtain a copy of the order and that the time spent in obtaining it should be excluded.⁶

5. Applicability of sub-sections (2) to (4) to proceedings under special or local laws. — Sub-section (2) of S. 29 makes this section, among others, applicable for the purpose of determining the period of limitation prescribed by any special or local law, unless its applicability is expressly excluded by such law.¹ Thus the section will apply to an application for leave to appeal under S. 12 (2) of the Oudh Courts Act, 1925,^{1a} or to an appeal under the Martial Law Ordinance (1 of 1922).^{1b} This, however, does not mean that every provision of the

5a. See also ('41) 28 A I R 1941 Mad 589 (590) : 199 Ind Cas 651 : (1941) 1 Mad L Jour 540 (542, 543), *Standard Type Foundry v. Venkataramaniam*. (Section applies to application under S. 73 of Madras Village Courts Act, I of 1889 to the District Munsif to set aside decree of Village Panchayat Court — ('37) AIR 1937 Mad 385 (FB), *Chidambara v. Rama*, followed.)

5b. ('45) 24 Pat 421 (422) (DB), *Ramdas v. Gangasagar*. (Section 12 (3) does not apply.)

6 ('83) 1883 All W N 4 (5), *Karam Khan v. Nathan Khan*.

('81) 1881 All W N 165 (166), *Disa Singh v. Juala Singh*.

Section 12 — Note 5

1. ('50) 37 A I R 1950 Cal 356 (Pr 5) : 54 Cal W N 297, *Province of Bengal v. Amulya Dhon*. (In computing the period of limitation for an appeal under S. 3, Calcutta Improvement (Appeals) Act, 1911 against the decision of the tribunal the appellant is entitled to deductions under S. 12, Limitation Act, by reason of S. 29 (2) of the Act or otherwise.)

('50) 37 A I R 1950 Nag 201 (Pr 2) : 1950 Nag L Jour 415, *General Manager, G. I. P. Rly. v. Shankar*. (The Workmen's Compensation Act has not excluded the appeals from the operation of S. 12, Limitation Act and hence in an appeal from an order of the Commissioner the appellant is entitled to the exclusion of the time for obtaining a certified copy of the order.)

('45) 32 A I R 1945 Nag 52 (53) : I L R (1944) Nag 714, *Rambhau v. Nagarmal*. (Rule 13 of Ch. 4 of the Nagpur High Court Rules does not expressly exclude the operation of S. 12 of the Limitation Act. The time taken for obtaining a copy of the judgment must, therefore, be excluded in calculating the period of limitation for an appeal under S. 10 of the Letters Patent.)

[See ('39) 26 A I R 1939 All 403 (408) : I L R (1939) All 647 : 183 I C 242 (FB), *Durag Pal Singh v. Pancham Singh*. (The rules as to computation of period of limitation laid down in Part III of the Act are not intended by the Legislature to apply only to periods of limitation prescribed by the schedule but apply also to periods of limitation provided for by other enactments.)]

1a. ('42) 29 A I R 1942 Oudh 316 (316, 317) : 18 Luck 66 : 199 Ind Cas 712, *Sheo Dulary v. Chandrabhal*. (Time spent in obtaining copy of judgment should be excluded in computing the period of 30 days prescribed by R. 7, Chap. XII of the Rules of the Oudh Chief Court.)

1b. ('23) 10 A I R 1923 Mad 95 (95) : 71 Ind Cas 217 (DB), *Mittoor Moideen Hajee, In re*.

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section will necessarily apply to every case under the special or local law, irrespective of the question whether the particular sub-section sought to be applied is *in terms* applicable to such a case. Where, therefore, the section is applicable by virtue of section 29 to a special or local law, but the application in respect of which the limitation is sought to be computed is not one of the applications referred to in sub-sections (2) to (4) of this section, the time spent in getting copies cannot be excluded, in making such computation. Thus, the Provincial Insolvency Act is a special law to which S. 12 is applicable by virtue of S. 29, but an application under S. 68 of that Act is neither an appeal, nor an application for review, nor an application for leave to appeal, nor an application to set aside an award within the meaning of sub-s. (2) to (4) of this section. Consequently, no period can be deducted for obtaining copies, in computing the period of limitation prescribed by that Act for such application.^{1c} On similar grounds it has been held that in computing the period of limitation for an application under S. 18 of the Land Acquisition Act, 1894, the time taken to obtain a copy of the Collector's order (called the award) cannot be deducted.²

It has also been held by the High Court of Allahabad on the same grounds that the time spent in obtaining copies of the order passed under S. 66, sub-s. (2) of the Indian Income-tax Act, 1922, cannot be deducted in computing the limitation for an application under S. 66, sub-s. (3) of that Act.³ The High Court of Lahore has, however, without advertng to the terms of this section, allowed such a deduction.⁴ Following the Lahore decision it has been held in the undermentioned Calcutta case^{4a} that in computing the period of limitation for an application under S. 21 of the Bengal Finance (Sales Tax Act) (1941) to state a case the time requisite for obtaining a copy of the order of the Board of Revenue should be excluded. According to the High Court of Patna, S. 29 makes this section applicable to "*any* suit, appeal or application" for which a period of limitation is prescribed by any

1c. ('15) 2 A I R 1915 Mad 360 (360) : 25 Ind Cas 610 (D B), *Duraisamy Iyenger v. Minakshi Sundara Iyer*. (A case under S. 22 of the Provincial Insolvency Act, III of 1907 which corresponds to S. 68 of Act V of 1920.)

2. ('32) 19 AIR 1932 All 598 (599) : 54 All 282 : 143 Ind Cas 111, *Kashi Prasad v. Notified Area of Mahoba*.

('04) 1904 Pun Re No. 79 : 1904 Pun L R No. 133, *Bhagwan Das v. Collector of Lahore*.

('27) 14 AIR 1927 Lah 858 (859) : 9 Lah 244 : 104 Ind Cas 397 (DB), *Nafisuddin v. Secretary of State*.

[But see ('26) 13 A I R 1926 Rang 135 (136, 137) : 96 Ind Cas 110, *H. H. Burjorjee v. Special Collector of Rangoon*. (Section 29 of the Limitation Act as amended in 1922 was held to extend S. 12 to such an application — Submitted not correct.)]

3. ('31) 18 A I R 1931 All 673 (673) : 133 Ind Cas 621 : 53 All 684 (DB), *Gulab Chand Chotey Lal, In re*.

4. ('29) 16 A I R 1929 Lah 170 (170) : 117 Ind Cas 881 (D B), *Md. Hayat Haji Muhammad v. Commissioner of Income-tax, Punjab and N.-W. F. P.*

4a. ('49) 53 Cal W N 191 (192), *India Ice & Cold Storage Co. v. Board of Rev., West Bengal*.

special or local law, and though the section is in terms not applicable, the principle of the section applies to the case referred to above; hence the deduction must be allowed.⁵ The High Court of Rangoon has, in a similar case, allowed such a deduction on *general principles*, and not upon any consideration of this section or of S. 29.⁶ It is submitted that the Allahabad view is correct on principle.

The Madras High Court has held that the term "appeal" should be interpreted liberally and even a proceeding in the nature of a revision petition should be treated as an "appeal" for the purpose of this section. On this view it has held that an application to a District Munsif under S. 73 of the Madras Village Courts Act (I of 1889) to set aside a decree passed by a Village Panchayat Court as an "appeal" for the purpose of this section and that the time requisite for obtaining a copy of the decree sought to be set aside should be deducted in computing the period of limitation for the application.⁷

6. Exclusion of day of pronouncing judgment. — The date of the delivery of the judgment must be excluded¹ even though that day happens to be a holiday.²

When the date of the judgment is duly communicated to the pleaders for the parties, the limitation for appeal commences from the date of the judgment notwithstanding the absence of either the party or the pleader at the time of the delivery of the judgment.³ But where the Judge signs the judgment on a particular date but does not pronounce it in accordance with the law of procedure and the party comes to know of the fact of the signing of the judgment only on a subsequent date, the latter date must be deemed to be the date of the

5. ('30) 17 A I R 1930 Pat 14 (19) : 9 Pat 172 : 122 Ind Cas 810 (D B), *Mohanlal Hardeo Das v. Commissioner of Income-tax, Bihar and Orissa*.

6. ('28) 15 AIR 1928 Rang 152 (153) : 110 Ind Cas 601 : 6 Rang 175 (DB), *Rama-natha Reddiar v. Commissioner of Income-tax*.

7. ('41) 28 A I R 1941 Mad 589 (590) : 199 Ind Cas 651 : (1941) 1 Mad L J 540 (543), *Standard Type Foundry v. Venkataramaniah*. (('37) A I R 1937 Mad 385 (FB), *Chidambara v. Rama*, followed.)

Section 12 — Note 6

1. ('85) 1885 All W N 257 (257), *Damru v. Murdan*.
(('70) 13 Suth W R P C 17 (18) (PC), *In re Ramanoojra Narain*. (Appeal to Privy Council—Date of decree appealed from to be excluded.)
- ('26) 94 Ind Cas 121 (121) (Nag) (DB), *Kutubuddin v. Gulam Rablani*. ("Pronounced"—Whole judgment need not be read out.)
- (1900) 10 Mad L Jour 398 (400), *Ganne Kotappa v. Venkataramiah*. (Word 'from' in S. 69 of Act VIII of 1865 means 'after'.)
2. ('20) 7 AIR 1920 Mad 359 (360) : 43 Mad 640 : 56 Ind Cas 67 (DB), *Subramanyam v. Narasimham*. (Judgment delivered on first day of Christmas vacation.)
3. ('27) 14 AIR 1927 Lah 59 (59) : 98 Ind Cas 942, *B. B. & C. I. Ry Co. v. Ram Sarup Mahru Mal*.
(('10) 8 Ind Cas 398 (399) : 34 Mad 151 (DB), *Secretary of State v. Gopisetty*. (Decision under Madras Surveys and Boundaries Act published by communication to parties — Date of communication is starting point for limitation.)
See also Note 3 to Art. 152.

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pronouncing of judgment and limitation does not begin to run earlier.⁴

7. Exclusion of time for copies. — Sub-sections (2) to (4) provide that the time requisite for obtaining the copies of the documents referred to therein shall be excluded in computing the period of limitation. The reason for the exclusion is to enable the appellant or the applicant, as the case may be, to have sufficient time to *consider the terms of the decree, judgment or order* before hurrying into a further proceeding in respect of it. In *Jijibhoy N. Surty v. T. S. Chettiyyar*,¹ where the reason of the rule in sub-ss. (2) and (3) came to be discussed, their Lordships of the Privy Council observed as follows :

"The decree may be complicated, and it may be open to draw it up in two different ways, and the practitioner may well want to see its form before attacking it by his memorandum of appeal. As to the judgment, no doubt, when the case does not come from up-country, the practitioner will have heard it delivered, but he may not carry all the points of a long judgment in his memory, and as Sir John Edge says,² the Legislature may not wish him to hurry to make a decision till he has well considered it."

It was accordingly held by their Lordships in *Jijibhoy's case*³ that the time spent in obtaining copies of the judgment and decree must be excluded in computing the period of limitation for an appeal, even though such copies need not, according to the rules of the High Court, accompany the memorandum of appeal. This view has been followed in subsequent decisions.^{3a}

4. ('38) 25 AIR 1938 Lah 707 (708) : 182 Ind Cas 108, *Mahomed Zaman v. Hans Raj Shah*. (Court delivering judgment without having previously fixed date for the same — Defendant being absent, judgment informed to his counsel on some later day — Limitation for appeal runs from the later day.)

('34) 21 AIR 1934 Lah 135 (136) : 149 Ind Cas 1127, *Chandu v. Mast Ram*.

('19) 6 AIR 1919 Lah 102 (103) : 1919 Pun Re No. 27: 51 Ind Cas 239 (DB), *Lalli v. Sain Ditta*.

('23) 10 AIR 1923 Pat 129 (130) : 1 Pat 771 : 75 Ind Cas 879 (DB), *Sagarmal Marwadi v. Lachmi Saran Missir*.

See also Note 3 to Art. 152 and Note 5 to Article 156.

Section 12 — Note 7

1. ('28) 15 AIR 1928 PC 103 (105) : 109 I C 1 : 6 Rang 302: 55 I A 161 (PC).

2. ('95) 17 All 213 (216) : 1895 All W N 61 (FB), *Wajit Ali v. Nawal Kishore*.

3. ('28) 15 AIR 1928 P C 103 (105, 106) : 109 Ind Cas 1 : 6 Rang 302 : 55 Ind App 161 (PC), *Jijibhoy N. Surty v. T. S. Chettiyyar Firm*. (Reversing AIR 1927 Rang. 20, *J. N. Surty v. T. S. Chettiyyar Firm*.)

3a. ('51) 38 AIR 1951 All 122 (Pr. 7): 1950 All L Jour 946 (FB), *Keshar Sugar Works v. R. C. Sharma*. (Per Malik C. J.—To an application for leave to appeal to the Privy Council S. 12 applied and the time requisite for obtaining a copy of the decree appealed from has to be excluded, though it is not necessary under the rules to file a copy of the decree along with the application for leave to appeal.)

('47) 34 AIR 1947 Pat 329 (331) : 26 Pat 157 (SB), *Lalit Kuari v. Maha Prasad*. (Appeal under Cl. 10, Letters Patent (Pat.) — Appellant is entitled to deduct time taken for obtaining copies of judgment and decree even if they are not required to be filed along with memo of appeal under R. 2 (7) Chap. 7 of the Rules of the High Court.)

'41) 28 AIR 1941 Lah 257 (259, 260) : I L R (1941) Lah 191 : 195 Ind Cas 452 (FB), *Punjab Co-operative Bank v. Punjab Cotton Press Co*.

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Their Lordships in the above case were dealing with the exclusion of time spent in obtaining copies for a *memorandum of appeal*. But the reasoning will apply also to *all* proceedings referred to in sub-ss. (2) to (4) of the section.⁴ Thus, the fact that a review application need not be accompanied by a copy of the judgment⁵ or of the decree⁶ will not deprive the applicant of his right to exclude the time spent in obtaining such copies in computing the limitation for such application. The contrary view taken in the undermentioned cases⁷ is, in view of the Privy Council decision, no longer law.

But the mere fact that the reason is absent in any particular case will not, however, make the maxim *cessante ratione legis cessat ipsa lex* (the reason of the law ceasing, the law itself ceases) applicable and disentitle a party from claiming to exclude the time requisite for obtaining the copies specified in the section. The reason is that the section enacts the rule of exclusion as a *positive direction*, although its object is to afford a party time to consider whether he will prefer an appeal or make an application.⁸ Thus, where the copy of the *judgment*

4. ('41) 28 AIR 1941 Mad 589 (590) : 199 Ind Cas 651 : (1941) 1 Mad L J 540 (543), *Standard Type Foundry v. Venkhtaramaniah*. (Application under S. 73 of Madras Village Courts Act, 1 of 1889, to District Munsif to set aside decree of Village Court — Time required for obtaining copy of decree should be excluded although S. 73 does not require a copy of the decree to be filed along with the application. — Note : Such application was held to be an "appeal" for the purpose of the section.)

('34) 21 AIR 1934 All 367 (368) : 148 I C 290 : 56 All 591 (DB), *Gouri Shankar v. Kashi Nath*. (Review application — Time spent in obtaining copy of judgment to be excluded.)

[But see ('35) 22 AIR 1935 Rang 184 (185) : 156 Ind Cas 733, *V. E. A. Chettiar Firm v. Karuppan Chettiar*. (A petitioner is not entitled to have the time spent in obtaining a copy, which he has not filed together with his application for review but which he has filed in another case, excluded in computing the period of limitation — Submitted not correct)]

5. ('34) 21 AIR 1934 All 367 (368) : 148 Ind Cas 290 : 56 All 591 (DB), *Gauri Shankar v. Kashi Nath*. (Relying on ('28) AIR 1928 PC 103 : 6 Rang 302 : 55 Ind App 161 (PC), *Jijibhoy v. Chettyar Firm* and 17 All 213.)

('95) 17 All 213 (216) : 1895 All W N 61 (FB), *Wajid Ali Shah v. Nawal Kishore*.

('21) 8 AIR 1921 Lah 124 (125) : 60 Ind Cas 259, *Kanshi Ram v. Karam Narain*.

('18) 5 AIR 1918 Mad 418 (418) : 42 Ind Cas 504 (DB), *Ramalinga Annavi v. Narayana Annavi*. (17 All 213 and ('17) AIR 1917 Cal 320 (DB), *Gangadhar v. Shekharbasini*, relied on.)

('20) 7 AIR 1920 Mad 633 (634) : 55 Ind Cas 444 (DB), *Chokkalingam Chetty v. Lakshumanan Chetty*.

6. ('17) 4 AIR 1917 Cal 320 (321) : 35 I C 348 (DB), *Gangadhar Karmakar v. Shekharbasini Dasya*.

7. ('99) 1 Bom L R 112 (113) (DB), *Jadhoji v. Rajoo*. (Appeal.)

('35) 22 AIR 1935 Lah 341 (341) : 158 I. C. 120 (DB), *Hari Ram v. Prem Nath*. (Application for leave to appeal to Privy Council — Time requisite for decree copy held not to be excluded as no copy of decree need be produced with application.)

('97) 20 Mad 476 (478, 479), *Kumara Akkappa Nayanam Bahadur v. Sithala Naidu*. (Appeal under S. 69, Madras Rent Recovery Act.)

('72) 17 Suth W R 230 (232) (DB), *Jhubhoo Sahoo v. Mt. Jusoda Kooer*.

('79) 2 All 192(192) (FB), *Fazal Muhammad v. Phul Kuar*. (Appeal under Cl. 10, Letters Patent.)

8. ('28) 15 AIR 1928 P C 103 (105) : 109 I. C. 1. : 6 Rang 302 : 55 I. A. 161 (PC), *Jijibhoy N. Surty v. T. S. Chettiar Firm*.

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obtained by the party gives all the information necessary to enable him to decide whether he should appeal or not, he is nevertheless also entitled to exclude the time taken in obtaining a copy of the *decree*.⁹ On the same principle it would follow that even in cases where a formal and final order is not necessary to be prepared, the party will be entitled to deduct the time taken for obtaining a copy thereof if such an order is *actually prepared*.¹⁰

The exclusion of any time in computing the period of limitation for a proceeding necessarily implies that such time must begin before the expiry of the period of limitation. Hence, as a general rule, in order to entitle an appellant to deduct the period required for obtaining the necessary copies, a proper application for copies must be made within the period of limitation for the appeal.¹¹ (As to how far this rule is subject to exceptions, see Notes 24 and 25.)

8. In respect of what documents exclusion should be made.— Only that period can be excluded under this section which has been spent in obtaining copies of —

- (1) the decree *appealed from* or *sought to be reviewed*,
- (2) the judgment *on which* the decree under the appeal or the review is founded,
- (3) the award *which is sought to be set aside*.

In computing the period of limitation for an *appeal* or an *application for review*, the time requisite for obtaining *both* a copy of the *judgment* as well as a copy of the *decree*, should be excluded,¹

9. ('35) 22 AIR 1935 All 258 (259) : 157 Ind Cas 170 : 57 All 751 (DB), *Gaekwar, Baroda State Railway v. Habibullah*. (Case of leave to appeal to the Privy Council.)

[See also ('85) 1885 All W N 257 (257), *Damru v. Murdan*. (Though copy is granted on the same day of application for it one day is to be excluded.)]

10. ('25) 12 AIR 1925 All 419 (419, 420) : 26 Cr L J. 961 : 87 I C. 417 : 47 All 462, *Daulat Ram v. Kanhaiya Lal*. (Proceeding under S. 476, Cr. P. C., in a civil Court—Final order separately drawn up in fact — ('20) AIR 1920 Pat 844 (DB), *Mahesh Kant v. Ram Prasad*, followed.)

11. ('37) 167 Ind Cas 250 (251) (Lah) (DB), *Atmaram v. Ramchand*.

('50) 85 Cal L Jour 299 (302) (DB), *Kedar Lall v. Hari Lall*. (The time requisite for obtaining a copy does not begin until an application for a copy has been made, and an appellant is not entitled to deduct the time requisite for obtaining a copy if the application for copy was made after the expiry of the period prescribed for appealing.)

('42) 29 A I R 1942 Mad 604 (606) : I L R (1942) Mad 868 : 203 Ind Cas 5, *Kamaraju v. Saramma*. (Section assumes that time requisite for obtaining copies must begin before expiry of limitation.)

[See also ('84) 10 Cal 652 (655) (DB), *Ramey v. Broughton*. (See remark of Garth C. J. in course of arguments.)]

Section 12 — Note 8

1. ('38) 25 AIR 1938 Lah 707 (708) : 182 Ind Cas 108, *Md. Zaman v. Hans Raj*. ('37) 24 AIR 1937 Oudh 65 (66) : 12 Luck 472 : 165 Ind Cas 578 (DB), *Lallu Ram v. Deputy Commissioner, Kheri*.

('37) 65 Cal L Jour 415(416), *Girish Chandra Ghose v. Narayan Chandra Ghose*.

('36) 165 Ind Cas 712 (713) (DB) (Pesh), *Muhammad Akbar Khan v. Abdul Rahman*. (Provided that the overlapping period is not counted twice over.)

subject, however, to the obvious qualification that where the periods *overlap*, one of the overlapping periods should be left out of account.² In computing the period of limitation for an application to set aside an award, the time requisite for obtaining a copy of the *award* only should be excluded.

Time spent in obtaining copies of documents *other* than those referred to above cannot be excluded^{2a} even though, according to rules of the Court, such copies have to be filed along with the appeal or application. Thus, in a *second* appeal the time spent in obtaining copies of the judgment and decree of the *first* Court cannot be excluded in computing the period of limitation for the second appeal.³

(30) 17 AIR 1930 Nag 113(116): 26 Nag L R 66: 123 Ind Cas 470 (FB), *Balshah Miyan v. Pandurang*. (Days on which both copies were being prepared cannot be doubly excluded—('11) 7 Nag L R 67, *Parashram v. Likhan*, overruled.)

(24) 11 AIR 1921 All 162 (162) : 74 Ind Cas 486, *Kidar Nath v. Nanak*.

(25) 12 A I R 1925 All 436 (436) : 87 Ind Cas 484 : 47 All 509 (DB), *Ramzan Bakhsh v. Muhammad Ishaq*.

(24) 11 AIR 1924 Bom 185 (186) : 48 Bom 292 : 87 Ind Cas 93 (DB), *Macmillan & Co. Ltd. v. K. & J. Cooper*. (Following ('09) 33 Mad 256 (DB), *Silamban v. Ramanadhan* & ('17) AIR 1917 Cal 619 (DB).)

(17) 4 AIR 1917 Cal 619 (619): 38 I.C. 66 (DB), *Rajini Nath v. Kali Mohan Das*.

(26) 13 AIR 1926 Lah 529 (529) : 95 I. C. 302, *Raja Ram v. Firm Nanhe Mal*.

(11) 10 Ind Cas 542 (542, 543) (Cal), *Tarabati Koer v. Jajleo Narain*.

(12) 17 Ind Cas 393 (393) (Mad), *Narasimhulu v. Secy. of State*. (Following ('09) 33 Mad 256 (DB), *Silamban v. Ramanadhan*.)

(22) 66 Ind Cas 23 (24) : 41 Mad L Jour 273 (274), *Velliyammal Bibi v. Koolay-anna Rowthen*. (Following ('09) 33 Mad 256 (DB) and ('98) 8 Mad L Jour 148 (DB).)

(11) 12 Ind Cas 677 (677, 678) (DB)(Cal), *Sunder Koer v. Lala Raghunath Sahai*. (Same period cannot be deducted twice over.)

(98) 8 Mad L Jour 148 (149) (DB), *Raman Chetti v. Kadirvalu*. (Except where these two periods overlap each other.)

(04) 28 Bom 643 (644) : 6 Bom L R 920, *Haji Hassan v. Noor Muhammad*.

[See ('08) 31 Mad 268 (270) : 4 Mad L Tim 77 (DB), *Settappa v. Muthia*.

(66) 5 Suth W R Misc 44(44), *Lal Gopalnath Sahee Deo v. Mt. Pudum Koonwur*.]

2. See cases cited in foot-note 1.

(50) 37 AIR 1950 Bom 350 (Pr 2) : ILR (1950) Bom 696 (DB), *Kanji Devsi v. Velji Haridas*.

(48) 35 AIR 1948 Pat 260 (262) : 26 Pat 295 (DB), *Manoo Rai v. Keshwar Rai*.

(Same period cannot be deducted twice over when application for copies of judgment and decree is made simultaneously and copies are obtained simultaneously.)

2a. See also ('50) 37 AIR 1950 Cal 356 (Para 5) : 54 Cal W N 297 (DB), *Province of Bengal v. Amulya Dhon*. (Time during which the application for the certificate that the case was fit for appeal asked for under S. 3 (b) (i) of the Calcutta Improvement (Appeals) Act was pending before the President of the Tribunal cannot be excluded under S. 12.)

3. ('18) 5 A I R 1918 All 389 (390) : 42 Ind Cas 855 : 40 All 1 (FB), *Narsingh Sahai v. Sheo Prasad*.

(39) 26 A I R 1939 Lah 378 (379), *Prithi Pal Singh v. Hans Raj*. (But having regard to the fact that the appellant had actually made an application for a certified copy of the first Court's judgment before limitation for the second appeal had expired, High Court may allow the time spent in obtaining the copy—('27) AIR 1927 Lah 717 followed.)

(28) 15 AIR 1928 All 416 (416) : 115 Ind Cas 880, *Banke Lal v. Bhola Nath*. (But it can be allowed under Section 5.)

(22) 9 AIR 1922 Lah 415 (415): 72 I. C. 797 (DB), *Gurdit Singh v. Charan Das*.

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The reason is that no rule of the Court can add to or modify the conditions and limitation laid down in the Act.⁴ As to whether time spent in obtaining copies of documents referred to in this section can be excluded even though according to the rules of the Court they are not required to be filed, see Note 7.

The delay necessitated in obtaining copies necessary to be filed along with the proceeding, but which are not referred to in sub-ss. (2) to (4), may, however, be excused under S. 5 of the Limitation Act, where such provision is applicable and there is sufficient cause for excusing it. (See Note 33 to section 5.)

9. Exclusion, where copies are obtained by stranger or for a different purpose. — It is not necessary that, in order to claim the exclusion of time under this section, the application for copies should have been made by the party himself in person.¹ Thus a party is entitled to use a copy obtained by *another party*² or even by a stranger³ and claim exclusion of the time spent in obtaining that copy. The application can be made through the party's agent (i. e., through the post office where, under the rules, an application through post is allowed), but in such cases, time will be excluded only from

(23) 10 AIR 1923 Lah 461 (461) : 73 Ind Cas 919, *Chuhar Mal v. Bira Ram*.

(27) 14 AIR 1927 Lah 717 (717) : 103 Ind Cas 498(DB), *George Gowshala v. Balak Ram*. (Court may allow though the deduction cannot be claimed as of right.)

(27) 14 AIR 1927 Lah 192 (192) : 100 Ind Cas 854, *Babu Singh v. Mangat Rai*.

(21) 8 AIR 1921 All 23 (28) : 43 All 660 : 63 Ind Cas 338 (FB), *Bhairon Ghulam v. Ram Autar Singh*. (Under rules of Allahabad High Court a second appeal without copies of first Court's judgment will not be proper presentation — Applicant can take advantage of Section 5.)

(23) 10 AIR 1923 Lah 96 (96) : 68 Ind Cas 777, *Madan Gopal v. Malawa Ram*.

(25) 12 AIR 1925 Rang 344 (344) : 3 Rang 310 : 90 Ind Cas 910 (DB), *Maung Po Aung v. U Bya*. (Court may in its discretion allow such time.)

(08) 32 Bom 14 (24, 25) : 9 Bom L R 1138, *Chunilal v. Dahyabhai*.

4. (18) 5 AIR 1918 All 389 (390) : 42 Ind Cas 855 : 40 All 1 (FB), *Narsingh Sahai v. Sheo Prasad*.

(27) 14 AIR 1927 Lah 192 (192) : 100 Ind Cas 854, *Babu v. Mangat Rai*.

(08) 32 Bom 14 (24, 25) : 9 Bom L R 1138 (FB), *Chunilal v. Dahyabhai*.

Section 12 — Note 9

1. (34) 21 AIR 1934 Lah 135 (135) : 149 Ind Cas 1127, *Chandu v. Mast Ram*.

2. (20) 7 A I R 1920 Mad 159 (159, 160) : 43 Mad 633 : 56 Ind Cas 73 (DB), *Aminudeen Sahib v. Pyari Bi*. ((02) 12 Mad L Jour 385 (DB), *Ramamurthi v. Subramania*, dissented from.)

3. (07) 29 All 264 (265, 266) : 4 All L Jour 152 : 1907 All W N 67 (DB), *Ram Kishan Shastari v. Kashi Bai*. (Copy obtained by pleader's clerk on his own application — Affirming (06) 1906 All W N 223, *Kashi Bai v. Ramkishan Shastari*.)

(14) 1 AIR 1914 Oudh 244 (244) : 23 Ind Cas 209, *Babu Rudra Pratap Singh v. Raghuraj Gir*. (Application made by applicant's pleader's clerk — Application not signed by vakil.)

[See however (32) 19 AIR 1932 Pat 103 (105) : 11 Pat 40 : 136 I. C. 302 (DB), *Basant Lal v. Commissioner of Income-tax*. (Case under Income-tax Act — Section 12 not applicable — Under the policy of the Act, no information could be furnished to a stranger — Copy applied for by stranger — Time not to be excluded — This decision has nothing to do with this section, and rests on special nature of Income-tax Act.)]

the date when the agent actually made the application to the proper officer.⁴

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It is not also necessary to show, for the applicability of the section, that the copy was obtained *for the purpose of* the appeal or application in question.⁵

10. "Time requisite," meaning of. — There is no definition of the expression "time requisite" used in this section, but it has been held that it must be understood to mean time *properly and reasonably* required.¹ In *Pramatha Nath Roy v. William Arthur Lee*,^{1a} their Lordships of the Privy Council observed that "no period can be regarded as requisite under the Act, which need not have elapsed, if the appellant had taken reasonable and proper steps to obtain the order." And in *Jijibhoy N. Surty v. T. S. Chettyar*,² Lord Phillimore in delivering the judgment of the Privy Council observed as follows:

"The word 'requisite' is a strong word ; it may be regarded as meaning something more than the word 'required.' It means 'properly required,' and it throws upon the pleader or counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default."

It follows from the above that the question what is the time requisite for obtaining copies in any particular case is one of fact and must be determined with reference to the facts and circumstances of that case³ and in the light of the rules, if any, framed on the subject⁴

4. ('34) 35 Pun L R 713 (714), *Mehr Ali Beg v. Sarwan*. (Time spent by copying agent in getting estimate etc., cannot be allowed.)

('14) 1 AIR 1914 Nag 60 (62) : 10 Nag L R 139 : 26 I. C. 819, *Raghu v. Madhgia*.

5. ('07) 29 All 264 (265, 266) : 4 All L Jour 152 : 1907 All W N 67, *Ram Kishan Shastari v. Kashi Bai*.

Section 12 — Note 10

1. ('40) 27 AIR 1940 Bom 415 (415) : 192 Ind Cas 275 (DB), *Balappa Tammanna v. Dyamappa Bhusappa*.

('38) 25 AIR 1938 Mad 823(324): 177 I C. 33, *Ramaseshaya v. Venkatarathnam*.

('38) 25 AIR 1938 Nag 287 (288): ILR (1940) Nag 312: 177 Ind Cas 538, *Mt. Hira Bai v. Indrabahadur Singh*.

('20) 7 AIR 1920 Mad 359 (360): 43 Mad 640 : 56 Ind Cas 67 (DB), *Subramanyan v. Narasimham*.

[See also ('40) 27 AIR 1940 Oudh 173 (174): 15 Luck 376: 186 Ind Cas 136 (DB), *Yusuf Ali v. Md. Kazim Ali*. (Object of this section is to exclude such time taken in obtaining a copy of a decree as is beyond the control of the appellant.)]

1a. ('22) 9 AIR 1922 P C 352 (353): 49 Ind App 307: 68 I.C. 900: 49 Cal 999 (PC).

2. ('28) 15 AIR 1928 P C 103 (106): 109 I. C. 1: 6 Rang 302: 55 Ind App 161 (PC).

[See also ('50) 37 AIR 1950 Bom 350 (Pr 2) : ILR (1950) Bom 696 (DB), *Kanji Dersi v. Velji Haridas*. (The expression "requisite" means something much more than required. The proper connotation of that expression is that the time indicated in sub-ss. (2) and (3) must be properly required before it could be excluded.)]

3. ('48) ILR (1948) 2 Cal 202 (207) (DB), *Purnendu Nath v. Kanailal*. (('27) AIR 1927 Rang 20 : 4 Rang 265, *J. N. Surty v. T. S. Chettyar Firm*, Foll.)

('46) 33 AIR 1946 Bom 437 (438) : I L R (1946) Bom 431 : 226 Ind Cas 95 (DB), *Bhausahab v. Sonabai*.

('37) 24 AIR 1937 Bom 162 (164) : 168 Ind Cas 77 : I L R (1937) Bom 443 (FB) *Murlidhar Shrinivas v. Motilal*. (Per Beaumont, C. J.)

('17) 4 AIR 1917 All 323 (324) : 34 Ind Cas 204, *Ram Autar v. Bhagelu Sahai*.

4. ('35) 22 AIR 1935 Lah 625 (625) : 160 I. C. 788 (DB), *Naul Mal v. Reru Mal*.

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Note 10

and of the practice of the Court.⁵ It also follows that the "time requisite" is not always the time *actually* spent in securing the copies.⁶ Delay caused by the appellant's carelessness or negligence cannot be considered "time requisite" and cannot be excluded.⁷

But delay by the office or the Court for which the appellant is not responsible, cannot be counted against him and will have to be excluded as being time requisite for obtaining the copies.⁸ See also Notes 22 and 23.

5. ('83) 12 Cal L R 541 (545) (DB), *Nobin Chunder v. Brojendro Coomar*.
6. ('46) 33 AIR 1946 Bom 437 (438) : ILR (1946) Bom 431 : 226 Ind Cas 95 (DB), *Bhausahab v. Sonabai*. (Having regard to the fact that some time is bound to be taken up between the passing and the signing of the decree, if the appellant waits for a reasonable time in applying for copies, he would be entitled to deduct that time in the time requisite under S. 12; but if he waits for an unreasonable time in applying for copies, he would not be entitled to include that period within the requisite time.)
- ('40) 27 AIR 1940 Bom 415 (415) : 192 Ind Cas 275 (DB), *Balappa Tammanna v. Dyamappa Bhusappa*.
- ('19) 6 AIR 1919 Lah 103 (104) : 50 Ind Cas 760, *Nur Muhammad v. Ram Das*. (Time during which copies lay ready but undelivered cannot be excluded.)
- ('37) 24 A I R 1937 Bom 64 (65) : 167 Ind Cas 664 : I L R (1937) Bom 421 (DB), *Nemichand Uttamchand v. Chaturbhuj Damji*.
7. ('45) 32 A I R 1945 Lah 233 (234) (DB), *Abdul Salam v. Abdul Khaliq*. (Partition suit decided - Decree not drawn up for considerable time as requisite stamp duty not furnished by parties or either of them within time fixed by Court - Appeal - Time between date of judgment and date on which decree was prepared and signed held could not be excluded under S. 12 as time requisite.)
- ('90) 12 All 79 (82) : 1890 All W N 25 (DB), *Parbati v. Bhola*.
- ('36) 23 AIR 1936 Sind 53 (56) : 29 Sind L R 445 : 163 Ind Cas 30 (DB), *Lachmi-bai v. Doulatram*.
- ('37) 24 A I R 1937 Bom 64 (65) : 167 Ind Cas 664 : I L R (1937) Bom 421 (DB), *Nemichand Uttamchand v. Chaturbhuj Damji*.
8. ('36) 23 AIR 1936 Lah 120(122) : 158 Ind Cas 736, *Labhu Ram v. Bansi Dhar*. (Delay due to negligence by copying department.)
- ('40) 27 A I R 1940 Oudh 173 (174) : 15 Luck 376 : 186 Ind Cas 136 (DB), *Yusuf Ali Khan v. Mohammad Kazim Ali*.
- ('14) 1 AIR 1914 Oudh 146 (147) : 25 Ind Cas 26, *Daljit v. Ram Rattan*. (Wrong copy given - Correct copy given after some time.)
- ('23) 10 AIR 1923 Lah 11(12) : 70 Ind Cas 299 (DB), *Mt. Chhoto v. Mt. Sona Devi*. (Application for copies wrongly rejected - Rejection set aside by appellate Court - Subsequently application granted - Interval must be excluded.)
- ('26) 13 AIR 1926 Lah 455 (455) : 94 Ind Cas 1055, *Kalian Singh v. Fazal Din*.
- ('36) 23 A I R 1936 Lah 200 (201) : 159 Ind Cas 178, *Rura Mal v. Ram Chand*. (Delay owing to erroneous practice of copying department in not receiving deposit at the time of application.)
- ('36) 23 AIR 1936 Lah 550 (551) : 163 I.C. 223, *Piarelal v. Karta Ram*. (Copying department is not agent of public.)
- ('36) 23 AIR 1936 Lah 693 (694) : 165 I. C. 516, *Mani Singh v. Anand Parkash*. [See also ('26) 13 A I R 1926 Sind 114 (115) : 91 Ind Cas 406, *Gangaram Ghan-shamdas v. Girdharimal Chetanmal*. (Time taken to obtain copies - Sum not legally payable, delay in payment of - Period of delay must be excluded - By due diligence, it should not be understood that a party should be ready and willing to pay any sums which are not legally leviable from him - Hence where there had been delay by non-payment of such sum, it was held that the plaintiff was entitled to claim exemption for the period of delay as well.)]

Notes 11 to 15 deal with various classes of cases in which the question of the time requisite for copies may arise for decision.

Section 12 Notes 10-12

10a. Day of copy application and day on which copy is ready to be excluded. — The date on which the application was made and the date on which copy was notified as ready must both be excluded.¹

11. Delay caused by application for copies made to wrong person. — An application for copies must be made to the *proper officer* appointed under the rules to entertain such an application.¹ Time spent in making an application to a wrong person cannot be considered as time requisite for obtaining the copies.

As to who is the proper officer to whom an application ought to be made for copies in District Courts and Subordinate Courts in the Punjab, see the undermentioned cases.²

12. Delay caused by defective application for copies. — In order that a party may be entitled to deduct the period required for obtaining copies a *proper* application for copies must be made within the period of limitation.¹ Where an application for copies is defective and has to be returned for correction, the period of exclusion commences only from the date of its re-presentation after due correction, as it is impossible till then for the copying department to comply with the application for copies.² Even where the defect arises out of the wrong

Section 12 — Note 10a

1. ('44) 31 AIR 1944 Nag 356 (356) : ILR (1944) Nag 725, *Ramkrishna v. Shrawan*.
- ('39) 26 AIR 1939 Nag 150 (154) : ILR (1939) Nag 185 : 182 Ind Cas 662 (DB), *Balkrishna Rajaram v. Baijnath Girdharilal*. (Day on which application for copies is filed.)
- ('38) 25 AIR 1938 Mad 823 (824) : 177 IC 33, *Ramseshayya v. Venkatarathnam*. (Day on which copy is notified to be ready.)
- (1864) 1864 Suth W R (Gap) 145 (145), *Moharajah Beer Chunder Joobraj v. Mohamed Asgur*.

Section 12 — Note 11

1. ('14) 1 AIR 1914 Nag 60 (61) : 10 Nag L R 139 : 26 IC 819, *Raghu v. Madhgia*.
- ('36) 23 AIR 1936 Lah 771 (777) : 17 Lah 429 : 166 Ind Cas 467 (FB), *Kishore Chand v. Bahadur*. (AIR 1934 Lah 474, *District Board, Jhelum v. Harichand*, followed, AIR 1935 Lah 625 (DB), *Naul Mal v. Resu Mal* and AIR 1935 Lah 889 (DB), *Jiwan v. Punjab National Bank* overruled).
2. ('36) 23 AIR 1936 Lah 771 (776) : 17 Lah 429 : 166 Ind Cas 467 (FB), *Kishore Chand v. Bahadur*. (('11) 9 Ind Cas 381 (DB), *Ashiq Hussain v. Ali Bakhsh*; AIR 1928 Lah 16, *Abdul Rahim v. Chet Ram* and AIR 1935 Lah 682 (DB), *Mathela v. Sher Mohammad*, referred to.)
- ('36) 23 AIR 1936 Lah 123 (123) : 161 Ind Cas 243, *Firm Surjan Das v. Firm Dwarka Das*.

Section 12 — Note 12

1. ('37) 167 Ind Cas 250 (251) (Lah) (DB), *Atmaram v. Ramchand*.
2. ('30) 17 AIR 1930 Nag 129 (129, 130) : 121 Ind Cas 647 : 26 Nag L R 149, *Mahomed Khan v. Mt. Fatma Bai*.
- ('26) 91 Ind Cas 425 (426) (Oudh), *Babu Lal v. Rampher Singh*. (Defective application returned to party as it did not give date of judgment — Party filing fresh application rectifying defect—Exclusion begins from date of latter application.)

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information supplied by the copying department itself, it has been held that the delay caused thereby in obtaining copies cannot, as of right, be excluded under S. 12, but that it is a matter falling under S. 5.³

In the undermentioned case⁴ of the Nagpur High Court it has been held that time lost on account of mistake in the copy application can be excluded as time requisite where the mistake could have been immediately detected by the copying department by exercise of due diligence, which it was expected to exercise under the rules of the High Court, but it failed to point out to the applicant the mistake and get it remedied then and there.

Under rules in some Courts an application for copies has to be accompanied by cash deposit or deposit of copy papers or folios. A defect in complying with this requirement raises a question as to the time requisite for obtaining copies. On this point, see Note 14.

13. Delay caused by separate application for copies of judgment and decree. — It has been seen in Note 8 above that the appellant is entitled to the exclusion of the time taken for copies of both the judgment and the decree. It is, therefore, open to the appellant to make his applications for copies of the judgment and the decree on different dates; but the second application must be within the period of limitation as extended by the first.¹ In such cases, however, if the

[See ('39) 26 AIR 1939 Mad 293 (293) : 189 Ind Cas 320, *Venkatarayulu Naidu v. Venkata Rattamma Garu*. (Application for copy of order filed on certain date — Memorandum asking decree to be drafted and copy of it to be furnished filed some days later — Held, first application was not one for copy of decree.)

('32) 1932 Mad W N 328 (329), *Poongavana Gramani v. Manicka Goundan*. (Copy application returned but not represented — Copies obtained on second application.)

('27) 14 AIR 1927 Lah 59 (59, 60) : 98 Ind Cas 942, *B. B. & C. I. Ry. Co. v. Ram Sarup Mahru Mal*.]

3. ('35) 22 AIR 1935 Nag 109 (110) : 155 I C 588, *Balwant Rao v. Balmukund*. (Appellant applied for and obtained judgment copy — This copy contained error with respect to the number of the suit — The error was repeated by appellant in his application for decree copy — Hence delay.)

4. ('48) 35 AIR 1948 Nag 395 (397) : ILR (1948) Nag 169, *Hadas v. Banwari Lal Shankarlal*. (Application for copy defective in particulars as to case number and date of disposal — Days between date of application and date when defect was pointed out to applicant excluded.)

Section 12 — Note 13

1. ('47) 34 AIR 1947 Lah 168 (170) : ILR (1946) Lah 107 : 230 Ind Cas 73 (DB), *Bhiwani Cloth Mills v. Parmeshari Doss*. (Judgment delivered on 31-7-1940 and application for copy of judgment made on same day — Copy ready for delivery on 7-8-1940 but actually delivered on 10-8-1940 — Court closed for vacation from 1-9-1940 to 30-9-1940 — Application for copy of decree on 30-9-1940 — Copy of decree obtained on 11-10-1940 and appeal filed on same day — Appeal is time-barred — Time taken for obtaining copy of decree cannot be excluded as time had already expired though right to appeal did subsist by virtue of S. 4.)

('17) 4 AIR 1917 Cal 619 (619) : 38 Ind Cas 66 (DB), *Rajani Nath v. Kali Mohan Das Kapali*. (('08) 8 Mad L Jour 148 (DB), *Raman v. Kadirvalu* ; ('09) 33 Mad 256 (DB), *Selamban v. Ramanadhan* and ('12) 17 Ind Cas 393 (DB), *Karnam v. Secy. of State*, relied on.)

('25) 12 AIR 1925 All 436 (436) : 87 Ind Cas 484 : 47 All 509 (DB), *Ramzan Baksh v. Mahomed Ishaq*. (AIR 1920 All 31, *Mool Raj v. Niadar Mal*, not followed.)

periods *overlap* each other, one of the overlapping periods alone can be excluded. (See Note 8.)

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Illustration.

A decree was passed on 12th of October. An application for a copy of the decree alone was made on the 18th of October and the copy was obtained on the 19th December. Subsequently, i.e., on the 22nd December, an application for a copy of the judgment was made and the copy was obtained on the 16th of February following. It was held that the period occupied for obtaining both the copies should be excluded, i.e., the period between the 18th October and the 19th December and that between the 22nd December and the 16th February.² The fact that this would enable a party to apply for the copy of one record and then after obtaining it to apply for a copy of the other record and thus extend the time, while if he had applied for both the copies together the time requisite would be less, cannot prevail against the express right conferred by this section.³

In some cases⁴ it has been held that the question of allowing the deduction of the separate periods depends on the facts of each case,

- (24) 11 AIR 1924 Bom 425 (425, 426) : 48 Bom 433 : 87 I C 545 (DB), *Timappa v. Manjaya*. (Case of two distinct and not overlapping periods.)
- (26) 13 AIR 1926 Lah 529 (529) : 95 I C 302, *Baja Ram v. Nanhe Mal Lala Mal*.
- (20) 7 AIR 1920 Lah 409 (410) : 54 Ind Cas 879 : 1919 Pun Re No. 163 (DB), *Ali Mahomed v. Nathu*. (No overlapping — Separate applications — Application for copy of decree put in before expiry of time for appeal.)
- (17) 4 AIR 1917 Lah 287 (288) : 39 I C 617 (DB), *Mahomed Amin v. Chiragh Beg*. (But in this case it was held that time spent in vernacular copy of decree which was unnecessary could not be excluded.)
- (28) 15 AIR 1928 Nag 131 (132) : 106 Ind Cas 57, *Ramachandra Rao v. Mayaram*. (Obiter.)
- (19) 6 AIR 1919 Nag 136 (137) : 49 Ind Cas 961, *Sheoram v. Chintoo*. (Law does not require that both copies must be applied for simultaneously.)
- (16) 3 AIR 1916 Nag 116 (117) : 42 Ind Cas 965, *Bagmal v. Jamnadas Poldar*.
- (15) 2 AIR 1915 Oudh 170 (171) : 28 Ind Cas 366 : 18 Oudh Cas 74, *Din Dayal v. Rameshar*. (8 Mad L Jour 148 relied on.)
- (24) 11 AIR 1924 Pat 113 (113, 114) : 77 Ind Cas 401 (DB), *Jadunandan Sahay v. Hanuman Sahay*.
- (36) 23 AIR 1936 Pesh 179 (180) : 164 Ind Cas 1069 (DB), *Gul Rahman v. Mt. Zar Jan*. (Copy of decree need not necessarily be applied for within period prescribed by first schedule, provided it is made within period as extended by application for copy of judgment.)
- (36) 165 Ind Cas 712 (713) (Pesh) (DB), *Muhammad Akbar Khan v. Abdul Rahman*.
- [See (37) 24 AIR 1937 Oudh 65 (66) : 12 Luck 472 : 165 Ind Cas 578 (DB), *Lallu Ram v. Deputy Commissioner, Kheri*.]
- [But see (20) 7 AIR 1920 All 31 (31, 32) : 42 All 260 : 55 Ind Cas 315 (DB), *Moolraj v. Niadar Mal*. (Facts not fully stated in judgment.)]
2. (09) 4 Ind Cas 301 (302) : 33 Mad 256 (DB), *Selamban Chetty v. Ramanadhan*.
3. (09) 4 Ind Cas 301 (302) : 33 Mad 256 (DB), *Selamban Chetty v. Ramanadhan Chetty*.
- (24) 11 AIR 1924 Pat 113 (113, 114) : 77 Ind Cas 401 (DB), *Jadunandan Sahay v. Hanuman Sahay*.
- (28) 15 AIR 1928 Nag 131 (132) : 106 Ind Cas 57, *Ram Chandra Rao v. Mayaram*.
- (37) 24 AIR 1937 Bom 162 (164) : 168 Ind Cas 77 : ILR (1937) Bom 443 (FB), *Murlidhar Shrinivas v. Moti Lal*. ((98) 23 Bom 442 (DB), *Yamaji v. Antaji* and 20 Ind Cas 537 (DB), *New Piece Goods Bazar v. Jivabhai*, Overruled.)
- (36) 23 AIR 1936 Pesh 179 (180) : 164 Ind Cas 1069, *Gul Rahiman v. Mt. Zar Jan*.
4. (18) 5 AIR 1918 Lah 29 (29, 30) : 48 Ind Cas 31 : 1918 Pun Re No. 100, *Sher Singh v. Pem Raj*.

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that unless the applicant shows sufficient reason why he did not apply for copies of both the records at the same time, only one of the periods is to be allowed and that the separate periods so taken cannot be considered "requisite" for obtaining copies. It is submitted that this view is not correct.

Where copies of the judgment and decree are applied for on the *same day*, the longer of the two periods should be credited to the applicant and he is not entitled to add on to the longer period any time within the *terminus* of the longer period.⁵

14. Delay in furnishing folios, stamps, etc. — Where the rules of Court require that the application should be *accompanied* by a deposit of cash or stamps fixed by rules or estimated by the applicant, the question arises whether an application without such a deposit or with an insufficient deposit prevents running of time.

In some cases¹ it has been decided that the application is not a proper application until the deposit is made or the deficiency is made good. In other cases² it has been held that if such an application is accepted without any objection and without demand for the deposit with the application, it must be regarded as a proper application. In the undermentioned case,³ where an application for copies was first refused not because there was no deposit but because the decree had

(1865) 2 Suth W R Misc 38 (39), *Baboo Nursingh Narain Singh v. Baboo Radhay Singh*. (He must not make unnecessary delay by asking for copies on separate dates.)

5. ('95) 1895 All W N 101 (102), *Batasi v. Hari Das*.

('05) 12 Cal W N 25 (26) (DB), *Bishendut Tewari v. Nandan Pershad*. (Per Woodroffe, J.)

Section 12 — Note 14

1. ('34) 35 Pun L R 713 (714), *Mehr Ali Beg v. Sarwan*.

('14) 1 AIR 1914 Nag 60 (62) : 10 Nag L R 130 : 26 I C 819, *Raghu v. Madhgia*. (Copy application and copying fees sent by post same day—Money-order reaching office later owing to holidays—Application deemed to be made on later date.)

('11) 10 Ind Cas 210 (210) : 5 Sind L R 47 (DB), *Topandas v. Manager of Encumbered Estates*. (No allowance can be made for time spent in making deposit.)

('36) 167 Ind Cas 250 (251) (DB) (Lah), *Atma Ram v. Ramchand*. (('34) 21 AIR 1934 Pat 4, *Pikhesar Nath v. Janakdeo*, distinguished.)

('11) 11 Ind Cas 387 (388) (DB) (Cal), *Sri Chandan Bhuya v. Haroo Sethi*. (Application is incomplete if it does not accompany sufficient number of folios.)

2. ('36) 23 AIR 1936 Lah 693 (694) : 165 I C 516, *Mani Singh v. Anand Parkash*. ('36) 23 AIR 1936 Lah 123 (123, 124) : 161 I C 243, *Firm Surjan Das v. Firm Dwarka Das*.

('36) 23 AIR 1936 Lah 120 (122) : 158 Ind Cas 736, *Labhu Ram v. Bansi Dhar*.

('37) 167 Ind Cas 275 (275) : 17 Lah 574 (DB), *Mehtab Ali v. Din Mohammad*.

(Where the applicant for copies of the judgment and the decree deposits Rs. 5 along with his application and also pays the further sum demanded without delay in accordance with the rules prescribed, the whole period from the date of the application to the date of the supply of the copies must be held to have been 'requisite' for obtaining the copies.)

[See also ('72-92) 1872-92 Low Bur Rul 425 (425), *Maung Tha Hnyin v. Naramen Chetty*. (Practice of beginning preparation of copies before charges are paid.)]

3. ('13) 19 Ind Cas 671 (671) : 6 Sind L R 244 (DB), *Manager, Incumbered Estates in Sind v. Ganga Ram Bacho Mal*.

not been then drafted and signed and the copy was subsequently granted without a fresh application, it was held that the whole period from the date of the application could be excluded.

Under para. 389 of the Oudh Civil Digest, an application must be accompanied by stamped copying papers equal in value to the charge for the preparation of a copy, and it is for the applicant himself to compute the necessary charges. It is not the duty of the department to make the calculation for him but only to check the calculation made by him. A Full Bench of the Oudh Chief Court has accordingly held that where the application for copies was accompanied by an insufficient deposit and the deficiency was supplied after a requisition therefor by the office, the time requisite for obtaining the copy should be computed not from the date of the application but from the date on which the deficiency was made up as the delay in deposit was due to the error of the party.⁴

According to the undermentioned cases,⁵ if the amount of deposit is not sufficient, the Court will have to cause the appearance of the applicant and inform him as to how much more money is necessary. If the copying department does not call for the applicant and give him that information, the time during which the copy could not be prepared on account of the deficiency cannot be reckoned against the applicant. If after such information is given to the applicant he is not diligent, the delay of course goes against him.⁶ In computing time

4. ('27) 14 AIR 1927 Oudh 129 (130, 131) : 101 Ind Cas 136 : 2 Luck 447 (FB), *Gudar Pal Singh v. Nagishar Bakhsh Singh*. (('22) A I R 1922 P C 352 (PC), *Pramatha Nath v. Hon. William Arthur*, relied on.)

5. ('44) 31 AIR 1944 Nag 356 (356) : ILR (1944) Nag 725, *Ramkrishna v. Shrawan*. (If the copying work is stopped for inadequate funds, the day on which the intimation about the deficiency is given to the applicant should be excluded, but the day on which funds are supplied cannot be excluded.)

('33) 20 AIR 1933 Nag 218 (218, 219) : 145 Ind Cas 742, *Gajpatilal v. Mauliprasad*. (('16) 3 AIR 1916 Nag 36, *Lachman v. Kalya*, relied on.)

('36) 23 AIR 1936 Lah 550 (550) : 163 Ind Cas 223, *Piare Lal v. Karta Ram*.

('97) 3 Cal W N 55 (56) (DB), *Dulali Bewa v. Saroda Kinkar Pandit*.

[See ('48) 35 AIR 1948 Nag 50 (52) : I L R (1947) Nag 323 : 230 Ind Cas 83, *Sitaram Bhiosan v. Wamanrao Bablaji*. (Copy application on 3-9-1945 — Intimation to supply funds on 18-9-1945 — Funds supplied on 28-9-1945 — Applicant held entitled to exclude day on which funds were supplied in addition to the period between 3-9-1945 and 18-9-1945 (both inclusive) — A I R 1938 Nag 287 : I L R (1940) Nag 312, *Mt. Hira Bai v. Indrabahadursingh*, Rel. on ; ('44) AIR 1944 Nag 356 : I L R (1944) Nag 725, *Ramkrishna v. Shrawan*, Diss.)

('21) 8 AIR 1921 Nag 141 (141) : 61 Ind Cas 889, *Gondaji v. Kisan*.

('36) 23 AIR 1936 Lah 670 (671) : 161 I C 215, *Abdul Ghani v. Maula Baksh*.

('38) 25 AIR 1938 Nag 287 (288) : I L R (1940) Nag 312 : 177 Ind Cas 538, *Mt. Hira Bai v. Indrabahadursingh*. (Time during which copying is stopped for want of funds should be excluded as time required to get copy of decree, when extra charges are paid without delay — Delay caused by Court giving wrong number should also be excluded.)]

6. ('21) 8 AIR 1921 Nag 141 (142) : 61 Ind Cas 889, *Gondaji v. Kisan*.

('16) 3 AIR 1916 Nag 36 (37) : 34 I C 458 : 12 Nag L R 66, *Lachman v. Kalya*.

('19) 6 A I R 1919 Pat 38 (41) : 49 Ind Cas 1000 (D B), *Mt. Bibi Fakhrunissa v. Rambhajan Singh*. (Where a part of the requisite stamped folios alone are sup-

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for copies in such cases the day on which the deficiency in deposit is notified and the day on which deficiency is made good should both be excluded.^{6a}

The rules in Lahore Courts require the applicant to deposit money and folios. Notwithstanding the rules, the Lahore High Court by a Full Bench⁷ has held that an application for copies, whether made in person or by post, which bears the necessary court-fee stamp and is addressed to the proper officer, is a valid application even if it is not accompanied by the full cost of preparation and certification of the copy. The time necessary for ascertaining the costs of preparing the copy was taken to be time "requisite for obtaining a copy," provided the deposit was made with due diligence when required by the copying department.

In computing the time for copies the day on which the folios are called for and the day on which they are supplied must be excluded, as time should be computed in whole days and not in hours.⁸ Any intermediate delay in supplying folios should go against the appellant.⁹ The time occupied in ascertaining the requisite number of folios, however, cannot be deducted.^{9a}

plied on notice and the rest only subsequently, the applicant is not entitled to exclusion of time till folios etc., are fully supplied.)

(16) 3 A I R 1916 Pat 267 (268) : 35 Ind Cas 868 : 1 Pat L Jour 573 (FB), *Ram Asray Singh v. Sheonandan Singh*.

[See ('38) 25 AIR 1938 Nag 287 (288) : I L R (1940) Nag 312: 177 Ind Cas 538, *Mt. Hira Bai v. Indrabahadursingh*. (If the time is wasted because of the appellant's own negligence, that time does not count.)]

6a. ('48) 35 A I R 1948 Nag 50 (52) : I L R (1947) Nag 323 : 230 Ind Cas 83, *Sitaram Bhiosan v. Wamanrao Bablaji*. (('38) A I R 1938 Nag 287 : I L R (1940) Nag 312, *Hira Bai v. Indrabahadursingh*, Rel. on.—('44) AIR 1944 Nag 356 : I L R (1944) Nag 725, *Ramkrishna v. Shrawan*, Diss.)

[See however ('44) 31 AIR 1944 Nag 356 (356) : I L R (1944) Nag 725, *Ramkrishna v. Shrawan*. (The day on which deficiency is made good cannot be excluded.)]

7. ('36) 23 AIR 1936 Lah 771 (777) : 17 Lah 429: 166 Ind Cas 467 (FB), *Kishore Chand v. Bahadur*. (('35) AIR 1935 Lah 889 (D B), *Jiwan v. Punjab National Bank*, Overruled.)

[See also ('36) 23 A I R 1936 Lah 1007 (1008) : 169 Ind Cas 176, *Mt. Ghulam Aishan v. Mohammad Sharif*. (Applicant presenting application for copy with insufficient payment for costs — Further demand for deposit made — Delay of two or three days in making necessary deposit — No negligence on applicant's part — Delay construed as time requisite within meaning of this section and hence excused.)]

8. ('02) 2 Ind Cas 359 (361) : 5 Low Bur Rul 15, *Abdulla Kaka v. Palaneappa*.

9. ('90) 12 All 79 (82) : 1890 All W N 25 (DB), *Parbati v. Bhola*. (Time requisite means time taken by officer in preparing copy.)

('90) 12 All 461 (479) : 1890 All W N 149 (FB), *Bechi v. Ahsan-Ullah Khan*.

('68) 9 Suth W R 138 (139), *Chumun Chowdhry v. Ali Azim*. (Delay in supply of required "plain paper" will also go against appellant.)

('26) 97 Ind Cas 728 (729) (D B) (Cal), *Mabarek Fakir v. Bhuban Mohan Ghose*.

('22) A I R 1922 P C 352 : 49 Ind App 307 : 49 Cal 999 (P O), *Pramatha Nath v. Hon. William Arthur*, followed.)

[See ('35) 157 Ind Cas 181 (181) (DB) (Lah), *Baij Nath v. Gapu Ram*.]

9a. ('86) 12 Cal 30 (33) (DB), *Gunga Das Dey v. Ramjoy Dey*.

Where time is being occupied for obtaining copy of one of the documents, either the decree or judgment, a delay during the same period in supplying folios in respect of the other document cannot be counted against the appellant as the period of delay is already being counted in his favour.¹⁰

Where the day or days immediately after the date of notice for requisite folios happen to be holidays, such days will be excluded.¹¹ But the applicant must deposit the papers on the re-opening day.¹² If, however, arrangements are made for receiving the folios or printing charges during the holidays and this fact is duly notified, the applicant is not entitled to wait till the re-opening of the Court for making the requisite supply.¹³

In a Patna case¹⁴ the decree appealed from was passed on 17-9-1919. The appellant applied for copies and the requisite folios were notified on 18-9-1919. The applicant supplied them on 19-9-1919 but they were short of the required number. The Court being closed for holidays re-opened on 27-10-1919, and on that date the deficiency in the folios was made up by the applicant. The High Court held that the thirty days time for appeal having expired during the holidays, the appellant was entitled to file an *application* for copies on the re-opening date, i.e., 27-10-1919 and that therefore he could very well supply the deficient folios on the re-opening day, thus keeping alive his application and claim the exclusion of the days of the application of the notice for folios and also 27-10-1919. It is submitted that the

10. ('22) 66 Ind Cas 23 (24) (DB) (Mad), *Valliammal Bibi v. Koolayanna*.

11. ('31) 18 A I R 1931 Cal 731 (732) : 58 Cal 969 : 134 Ind Cas 895, *Mahomed Ismail Chowdhury v. Kalicharan Singh*. (Calcutta High Court General Letter No. 16, Cls. 1 and 2.)

('13) 21 Ind Cas 192 (492) (D B) (Mad), *Ramasamy Chetty v. Ramanatha Chetty*. (Following ('90) 12 All 461 (FB), *Bechi v. Ahsan-Ullah Khan*.)

('03) 8 Cal W N 141 (142) (DB), *Nawab Syed Amir Hossain v. Tulsi Dass*. (Folios were called for during holidays and would not be received during the holidays.) The same principle will apply to supplying information necessary for drawing up the copies :

('36) 23 AIR 1936 Nag 289 (289, 290) : 166 Ind Cas 965 : I L R (1938) Nag 342, *B. K. Rai v. Thunman Singh*. (('21) A I R 1921 Nag 141, *Gondaji v. Kishan*, relied on.)

12. ('21) 8 AIR 1921 Nag 141 (141) : 61 Ind Cas 889, *Gondaji v. Kishan*.

13. ('19) 6 AIR 1919 Mad 581 (582) : 50 Ind Cas 518 (DB), *Kadir Moideen Sahib v. Abu Baker Sahib*. (Arrangements to 'deliver' copies during vacation imply arrangements to receive printing charges, etc.)

14. ('20) 7 A I R 1920 Pat 818 (819) : 60 Ind Cas 493, *Farzand Ali v. Abdul Hamid*.

[See also ('37) 167 Ind Cas 250 (251) (Lah) (DB), *Atmaram v. Ram Chand*. (Judgment delivered on 31-8-1933 — Plaintiff applying for copy of judgment and decree on same day but failing to pay copying fee — Court closed from 1-9-33 and re-opened on 2-10-33 — Appellant depositing the necessary copying fee on 4-10-33 — Held that owing to the intervention of the holidays, the last day of limitation for the appeal was 2-10-33 and that as the copying fee was not paid within that date, the appeal was time barred — It is submitted that the view that limitation is extended upto the reopening day is not correct — See S. 4 Note 10.)]

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view that the period of limitation for the appeal is *extended* upto the re-opening day is not correct. (See S. 4 Note 10.) See Note 24 for fuller discussion of the effect of the intervention of holidays after judgment.

Where after making an application no delay has been caused by the applicant, the whole period between the date of the application and the date of the copy being ready for delivery must be excluded.¹⁵

Where an application for copies is made with the requisite folios and stamps and the applicant is informed that the copies will be ready on a particular day, there is no further duty on the applicant or his lawyer to go to the Court on intervening days to ascertain from the register whether further stamps or folios are necessary. Where it is notified by a mere entry in the register that further stamps and folios are required but the applicant comes to know of it only on the date originally fixed for the delivery of the copies, the delay in supplying the stamps and folios ought not to be counted against him.¹⁶

15. Delay in taking delivery of copy. — The date on which the copy is ready should be excluded as time requisite for obtaining it.¹ But any delay of the party subsequent to that date in taking delivery of the same is not time "requisite for obtaining a copy" and consequently the time between the date on which the copy is ready and the date on which it is actually taken delivery of by the party cannot be excluded.²

15. ('17) 4 A I R 1917 Pat 701 (701) : 37 Ind Cas 211 : 1 Pat L Jour 163, *Kesho Prasad Singh Bahadur v. Harbans Raut*.

('19) 6 A I R 1919 Pat 38 (38) : 49 Ind Cas 1000 (D B), *Mt. Bibi Fakhrunissa v. Rambhajan Singh*.

[See ('70) 13 Suth W R 245 (246, 247) : 4 Beng L R App 84 (DB), *Secy. of State v. Mutusawmy*.]

16. ('41) 28 A I R 1941 Cal 378 (379) : I L R (1941) 1 Cal 536 : 196 Ind Cas 193, *Jamadar Singh v. Sheikh Naiyab Ali*.

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1. ('39) 26 AIR 1939 Bom 46 (46) : 179 Ind Cas 645 (DB), *Raichand Chunilal v. Rahi Nana*.

('33) 20 AIR 1933 Nag 362 (363) : 147 Ind Cas 1113, *Shiva v. Dashrath*. (('14) AIR 1914 Nag 60, *Raghu v. Madhgia*, relied on.)

('15) 2 AIR 1915 Nag 117 (118) : 29 Ind Cas 833 : 11 Nag L R 104, *Kashibai v. Kannoo*.

('37) 24 AIR 1937 Oudh 26 (27) : 165 Ind Cas 269 : 12 Luck 531, *Sukhnandan Prasad Shukla v. Raja Ahmed Ali Khan*.

2. ('19) 6 AIR 1919 Lah 103 (104) : 50 Ind Cas 760, *Nurmuhammad v. Ram Das*, (Not time actually spent but time requisite can be deducted.)

('22) 9 AIR 1922 Lah 423 (423) : 67 Ind Cas 478, *Bawa Singh v. Thakur Singh*.

('17) 4 AIR 1917 Sind 52 (53) : 38 Ind Cas 464 : 10 Sind L R 165 (DB), *Tolaram v. Jaffer Khan*. (There is no rule in Sind Courts Civil Circular for giving notice of copies being ready for delivery—Party must be diligent.)

('14) 24 Ind Cas 977 (977) : 7 Sind L R 201, *Allahdadshah v. Mukhdum Amin*.

('90) 12 All 79 (82) : 1890 All W N 25 (DB), *Parbati v. Bhola*.

('90) 4 C P L R 188 (189), *Mt. Kaveri Bai v. Mt. Chandra Bhagabai*.

('81) 9 Cal L R 293 (294) (DB), *Gopal Chunder Roy v. Brojo Behary Mitter*.

('23) 10 AIR 1923 Lah 696 (696) : 73 Ind Cas 447, *Ram Sarup v. Zorawar Mal*.

('30) 17 AIR 1930 Rang 209 (209) : 127 Ind Cas 379, *Hatin v. Osi Ulla*.

[See ('11) 9 Ind Cas 607 (607) (Lah), *Mohan Ram v. Md. Khuda Dad Khan*.]

In the absence of a notice or a communication to the party of the date on which the copies are ready for delivery, the delay in taking delivery cannot be counted against the appellant.³ Where under the rules of a Court the copying establishment is unable to tell the exact date on which copies will be ready and the appellant is not guilty of undue delay in taking delivery, the period between the date of their being ready and the date of taking delivery should be excluded.⁴

Where a Sunday or a holiday succeeds the day on which the copy is ready for delivery, such a day also will be excluded if the delivery is taken the next day.⁵ But where special arrangement is made to deliver copies during holidays and this fact is known to the appellant, he cannot take delivery of the copy on the re-opening of the Court and claim a deduction of the whole period it remained undelivered.⁶

16. Supply of folios before they are called for by Court.—

The appellant made an application for copies of judgment and decree on 6-10-1923 and with the application deposited a certain number of folios for the copies. On 8-10-1923 folios necessary for the copies were called for. As the appellant had already deposited a certain number of folios, the remaining number of folios were supplied on 14-11-1923. The copy of the decree was ready for delivery on 16-11-1923. The copy of the decree required only three folios, that is, less than the number of folios deposited with the application for copies. It was held that the appellant was entitled to deduct the whole period between 6-10-1923 and 16-11-1923 as time requisite for a copy of the decree, even though all the folios necessary for the *judgment* were not deposited in proper

3. ('20) 7 AIR 1920 Pat 278 (279) : 57 Ind Cas 266, *Fouda Uraon v. Ganpat Ram*.

('90) 12 All 105 (109) : 1890 All W N 10, *Bachi v. Sheo Gobind*.

('67) 8 Suth W R 141 (141, 142), *Bharutt Chunder Roy v. Issur Chunder Sircar*. (Delay due to negligence of Munsif's Amlah.)

[See ('12) 13 Ind Cas 850 (851) (Lah), *Sarkhara v. Nawab*. (Party not called to appear for delivery of copy.)]

[See however ('17) 4 AIR 1917 Sind 52 (53) : 38 Ind Cas 464 : 10 Sind L R 165 (DB), *Tola Ram v. Jaffer Khan*. (There is no rule in Sind Courts civil circular for giving notice of copies being ready for delivery.)]

4. ('90) 4 C P L R 166 (166), *Upasoo v. Gopal*.

('91) 6 C P L R 13 (14), *Punjaji v. Jagannath*.

5. ('13) 21 Ind Cas 192 (192) (Mad), *Ramasamy Chetty v. Ramanathan Chetty*. ('90) 12 All 461 (FB), *Bechi v. Ahsan-Ullah Khan*, followed.)

6. ('19) 6 AIR 1919 Mad 409 (410) : 49 Ind Cas 626, *Appalaswamy v. Narayana-swamy* (Madras High Court, by Notification published in Government Gazette, made arrangements to deliver copies during the summer vacation and not during the Christmas holidays.)

[See however ('11) 12 Ind Cas 183 (184) : 34 All 41 : 8 All L Jour 1095 (DB), *Khub Chand v. Harmukh Rai*. (Notice put on Court notice-board during vacation that copy was ready — Party alleging that he received no notice — Held notice-board notice was not enough — Party was not bound to take cognizance of such notice.)]

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time, as he had deposited the requisite folios for the decree without any loss of time.¹

17. Application struck off for non-compliance and subsequently revived. — Where under rules a time is fixed within which the copy stamps are to be furnished failing which the copy application is to be struck off, an application so struck off may be revived by a special application to the Court on that behalf and the computation of the limitation period will be made as if the application has been subsisting.¹

18. Delay caused by despatch of copies by post. — When rules allow copies to be despatched by post, the post office is the agent of the *applicant* and the date on which the copy is handed over to the post office is the date of delivery to the applicant. The period, therefore, between the date on which the copy was ready and the date on which it was despatched by post is to be excluded also,¹ but not the time taken in the transmission of the copy by post.^{1a} But if being despatched by the copying department to a wrong address the copy is returned to the department and again re-despatched to the correct address, the period between the date of despatch to the wrong address and date of despatch to the right address will have also to be excluded.²

Section 12 — Note 16

1. ('26) 13 AIR 1926 Cal 1105 (1106) : 98 I. C. 748 (DB), *Adarpriya Choudhrani v. Ramprotap Agarwala*.

Section 12 — Note 17

1. ('42) 29 AIR 1942 Mad 369 (370):204 Ind Cas 523, *Berumull v. Velu Gramany*. (Where an application for copies is struck off under R. 129 of Madras High Court Civil Rules of Practice for non-deposit of requisite stamp, papers and a subsequent petition is put in for restoration of the previous application, the Court has power to restore the original application and to treat the subsequent application as a continuation of the original application for the purpose of computing the time for filing an appeal.)
- ('95) 18 Mad 374 (376, 377), *Ramanuja Iyengar v. Narayana Iyengar*. (Madras Copy Rules Default in supplying within three days stamp paper as required — Application liable to be struck off.)

Section 12 — Note 18

1. ('22) 9 AIR 1922 Lah 219 (220) : 3 Lah 280 : 69 Ind Cas 818, *Ghulla Singh v. Sohan Singh*.
- ('22) 9 AIR 1922 Lah 415 (415) : 72 Ind Cas 797(DB), *Gurdit Singh v. Charan Das*.
- ('19) 6 AIR 1919 Oudh 11 (11) : 54 Ind Cas 831, *Mt. Iqbal Jehan Begam v. Mathra Prasad*.
- ('26) 13 AIR 1926 Lah 223(223):92 I.C. 966, *Allah Baksh v. Rohtak Municipality*.
- ('33) 20 AIR 1933 Pesh 22 (23) : 142 Ind Cas 230, *Sultan Din v. Partab Singh*. (Whether by ordinary post or by V. P. P. immaterial.)
- ('12) 13 Ind Cas 943 (943) (All) (DB), *Balmakand v. Kundan Lal*.
- ('12) 14 Ind Cas 403 (404) : 8 Nag L R 11, *Krishna v. Balia*. (Where rules permit of copies being granted by post, delay caused by the office in despatching them after their being ready should not be reckoned against party.)
- ('12) 17 Ind Cas 624 (625) : 8 Nag L R 172, *Paga v. Sadasheo*. (Copy ready on 3rd but office unable to despatch it that day — Party took delivery on 4th — As office could have despatched it only on 4th, held 4th also to be excluded.)
- See also ('25) 12 AIR 1925 Oudh 643 (644) : 90 Ind Cas 115, *Sripat v. Hubdar*.]
- 1a. ('01) 14 C P L R 40 (41), *Garud Chamar v. Hira Ram Koshta*.
2. ('22) 9 AIR 1922 Lah 170 (171) : 69 Ind Cas 895 (DB), *The Municipal Committee, Chiniot v. Bashi Ram*. (So assumed.)

In a case where the applicant had asked copies to be sent by post under rules but the department failed to do so but only posted a notice on the board that the copies were ready and the party took delivery of it in person after waiting for a reasonable time, the period between the date of the copy being ready and the date of delivery was deducted.³

19. Delay caused by getting a vernacular copy of decree or judgment. — Where the decree of the Court has been drafted in English, and the party obtains only a vernacular copy and files it along with the appeal, he is not entitled to a deduction of the time taken for such a copy.¹ The same rule applies in the case of an English judgment of which the appellant had applied for a translation.²

20. Copies of same documents obtained on two different occasions — Time requisite to obtain which copy to be excluded. — Where copies of the judgment and decree are obtained but are not available for being filed owing to their loss or to other causes, and subsequently another application for copies is made and an appeal is filed with these copies, it has been held by a Full Bench of the High Court of Madras that the time requisite for obtaining the copies *which accompany the memorandum of appeal* should be excluded, and not the time spent in obtaining the other copies.¹ The Allahabad High Court holds the same view.^{1a} The High Court of Lahore has dissented from this view, and has held that the appellant will be entitled to deduct only the time requisite for obtaining a copy of the decree and the judgment, and if according to the copy already obtained the appeal would be out of time, the appellant cannot claim to get over the bar by claiming to exclude the time taken to obtain the later copy and by filing the same with the appeal.² See also the case noted below.³

3. ('05) 8 Oudh Cas 150 (151), *Mt. Fatim-un-nissa v. Amjad Ali Khan*.

Section 12 — Note 19

1. ('17) 4 AIR 1917 Lah 287 (288) : 39 Ind Cas 617 (DB), *Mohammad Amin v. Chiragh*. (Rules requiring English copy of decree to be produced with appeal memorandum.)

('34) 21 AIR 1934 Lah 304 (304) : 150 Ind Cas 781, *Meher Singh v. Ram Chand*. (Copy of translation of decree unsigned by Judge — ('31) 132 Ind Cas 3, *Sher Dial Khan v. Samundar Khan*, followed.)

2. ('20) 7 AIR 1920 Lah 224 (224) : 59 I. C. 965, *Kanhaya v. Nur Muhammad*. ('83) 1883 Pun Re No. 145, *Mt. Dya Kour v. Mt. Amrao Kour*.

Section 12 — Note 20

1. ('34) 21 AIR 1934 Mad 306 (307, 309) : 149 Ind Cas 172 : 57 Mad 560 (FB), *Thirumala v. Anavemareddi*. (('22) AIR 1922 P C 352, *Pramatha Nath v. Hon. William Arthur* and ('25) AIR 1925 Cal 735 (DB), *Kamruddin v. M. N. Mitter*, *disting.*)

1a. ('50) 37 AIR 1950 All 486 (Pr 5) : 1950 All L Jour 794, *State v. Kashi Prasad*.
2. ('35) 22 AIR 1935 Lah 682 (684, 685) : 161 Ind Cas 72 : 17 Lah 621 (DB), *Mathela v. Sher Muhammad*.

3. ('50) 37 AIR 1950 All 486 (Pr 5) : 1950 All L Jour 794, *State v. Kashi Prasad*. (The time taken in the preparation of a copy anywhere except in the copying department, cannot be treated as a time requisite for obtaining a copy of decree etc., even though it is certified to be a true copy by the office of the copying department.)

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21. Application for copy on date of judgment. — Sub-section (2) provides that in addition to the time requisite for obtaining copies, the day on which the judgment is pronounced should also be excluded. But where the application for copies is put in on the same day as the judgment, that day cannot be excluded twice over, once as the day on which judgment was pronounced and again as the day requisite for obtaining copies. The day of judgment has to be excluded first and then the time requisite for copies has to be excluded.¹ A contrary view has, however, been taken by the High Court of Nagpur which has held, overruling the undermentioned case² that such day can be excluded twice over.³

22. Application for copy mislaid by office.—The fact that time is lost by reason of the party's copy application being lost in the copying department and that another application is rendered necessary is not to be counted against the appellant.¹

23. Time between the date of the application for copies and the date of notice of requisition for stamp and folios for copies.— This period will have to be excluded in the computation of the period of limitation, i.e., the period inclusive of the date of the application and the date of the notification.¹ The proper mode of informing the applicant of the requisite or deficit stamps and folios is to put up a notice on the notice board in Court. Calling out the names of the applicant in the copying department is not sufficient notice.²

24. Holidays intervening between dates of judgment and copy application.—As a general rule, no period *prior* to the date of application for copies can be regarded as "time requisite" for obtaining

Section 12 — Note 21

1. ('24) 11 AIR 1924 Lah 599 (600) : 75 I. C. 1055, *Ata Muhammad v. Pir Khan*.
- ('92-96) 2 Upp Bur Rul 456 (457), *Maung Aung Gyi v. Mobyte Sitke Gye*.
2. ('17) 4 AIR 1917 Nag 196 (197) : 40 Ind Cas 425 : 13 Nag L R 89, *Salamsingh v. Hira*.
3. ('39) 26 AIR 1939 Nag 150 (154) : ILR (1939) Nag 185 : 182 Ind Cas 662 (DB), *Balkrishna Rajaram v. Baijnath Girdharilal*. (There is nothing fundamentally unjust or unreasonable in excluding the same day twice.)

Section 12 — Note 22

1. ('14) 1 AIR 1914 Lah 545 (546) : 1915 Pun Re Cri No. 3 : 28 Ind Cas 524 : 16 Cri L Jour 300, *Hidayata v. Emperor*.

Section 12 — Note 23

1. ('44) 31 AIR 1944 Nag 356 (356):ILR(1944) Nag 725, *Ramkrishna v Shrawan*. (Copy stopped for want of funds but applicant informed of it later on — Time from date of application to date of notification (both inclusive) to be excluded.)
- ('31) 18 AIR 1931 Cal 731 (732) : 58 Cal 969 : 134 Ind Cas 895 (DB), *Md. Islam Choudhury v. Kali Charan Singh*. (*Vide* clauses 1 and 2 of the Rule in General Letter No. 16 of the Calcutta High Court.)
- ('36) 23 AIR 1936 Lah 650 (651, 652): 166 I. C. 716 (DB), *Sheo Ram v. Luta Ram*.
- ('02) 7 Cal W N 109 (110) (DB), *Kali Sankar Bajpai v. Baikanta Nath Sen*.
2. ('31) 18 AIR 1931 Oudh 314 (315) : 132 Ind Cas 777 : 6 Luck 578, *Rahim Bux v. Maiku*.

the copies.¹ The rule is, however, subject to a broad exception, and that is, that holidays intervening in such a way as to prevent a party from taking the necessary steps for obtaining copies should be regarded as time requisite for obtaining the copies. Whether the exception applies in any case depends largely on the facts and circumstances of that case. Its applicability may be exemplified by a reference to illustrative cases:

Illustration 1. — A judgment is delivered on the last day before the closing of the Court. A copy application is filed on the re-opening date and copies are obtained with which the appeal or other proceeding is filed.

According to the High Court of Madras, if the judgment was delivered at an hour after which, under the rules of the Court, no copy application could have been filed, the holidays must be regarded as "time requisite" for obtaining the copies,² but if a copy application *could* have been filed on the date of the judgment itself, the holidays cannot be regarded as time requisite.³ According to the High Court of Calcutta⁴ and the Chief Court of Oudh,⁵ if there is nothing to show at what hour of the day the judgment was delivered, it is reasonable to regard the holidays as time requisite for obtaining the copies. According to the High Court of Patna,⁶ it would appear that the question, whether the application could or could not have been filed on the date of the judgment, is not relevant, and the holidays must necessarily be excluded as time requisite, whether the copy application is filed on the re-opening

Section 12 — Note 24

1. ('21) 8 AIR 1921 Pat 175 (176) : 6 Pat L Jour 350 : 62 Ind Cas 649 (FB), *Jyotindranath Sarkar v. The Lodna Colliery Co. Ltd.* (Overruled on another point in ('36) AIR 1936 Pat 45 (FB), *Gabriel v. Chandra Mohan*.)
- ('20) 7 AIR 1920 Mad 359 (360) : 43 Mad 640:56 Ind Cas 67 (DB) *Subramanyan v. Narashimham*. (('90) 12 All 461 (FB), *Bechi v. Ahsan Ullah*, relied on.)
- ('22) 9 AIR 1922 Oudh 39 (40) : 25 Oudh Cas 71 : 68 Ind Cas 250, *Abdul Ghaffor v. Mt. Rasul-un-nisa*. (Do.)
- ('12) 15 Ind Cas 59 (61, 62) : 39 Cal 766 (DB), *Haris Chandra Tewari v. Chandpur Co. Ltd.* (Do.)
- ('20) 7 AIR 1920 Cal 304 (304) : 58 Ind Cas 408 (DB), *Nibaran Chandra v. Martin & Co.* (Do.)
- ('11) 10 Ind Cas 866 (868) : 7 Nag L R 67, *Parashram v. Likhan*. (Do.)
- [See also ('19) 6 AIR 1919 Cal 374 (378) : 52 Ind Cas 582 (DB), *Pramatha Nath Roy v. W. A. Lee*. (Per Chitty, J.)]
2. ('04) 27 Mad 21 (22, 23) : 13 Mad L Jour 300, *Saminatha v. Venkatasubba*.
3. ('20) 7 AIR 1920 Mad 1025 (1025) : 63 I. C. 922 (DB), *Masilamny v. Arunga Mudali*. ('11) 11 Ind Cas 339 (DB), *Tanjore Palace Estate v. Andi Ramiah* and ('20) AIR 1920 Mad 359 (DB), *Subramanyan v. Narashimham* followed.)
4. ('11) 11 Ind Cas 387 (388) (DB) (Cal), *Sri Chandan Bhuya v. Haroo Sehi*.
5. ('42) 17 Luck 314 (318), *Uma Shankar v. Abdul Karim*. (('22) AIR 1922 Oudh 39 : 25 Oudh Cas 71, followed.)
- ('22) 9 AIR 1922 Oudh 39 (40) : 25 Oudh Cas 71 : 68 Ind Cas 250, *Abdul Ghaffor v. Rasul-un-nisa*.
6. ('16) 3 AIR 1916 Pat 317 (318, 319) : 35 Ind Cas 888 : 1 Pat L Jour 485 (DB), *Debi Charan Lal v. Mehdi Hussein*. ("Time requisite" need not be continuous.) ('34) 21 AIR 1934 Pat 4 (5) : 146 Ind Cas 931, *Pikhesarnath v. Janakdeonath*. (Whether appeal is to lower Court or to High Court makes no difference.)

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day or later, the reason being that it is the universal practice to exclude the day on which the case was decided; for all purposes connected with the calculation of limitation for an appeal. It is submitted that this last view is correct. The late Judicial Commissioner's Court of Nagpur had also held that the holidays should be excluded, but not on the ground that it is "time requisite."⁷ The ground of the decision was that the appeal could have been, by virtue of S. 4, filed on the re-opening date, that the copy application made on the re-opening date is therefore made *before the expiry of the period* of limitation for the appeal and that therefore the appeal filed after obtaining the copy is within time. As will be seen further, this reasoning is not correct, though the decision itself can clearly be supported on the ground that the holidays should be excluded as being "time requisite" for obtaining the copy. The Lahore High Court has also expressed the same view as the Nagpur Judicial Commissioner's Court.^{7a}

Illustration 2. — A judgment is delivered during the time the Court is closed for the holidays. A copy application is filed on the re-opening date, and copies are obtained with which the appeal is filed.

If in such a case the party could not, under the rules of the Court, have applied for copies during the holidays, it is quite clear that the holidays must be regarded as time requisite for the copies, in view of the fact that he has applied as soon as the Court re-opened. This follows from what has been said under illustration 1.

Illustration 3. — A judgment is delivered during the vacation when the Court is closed for the holidays. A copy application is filed not on the re-opening day but some days *after* the re-opening and copies are obtained with which an appeal is filed.

There is a conflict of opinions as to whether in such a case the holidays should be regarded as time requisite for obtaining the copies. According to the High Court of Madras it is not. In *Tanjore Palace Estate v. Andi Ramiah Chetty*,⁸ where the judgment was delivered after the Court closed for vacation but the party applied for copies seventeen days after the re-opening of the Court, their Lordships held that the holidays could not be excluded in computing the period of limitation. They observed :

'We can see no reason for excluding the period during which the Court was closed in this case, except on grounds, which would entitle an appellant to demand the exclusion of every holiday which occurred during the period allowed for the presentation of his appeal; that nothing of this kind is intended by the Act is clear from the wording of Section 5, clause (1).'

In *Subramanyan v. Narasimham*,⁹ which was also a similar case to that mentioned above, Wallis, C. J., held to the same effect and observed that by "requisite" is meant "reasonably requisite" and that it would defeat the intention of the Legislature that time should

7. ('15) 2 AIR 1915 Nag 117 (118) : 29 Ind Cas 833: 11 Nag L R 104, *Kashi Bai v. Kannoo*.

7a. ('37) 167 Ind Cas 250 (251) (DB) (Lah), *Atmaram v. Ram Chand*. (Implied.)

8. ('11) 11 Ind Cas 339 (340) (DB) (Mad).

9. ('20) 7 AIR 1920 Mad 359 (360) : 43 Mad 640 : 56 Ind Cas 67.

run on days when the Court is closed. The High Court of Allahabad has followed the Madras view in the undermentioned case.^{9a} The Lahore High Court also has held that the holidays cannot be excluded in such a case.^{9b} The High Court of Patna has held a contrary view.¹⁰ In *Debi Charan Lal v. Mehdi Hussain*,¹¹ where judgment was delivered on 27th September 1913, the Court closed on 28th September 1913 and re-opened on 1st November 1913, and the copy application was made on 3rd November 1913, Chamier, C. J., observed as follows:

"It is common ground that from 28th September to 31st October (both days included) the appellants could not have applied for a copy either of the judgment or of the decree. That being so, it appears to me to follow that the whole of the time which elapsed from the delivery of the judgment to the re-opening of the Court on 1st November 1913, was part of the time requisite for obtaining copies of the judgment and decree, and that *this must be so whether the appellant applied for copies on the day on which the Court re-opened or on some later date*. In fact it appears to me that the date on which the application for copies was made, has in this case no bearing on the question whether or not the period of the vacation should be deducted. In this respect I am unable to accept the decision in *Tanjore Palace Estate v. Andi Ramiah Chetty*.¹² It was suggested that the time requisite for obtaining a copy must be continuous. But the words of the section do not appear to lay down any such rule."

In view of the reasons stated in the above passage, it is difficult to support, on principle, the decisions of the High Courts of Madras, Allahabad and Lahore.

Illustration 4. — A judgment is delivered, and several days thereafter the Court closes for the vacation. The limitation for the appeal expires during the holidays. A copy application is filed on the re-opening day and on getting the copies the appeal is filed.

There is a conflict of opinions here also as to whether the appeal is in time. In the cases noted below¹³ it has been held that the appeal is barred. A contrary view has been held in the undermentioned

9a. ('38) 25 AIR 1938 All 106 (107, 108) : ILR (1938) All 209 : 174 I. C. 50 (DB), *Puttu Lal v. Bhagwan Das*. (Judgment delivered on last day before vacation — Application for copy not made on opening day — Period of limitation for appeal expiring during vacation — Period of limitation is not extended under S. 12 (2))

9b. ('37) 167 Ind Cas 250 (251) (DB) (Lah), *Atmaram v. Ram Chand*. (Judgment delivered on 31-8-'33 — Court closed from 1-9-'33 and reopening on 2-10-'33 — Application for copy made on 4-10-'33.)

10. ('16) 3 AIR 1916 Pat 317 (319) : 35 I. C. 888 : 1 Pat L Jour 485 (DB), *Debi Charan Lal v. Sheikh Mehdi Hussain*. (Judgment was delivered on the last day before Court closed for vacation and not during the vacation.)

('19) 6 AIR 1919 Pat 506 (507) : 49 Ind Cas 664, *Imaman v. Sham Sagar Rai*. (Application sent one day after Court re-opened.)

('29) 16 AIR 1929 Pat 615 (616) : 120 I. C. 765 (DB), *Munshi Mahlon v. Lachman Lal*. (Copy application made 15 days after re-opening; — A I R 1916 Pat 317 held not overruled by ('21) AIR 1921 Pat 175 (FB), *Jyotindranath v. Lolna Colliery Co. Ltd.*)

11. ('16) 3 AIR 1916 Pat 317 (319) : 35 Ind Cas 888 : 1 Pat L Jour 485 (DB).

12. ('11) 11 Ind Cas 339 (340) (DB) (Mad).

13. ('47) 34 AIR 1947 Lah 168 (170) : ILR (1946) Lah 107 : 230 Ind Cas 73 (DB), *Bhiwani Cloth Mills v. Parmeshari Doss*.

'42) 29 AIR 1942 Mad 604 (606) : ILR (1942) Mad 868:203 Ind Cas 5, *Kamaraju v. Saramma*

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cases.¹⁴ The ground on which these latter decisions proceed is that under S. 4 of the Act the appeal could be filed on the re-opening day, that thus the appeal is *not barred* by limitation on the re-opening day and that since the copy application was made on the re-opening day, the appeal cannot be barred, inasmuch as the period from the

('05) 28 Mad 452 (453):15 Mad L Jour 109 (DB), *Venkata Rao v. Venkatachalam Chetty*. ('01) 25 Bom 584 (DB), *Tukaram v. Pandurang* and ('01) 25 Bom 586 (DB), *Pandharinath v. Shankar*, *disting.*)

('16) 3 AIR 1916 Lah 407 (407) : 35 I. C. 233:1916 Pun Re No. 79, *Guran Rakha v. Bindraban*. (Do.)

('36) 23 AIR 1936 Rang 201 (202):14 Rang 276 : 162 I. C. 853 (DB), *U Chan Mya v. Mrs. Whittam*. (Primary period of limitation expiring during holidays—Copy application filed on re-opening day, though during holidays practice of Court provided for application and delivery of copies — Held time for copy not to be excluded)

14. ('38) 25 AIR 1938 Lah 317 (318):177 Ind Cas 672, *Asa Singh v. Hira Singh*.

('97) 19 All 342 (346) : 1897 All W N 76 (DB), *Siyadut-un-nissa v Muhammad Mahmud*. (See also critical note on this case in 7 Mad L Jour 340 (341) Jour.)

(1900) 2 Bom L R 221 (223) (DE), *Sitaram v. Ramji*.

('01) 25 Bom 586 (588):3 Bom L R 244 (DB), *Pandharinath v Shankar*. (So long as right to present appeal subsists exclusion sanctioned by this section applies.)

('30) 17 AIR 1930 Lah 216 (216, 217) : 120 Ind Cas 169 :11 Lah 111, *Mt. Attri v. Ramkishan*. (Provided copies have not been obtained previously.)

('29) 16 AIR 1929 Rang 96 (96) : 6 Rang 743 :115 I. C. 667 (DB), *Ma Dan v. Tan Chong San*. (25 Bom 584 followed.)

('28) 15 AIR 1928 Lah 655 (656, 657) : 112 I. C. 670, *Ram Chand v. Ram Rattan*.

('26) 13 AIR 1926 Lah 121 (122) : 89 Ind Cas 437, *Naman v. Gurditta*.

('26) 13 AIR 1926 All 111 (112) : 89 I. C. 956, *Megh Baran v. Ram Das*. (12 All 461 not followed.)

('14) 1 AIR 1914 All 303 (304) : 23 Ind Cas 874, *Budhu v. Sultan*.

('31) 18 AIR 1931 Pat 60 (60) : 130 Ind Cas 265 (DB), *Ramcharan Shukul v. Sri Thakurjee Mandil Darkadhis*. (Time for appeal as extended by application for copy of decree expiring during holidays — Copy of judgment applied for on re-opening day and appeal filed on delivery of copy of judgment.)

('37) 24 AIR 1937 Oudh 26 (27) : 165 I. C. 269 : 12 Luck 531 (DB), *Sukhnandan Prasad Shukla v. Raja Ahmad Ali Khan*.

[See also ('39) 26 AIR 1939 Bom 46 (46) : 179 I. C. 645 (DB), *Raichand v. Rahi Nana*. (Limitation for appeal expiring on Sunday — Application for copies on Monday — Appeal filed next day after copies ready—Appeal held in time.)

('38) 25 AIR 1938 Bom 288 (288) : 175 I. C. 508, *Pannalal Murtidhar v. Khemchand Sakharchand*. (Limitation for appeal expiring on Sunday and next day holiday—Appeal presented before expiry of period of limitation —Application for copies made on next working day—Appellant is entitled to deduct time required for obtaining copies.)

('38) 25 AIR 1938 Lah 707 (708, 709) : 182 I. C. 108, *Mahomed Zaman v. Hans Raj Shah*. (Limitation expiring on holiday — Copy application on next day — Time deducted — Even if it be assumed that application for obtaining copy of decree does not strictly fall within purview of S. 4, Limitation Act, the general principle underlying that section reproduced in S. 10, General Clauses Act, must be given effect to.)

('11) 12 I. C. 58 (60):36 Mad 131 (DB), *Mira Mohideen v. Nalla Perumal Pi lai*.

('01) 25 Bom 584 (585, 586) : 3 Bom L R 143 (DB), *Tukaram Gopal v. Pandurang*. (Under rules copy application could have been made during vacation — Copy applied for, on re-opening day —Appeal time is subsisting as last date for appeal was re-opening day by operation of S. 5 of Act of 1877 — Time during vacation was still extended.)

('02) 26 Bom 782 (784) : 4 Bom L R 608 (DB), *Bai Hemkore v. Masmalli*.

('06) 3 Cal L Jour 94n (SN), *Kabiran v. Golam Peer*.]

re-opening date to the date of filing the appeal is excluded by this section. It is submitted that this latter view is not correct. It has been held by the Privy Council in *Maqbul Ahmad v. Onkar Pratap*,¹⁵ that s. 4 does not alter the length of any prescribed period but only provides that where the prescribed period expires on a day when the Court is closed, then notwithstanding the fact, the application may be made on the day that the Court re-opens. An appeal, the time for which has expired during the holidays, is really barred on the day of the re-opening of the Court but is allowed to be filed notwithstanding such bar. See also Notes to s. 4. The basis of the view expressed in the cases cited in Foot-Note 14 has been thus overruled by the Privy Council, and consequently the decisions cannot any longer be considered as good law. See also Note 10 to section 4.

25. Interval between the judgment and the signing of the decree, if and when can be deducted. — Where there is an interval of several days between the pronouncement of the judgment and the signing of the decree, can such interval be excluded under the section irrespective of the date of the application for copies of the judgment and decree? Ordinarily, after a Court pronounces judgment, a drafting of the decree in accordance with the judgment and signing it is a matter for the Court with which a party has no direct concern. It may also be noticed that under Order 20, Rule 7 of the Code of Civil Procedure the decree "shall bear date the day on which the judgment was pronounced." Further, it has been seen already that the ordinary rule is that no period prior to the application for copies can be regarded as time requisite for obtaining the copies. It has accordingly been held in several decisions of various High Courts that the interval referred to above cannot be excluded as time requisite without regard to the date of the application for copies;¹ in other words, that it is

15. ('35) 22 AIR 1935 P C 85 (87) : 155 I. C. 205 : 62 I. A. 80 : 57 All 242 (PC).

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1. ('51) 38 AIR 1951 All 122 (Prs. 18, 33, 94, 97 & 116) : 1950 All Jour 946 (FB), *Keshar Sugar Works v. R. C. Sharma*. (The appellant or the applicant is not entitled to have the period taken in preparation of a decree or formal order deducted from the period of limitation fixed for an appeal or an application for leave to appeal antecedent to his filing an application for a copy of the decree or order.)
- ('50) 37 AIR 1950 Assam 83 (Pr. 5) : I L R (1950) 2 Assam 12 (DB), *Governor-General in Council v. Jesraj Tilakchand*. (Time between date of pronouncing judgment and date of signing decree cannot be excluded as time requisite for obtaining copy of decree.)
- ('50) 37 AIR 1950 East Punj 195 (Pr 17) (DB), *Tej Kishan v. Delhi Cloth General Mills. Co.* (Application for leave to appeal — Time spent in obtaining copy of decree not applied for and copy of judgment, and on preparation of decree cannot be excluded.)
- ('41) 28 AIR 1941 Pesh 74 (76) : 196 Ind Cas 654 (DB), *Shivan Ditta v. Radhakishan*. (Application for copy not made till decree is signed — Applicant cannot be said to have exercised due diligence and caution — Period between date of judgment and date of signing decree can be said to be time requisite.)
- ('39) 1939 Rang L R 686 (689) (DB), *Maung Baw Byu v. Maung Yan Shin*.
- ('90) 12 All 461 (471, 474) : 1890 All W N 149 (FB), *Bechi v. Ahsan Ullah*.

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only the time required *after* the application is made that can be excluded as "time requisite." In *Seth Jagannath v. Gangaram*,² the late Judicial Commissioner's Court of Nagpur observed as follows :

"I think that the time requisite for obtaining a copy must be taken to commence only when the applicant does something in order to obtain the copy and to end when he obtains the copy. If a decree has not been drawn up and signed at the time when an application for a copy of it is made, and the making of the copy is thereby delayed, such period of delay must be allowed for in computing the time which was requisite for obtaining the copy. But it could never have been intended that a would-be-appellant should be allowed to sleep over his right of appeal and then to claim extension of the period of limitation by taking advantage of a delay with which he had no direct concern."

According to the High Court of Calcutta, the interval should be excluded as part of the time requisite for obtaining the copies.³ The

- (190) 12 All 79 (81, 82) : 189 J All W N 25 (DB), *Parbati v. Bhola*. (Such time can only be excluded if it delayed applicant in obtaining copy.)
- (199) 23 Bom 442 (445) (DB), *Yamaji v. Antaji*.
- (1905) 3 Low Bur Rul 62 (64, 65):11 Bur L R 220 (FB), *Maung Kin v. Maung Sa*. (Time begins only when step is taken to obtain copy.)
- (1905) 1905 Upp Bur Rul C P C 24 (24), *Maung San Ko v. Ma Myo Ma*.
- (1935) 22 AIR 1935 Oudh 30 (32) : 152 I. C. 419 : 10 Luck 250 (DB), *Gokul Prasad v. Kunwar Bahadur*. ((186) 13 Cal 104 (FB), *Bani Madub v. Matungini*, not followed.)
- (198) 1 Oudh Cas 184 (186), *Kamikhya Singh v. Indar Down Singh*.
- (1930) 17 AIR 1930 Oudh 369 (370):127 I.C. 35 :6 Luck 187, *Faqir Bux v. Bileshar*.
- (1936) 23 AIR 1936 Lah 670 (671) : 161 Ind Cas 215, *Abdul Ghani v. Maula Baksh*. (Application was made before decree was prepared.)
- (1935) 157 Ind Cas 181 (181) (Lah), *Baij Nath v. Gapu Ram*. (Do.)
- (1915) 2 AIR 1915 Mad 308 (308) : 25 Ind Cas 67 (DB), *Narayanaswamy Thevan v. Krishnaswamy Pillai*. (Decree could not be prepared owing to non-payment of extra court fee - Time granted for payment.)
- (1927) 14 AIR 1927 Nag 1 (2) : 98 Ind Cas 1057 (FB), *Umda v. Rupchand*. ((1926) AIR 1926 Nag 207, *Tukaram v. Laxminarayan*, cannot be considered to be good law in view of this decision and that in AIR 1933 Nag 125.)
- (1933) 20 AIR 1933 Nag 125 (126, 127) : 29 Nag L R 220 : 143 Ind Cas 745 (DB), *Mukunda Ramkrishna v. Bisansa Sakharamsa*. (Dissenting from (1924) AIR 1924 Nag 271, *Pandu v. Rajeshwar* and following (1900) 13 C P L R 78, *Jagannath v. Gangaram*.)
- (1922) 9 AIR 1922 Nag 113 (113) : 66 Ind Cas 7, *Narayan v. Ramdulari*. (Decree must be deemed to come into existence on the day the judgment is pronounced - A decree is a decree even before it is signed.)
- (1926) 94 Ind Cas 121 (121) (DB) (Nag), *Kutubuddin v. Ghulam Rabbani*.
- (1926) 13 AIR 1926 Nag 349 (349, 350):22 N.L.R. 60:97 I.C. 307, *Dindayal v. Anopi*.
- (1925) 12 AIR 1925 Oudh 600 (600, 601) : 89 Ind Cas 479, *Mehdi Ali Khan v. Lal Bahadur Singh*.
- (1929) 16 AIR 1929 Rang 116 (116) : 7 Rang 18 : 117 Ind Cas 251, *Maung Po Kyaw v. Ma Lay*.
- (1921) 8 AIR 1921 Sind 42 (44):15 Sind L R 16:62 Ind Cas 537 (DB), *Harjimal & Sons v. Firm Dhanpatmal Diwan Chand*. (Time between date of application and date of copy being ready to be excluded.)
- (1907) 1 Sind L R 71 (74), *Lakhi mal v. Joomromal*.
[See (1941) 28 AIR 1941 Lah 212 (213) :195 Ind Cas 157 : 3 Pun L R 88 (90), *Jiwan Das v. Rakhmat Din*. (Application for copy made before decree was signed - Period till signing of decree to be excluded.)]
2. (1900) 13 C P L R 78 (79, 80).
3. (1950) 37 AIR 1950 Cal 356 (Para 5): 54 Cal W N 297 (DB), *Province of Bengal v. Amulya Dhon*. (The period between the date of judgment and the date when

leading case which is the foundation of the practice in that Court is *Bani Madhub Mitter v. Matungini Dassi*.⁴ In that case the judgment was delivered on 17th July 1883, the decree was signed on 23rd July 1883 and the copy application was filed on 3rd August 1883. It was observed by Petheram, C. J. :

"In our opinion the fact that the decree was not in existence, that is, signed by the particular Judge, and could not therefore be copied until 23rd July, that is, six days after the date that it bears, entitles the appellant to ask us to deduct those six days in addition to the eight days, and thus to hold that under S. 12 the appeal has been presented within the prescribed period."

The High Court of Patna has followed the practice of the High Court of Calcutta.⁵ Some recent decisions in other Courts also agree

the schedule of costs (decree) was signed, and the period requisite for obtaining copies of judgment and decree should be excluded.)

('46) 33 AIR 1946 Cal 10 (11) : 222 Ind Cas 475 (DB), *Dwarka Das v. Gajanan*.

('39) 26 AIR 1939 Cal 711 (713) : 186 I. C. 58, *Sarat Chandra v. Rati Kanta*.

(Even if application for copy of decree is not within 30 days from judgment.)

('27) 14 AIR 1927 Cal 65 (66) : 97 Ind Cas 539 (DB), *Ashutosh Roy Chowdhury v. Mono Mohan Roy*. ('86) 13 Cal 104 (FB), *Bani Madhub v. Matungini*, and Court practice of forty years followed.)

('04) 32 Cal 175 (177) (DB), *Gopal Chandra Chakravarti v. Preonath Dutt*. (Time between judgment and final order in an inquiry as to mesne profits under O. 20, R. 12, Civil Procedure Code.)

('11) 10 Ind Cas 542 (542) (DB) (Cal), *Tarabati Koer v. Gajdeo Narain*. (There was however an application for decree copy before decree was drawn up.)

('11) 12 Ind Cas 677 (677, 678) (DB) (Cal), *Sundar Koer v. Raghunath Sahai*.

('17) 4 AIR 1917 Cal 320 (321) : 35 Ind Cas 348 (DB), *Gangadhar Karmakar v. Sekhar Basini Dasya*. (Review.)

('37) 24 AIR 1937 Cal 732 (734) : 176 Ind Cas 361, *Sudhansu v. Majho Bibi*. (Following 13 Cal 104 (FB).)

('24) 11 AIR 1924 Cal 1006 (1007) : 81 Ind Cas 527 (DB), *Irrani v. Naimuddin*.

('72) 18 Suth W R 512 (512) (DB), *In re Chowdhury Mohendro Narain Roy*.

[See also ('12) 14 Ind Cas 1006 (1007) (DB) (Cal), *Kamala Dasi v. Tarapada Mukerji*.

('36) 165 Ind Cas 53 (54, 55) (Cal), *Kedar Nath Moyra v. Gollam Hossain Mollah*.]

[But see ('12) 15 Ind Cas 59 (62) : 39 Cal 766 (DB), *Harish Chandra v. Chandpur Co. Ltd.* (But in this case copy application was made after the expiry of the period of limitation.)]

4. ('86) 13 Cal 104 (107) (FB).

5. ('48) 35 AIR 1948 Pat 260 (262) : 26 Pat 295 (DB), *Manoj Rai v. Keshwar Rai*.

('39) 26 AIR 1939 Pat 135 (136, 137) : 180 Ind Cas 314, *Kameshar Singh v. Kusheshwar Mahto*. (Exclusion can be claimed even if application for copy of decree is not made within the period of limitation.)

('36) 23 AIR 1936 Pat 45 (46) : 160 Ind Cas 447 : 15 Pat 284 (FB), *Gabriel Christian v. Chandra Mohan*. ('21) AIR 1921 Pat 175 (FB), *Jyotindranath v. Lodna Colliery Co. Ltd.*, overruled on this point.)

('16) 3 AIR 1916 Pat 267 (267) : 35 Ind Cas 868 : 1 Pat L Jour 573 (FB), *Ram Asray Singh v. Sheonandan Singh*.

('19) 6 AIR 1919 Pat 506 (507) : 49 Ind Cas 664, *Imaman v. Sham Sagar Rai*.

('23) 10 AIR 1923 Pat 140 (141) : 6 Pat L Jour 237 : 63 Ind Cas 278 (DB), *S. C. Dey v. Mt. Rajwanti Kuer*.

[See ('23) 10 AIR 1923 Pat 529 (530) : 75 Ind Cas 265, *Mohammed Moinuddin Ashraf v. Mohammad Ishaq Ashraf*.

('20) 7 AIR 1920 Pat 594 (595) : 55 Ind Cas 17 (DB), *Jaleswar Dayal v. Ram Hari Sahu*.]

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with the Calcutta view.^{5a}

In the undermentioned case⁶ where the Court after pronouncing judgment refused to pass a decree till the plaintiff complied with certain orders in relation to the suit, it was held that the decision of the Court in that case must be deemed to have been postponed to the date when the decree was passed after the orders were complied with, and that time began to run from the date of passing of the decree which must also be regarded as the date of the final judgment.^{6a}

No exclusion can be claimed in any case between the signing of the decree and the application for copies.⁷

[But see ('20) 7 AIR 1920 Pat 267 (269) : 57 Ind Cas 312, *Mahadeo Prasad v. Gajadhar Prasad*. (Leave to appeal to Privy Council—AIR 1916 Pat 267 (FB) not referred to)]

5a. ('40) 27 AIR 1940 Bom 415 (416) : 192 I. C. 275 (DB), *Balappa Tammanna v. Dyamappa Bhusappa*.

('40) 27 AIR 1940 Oudh 173 (174) : 15 Luck 376 : 136 Ind Cas 136 (DB), *Yusuf Ali Khan v. Mohammad Kazim Ali*. (Follows the Calcutta and Patna view—No reference made to earlier Oudh cases.)

('28) 15 AIR 1928 Nag 199 (201) : 109 Ind Cas 70, *Sirajuddin v. Soni Lal*. (This simply follows the view in ('24) AIR 1924 Nag 271, *Pandu v. Rajeshwar*, which is of doubtful authority in view of the decision in ('27) AIR 1927 Nag 1 (FB), *Umda v. Rupchand* and that in ('33) AIR 1933 Nag 125 (DB), *Mukunda v. Bisansa*.)

('36) 23 AIR 1936 Lah 976 (977, 978) : 168 Ind Cas 897, *Kahanchand v. Gurdit Singh*. (Follows the Calcutta and Patna view.)

('48) 35 AIR 1948 Sind 18 (21, 22) : I L R (1947) Kar 76, *Tulsidas Pohumal v. Parasram*. (In order to secure under S. 12 (2), Limitation Act the benefit of the time that elapsed until the date when the decree is signed, it is not necessary for an appellant to apply for a copy of the decree before the expiry of the period of limitation for the appeal if the application is made even a day before the decree is signed.)

('44) 31 AIR 1944 Oudh 154 (155) : 19 Luck 456 : 215 Ind Cas 272, *Jadubir Singh v. Sheo Naresh Singh*. (Where it is the duty of the Court to draw up a decree or order without reference to the parties, the time between the date of the judgment and the signing of the decree or order has to be excluded in computing the period of limitation for filing an appeal—('40) AIR 1940 Oudh 173 : 15 Luck 376 (DB), *Foll.*; remarks in ('35) A I R 1935 Oudh 30 : 10 Luck 250 (DB), *Gokul Prasad v. Kunwar Bahadur*, held obiter.)

('42) 29 AIR 1942 Oudh 392 (393) : 200 Ind Cas 608, *Kaliu Mal v. Nawabganj Municipality*. (Application for revision—Time between date of passing order and that on which it was signed was excluded in considering whether revision was unduly delayed—('40) AIR 1940 Oudh 173 : 15 Luck 376 (DB), *Rel. on.*)

[See also ('46) 33 AIR 1946 Bom 437 (438) : I L R (1946) Bom 431 : 226 Ind Cas 95 (DB), *Bhausahab v. Sonabai*. (Party waiting for reasonable time after passing of decree in applying for copies—Such time can be included in 'time requisite'—What is reasonable time is to be decided on facts of each case—Interval of 26 days held unreasonable—AIR 1940 Bom 415, *Rel. on.*)]

6. ('16) 3 AIR 1916 Sind 2 (3) : 34 Ind Cas 867 : 9 Sind L R 193, *Khudadad v. M. riokhan*. (Passing of decree made conditional on plaintiff paying penalty on sale deed under the Stamp Act.)

See also Note 5 to Article 156.

6a. See also ('14) 1 AIR 1914 Mad 418 (420) : 22 I. C. 919 (DB), *Numberumal Chettiar v. Krishnajeel*. (Court ordering that decree should be recalled—Appellant was held to have sufficient cause for not presenting an appeal in time.)

7. ('22) 9 AIR 1922 Lah 170 (171) : 69 Ind Cas 895 (DB), *Chiniot Municipal Committee v. Bashi Ram*.

Where an application is made for copies of the judgment and the decree, but the office returns the application or the copying folios in so far as the decree is concerned on the ground that the decree has not been signed, it has been held by the High Court of Calcutta that the return is wrong and that the application must be treated as pending all the time, even though the party again applies for a copy after the decree is signed.⁸

In the cases dealt with above the party had nothing to do with the preparation of the decree. But there are cases where a party *has to take certain definite steps* to have the decree drafted. Thus, on the original side of the High Court of Calcutta, the rules require that the party in whose favour a decree or order is passed should, within four days, put in a requisition for getting the decree or order drafted and that if he does not do so, the other party can put in a similar requisition and have the decree drafted. Similarly, there is a rule of the Patna High Court that no decree need be drawn up by the Subordinate Civil Courts if neither party has to recover anything from the other unless the Judge otherwise directs. In such cases it has been held that the mere fact that an application for copies is made will not entitle the party to deduct all the time which elapses before the date of the copy being ready, without regard to the question whether he has taken necessary steps for getting the decree drafted without delay. If he has delayed making a requisition for getting the decree drafted or is guilty of *laches* in attending to the other matters necessary to get the decree drafted, such delay will be counted against him and will not form part of the time requisite for obtaining the copies.⁹ For, as observed by the Privy Council in *Pramatha Nath Roy v. William Arthur Lee*,¹⁰ "no period can be regarded as requisite under the Act,

8. ('11) 10 Ind Cas 542 (543) (DB) (Cal), *T'aralatti v. Jagdeo Narain*.

9. ('32) 19 AIR 1932 Cal 331 (336) : 137 Ind Cas 526 : 59 Cal 1215 (FB), *Secy. of State v. Parijat Debi*. (Overruling ('27) AIR 1927 Cal 623 (DB), *Sarat Chanara v. Upendra Nath*.)

('34) 21 AIR 1934 Cal 543 (545) : 61 Cal 306 : 151 Ind Cas 809 (DB), *Brijlal Ganeriwalla v. Gireendra Shekhar*. (Delay in drafting decree was due to default of appellant in carrying out an amendment of plaint ordered by Court.)

('29) 16 AIR 1929 Cal 734 (735) : 56 Cal 709 : 121 Ind Cas 307 (DB), *Sambhu Nath v. Gopilal*. (Time taken by opposite party not to be counted against party.)

('31) 21 AIR 1934 Pat 266 (268) : 149 Ind Cas 142 : 13 Pat 371 (DB), *Lachimi-narayan Tekriwala v. Jogesh Chandra Lahare*. (('22) AIR 1922 P C 352 (PC), *Pramatha Nath v. Hon. William Arthur*, followed.)

('25) 12 AIR 1925 Cal 735 (735, 736) : 52 Cal 342 : 89 Ind Cas 277 (DB), *Kamruddin Hyder v. M. N. Mitter*. (Laches in getting order drawn up.)

('84) 10 Cal 652 (661, 662) (DB), *Ramey v. Broughton*.

[See ('37) 24 AIR 1937 Cal 732 (734) : 176 Ind Cas 361, *Sudhansu Bhusan v. Majho Bibi*. (Where under the Rules, parties have to apply to get the decree drawn up, the question of promptitude on the part of the party becomes material in considering the question whether time is requisite.)

('37) 170 Ind Cas 653 (655) (Cal), *Rayfield v. Raj Narain*. (Party not entitled to apply unless other party failed to apply for drawing up decree - Other party applying Time taken must be excluded.)]

10. ('22) 9 AIR 1922 P C 352 (353) : 49 Ind App 307 : 68 Ind Cas 900 : 49 Cal 999 (PC). (On appeal from ('19) AIR 1919 Cal 374 (DB), *Pramatha Nath v. Lee*.)

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which need not have elapsed if the appellant had taken reasonable and proper steps to obtain the order."

Where in a suit for partition the Court ordered the parties to supply the requisite stamp within certain time for the preparation of the decree but the party who wished to appeal from the decree paid the necessary stamp duty after an inordinate delay, it was held that the time between the date of the judgment and the preparation of the decree could not be allowed to be deducted under this section as "time requisite."¹¹ See also the undermentioned case.¹²

See also Note 5 to Art. 156.

25a. Delay caused by getting order varied and settled.

— Where the appellant applied for a variation and settlement of the order to be appealed from, and it could not be said that he was during such period, failing to take reasonable and proper steps to obtain a copy of the order, it was held by their Lordships of the Privy Council in the undermentioned case¹ that the period could not be regarded as requisite for obtaining a copy of the order within the meaning of this section.

26. One common judgment in two suits filed in two appeals against judgment. — Where suits X and Y are decided by a common judgment and two appeals A and B are filed against such judgment in the two suits, but a copy of the judgment which had been applied for only in suit X is filed along with the appeal A, can the time spent in obtaining the copy be excluded for the purpose of computing the limitation for appeal B? According to the High Court of Madras it cannot be.¹ But according to the High Court of Patna it can be.² It is submitted that the view of the High Court of Madras is not correct. It has been seen already that it is not necessary that the copy should have been obtained *for the purpose of appeal*. It has also been seen that the time should be excluded even though a copy of the judgment is not necessary to be filed along with the appeal, under the rules of Court. It would, therefore, seem that it really does not matter

11. ('45) 32 AIR 1945 Lah 233 (234) (DB), *Abdul Salam v. Abdul Khaliq*.

12. ('48) 35 AIR 1948 Mad 172 (172) : I L R (1948) Mad 413 (DB), *Naland Nallendra Konar v. Venkatchala Konar*. (Duty of Court under S. 29 (g) of Stamp Act to direct proportion of stamp duty to be borne by each party in respect of partition decree — Court not doing so — Time taken in furnishing stamps and getting copy of decree can be excluded in computing limitation for filing an appeal.)

Section 12 — Note 25a

1. ('37) 24 AIR 1937 P C 107 (108) : 167 Ind Cas 345 : 31 Sind L R 239 (PO), *Hubert Rowan Hodge v. Mahomed Kamgar Shah*.

See also Note 3 to Article 151.

Section 12 — Note 26

1. ('15) 2 AIR 1915 Mad 493 (494) : 25 I. C. 28 (DB), *Avudai Ammal v. Ganapathi*.

2. ('20) 7 AIR 1920 Pat 535 (535, 536) : 58 Ind Cas 991, *Mt. Umatal Rasul v. Ram Charan*. (The practice of Patna High Court is that in several appeals from a common judgment, it is sufficient if the judgment copy is produced in one of the appeals only.)

in what suit the copy was got, provided it is a copy of the judgment appealed against.

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27. Appeal from a judgment on review—Copy of original judgment.—Order 47 Rule 7, Civil Procedure Code, gives a right of appeal from an order granting review of a judgment. In computing the period of limitation for such an appeal, the time requisite for obtaining a copy of the order or judgment appealed against, i. e., the judgment pronounced on review, can be deducted under S. 12. But is the appellant entitled to the deduction of the time requisite for a copy of the original judgment which was the subject-matter of the review application? The answer is in the affirmative if the original judgment can be construed as one from which also the appeal is made, in other words, if the original judgment together with the judgment passed on review can be taken as really one judgment. Where the second judgment did not give all the facts of the case but made an express reference to the first judgment for a discussion of the full facts and it modified only a portion of the first judgment, it was held to be merely supplementary to the first and jointly with it to be one judgment and the time requisite for copies of both the judgments was excluded.¹

28. Application for leave to appeal to the Privy Council.—Sub-section (2) of the section which provides for the exclusion of the time taken for copy of a *decree* covers *applications* for leave to appeal. In respect of these *applications* the time requisite for obtaining a copy of the *decree* should be excluded.¹ But sub-s. (3) dealing with copies of *judgments* does not expressly include *applications* for leave to appeal. It has accordingly been held by the High Courts of Allahabad²

Section 12 — Note 27

1. ('28) 15 AIR 1928 Lah 755 (756): 112 Ind Cas 46, *Jagiri Ram v. Daulath Khan*.

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1. ('46) 33 AIR 1946 Cal 10 (11): 222 I. C. 475 (DB), *Dwarka Das v. Gajanan*.
('28) 15 AIR 1928 Nag 63 (64): 105 Ind Cas 852: 24 Nag L R 297 (DB), *Gulab Chandji v. Gulab Singh*. (Article 179 which governs such applications cannot be read divorced from S. 12 (2).)
('35) 22 AIR 1935 All 258 (259): 157 Ind Cas 170: 57 All 751 (DB), *Gackwar Baroda State Railway v. Mohammad Habibullah*. (Sub-section 2 is general and applies to all applications for leave to appeal.)
('15) 2 AIR 1915 All 335 (336): 38 All 82: 31 Ind Cas 906 (DB), *Ram Sarup v. Jaswant Rai*.
('14) 1 AIR 1914 Cal 679 (681): 42 Cal 35: 24 Ind Cas 273 (DB), *Abdullah Husain v. Ananda Chandra*.
('12) 15 Ind Cas 497 (497): 39 Cal 510, *Eastern Mortgage Co. Ltd. v. Purna Chandra Sarbagna*.
See also Note 4 to Art. 179.
2. ('35) 22 AIR 1935 All 99 (100): 152 I. C. 384: 57 All 455 (DB), *Gulab Chand v. Peary Lal*. (The Court was of opinion that copies of judgment can always be got in a shorter time than decrees, that a judgment is ready for copy application on the date of judgment and not so a decree, that period of limitation for application for leave to appeal is ordinarily sufficient for obtaining copy of judgment.)
('26) 13 AIR 1926 All 286 (286): 92 Ind Cas 897 (DB), *Wilayati Begam v. Jhandu Mal Mithu Lal*. (Rules of Allahabad High Court—Judgment copy not necessary.)

Section 12
Note 28

and Lahore^{2a} and the Judicial Commissioner's Court of Sind³ that in the case of such *applications*, the time requisite for obtaining a copy of the judgment cannot be excluded.

The contrary view is held in the undermentioned cases.⁴ In *In re Secretary of State by Collector of Chingleput*,⁵ it has been held by the High Court of Madras that sub-s. (3) applies *reasonably* and by *implication* to applications for leave to appeal. Their Lordships observe that though that sub-section does not in terms apply to them, the language used in it really covers the case. Under sub-s. (2), where an application for leave to appeal is put in the time "requisite for a copy of the *decree appealed from*" may be deducted. Here the expression "decree appealed from" in relation to those applications really means "when a decree is *sought* to be appealed from" as the decree cannot strictly be said to be *appealed* from until leave has been given. There is no reason, say their Lordships, why the same phrase in sub-s. (3) should not have the same meaning also. In other words, sub-s. (3) may according to that decision be read also as follows: "When a decree is *sought* to be appealed from, etc." and when that is done it becomes applicable to the case of the application in question.

In *Hari Ram v. Prem Nath*,⁶ the Lahore High Court has held that a copy of the decree not being a necessary annexure to an

(34) 21 AIR 1934 All 974 (976): 57 All 306 : 151 Ind Cas 604 (DB). *Gurmukh Rai v. Secretary of State*. (Case under Income-tax Act.)

2a. ('50) 37 AIR 1950 Lah 76 (Pr 4) : Pak L R (1949) Lah 884, *Ghulam Haider v. Abdul Ghani*.

('39) 26 AIR 1939 Lah 43 (44) : I L R (1939) Lah 156 : 179 Ind Cas 912 (DB), *Punjab Co-operative Bank Ltd., Amritsar v. Punjab National Bank Ltd., Amritsar*.

3. ('25) 12 AIR 1925 Sind 60 (60, 61) : 17 Sind L R 306 : 78 Ind Cas 953 (DB), *Nur Mahomed v. Hassomal*. (Word 'also' in Cl. 3 shows that time requisite for copy of judgment can be excluded in addition to time for copy of decree only in cases where decree is appealed from or sought to be reviewed.)

('29) 16 AIR 1929 Sind 206 (206, 207) : 118 Ind Cas 212 : 24 Sind L R 108 (DB), *Jhamandas v. Mt. Bibi Aishan*. (('28) AIR 1928 P C 103 (P C), *Jijibhoy v. Chettyar*, distinguished.)

4. ('46) 33 AIR 1946 Cal 10 (11): 222 Ind Cas 475 (DB), *Dwarka Das v. Gajanan*. ('41) 28 AIR 1941 Oudh 247 (249) : 16 Luck 638 : 193 Ind Cas 295 (DB), *H. Hunter v. Ehsan Husain*.

('22) 9 AIR 1922 Pat 255 (256) : 66 Ind Cas 88 : 1 Pat 429 (DB), *Mahatir Prasad Tewari v. Jamuna Singh*. (On the ground that when appeal is from a decree it is generally necessary to obtain judgment on which it is based.)

('36) 23 AIR 1936 Rang 82 (82) : 13 Rang 762 : 161 Ind Cas 464 (DB), *R. K. Banerjee v. Alagammai Achi*.

('32) 19 AIR 1932 Cal 587 (587) : 59 Cal 251 : 139 Ind Cas 236 (DB), *Commissioner of Income tax v. Shaw Wallace & Co.* (Application to High Court by Commissioner of Income-tax for issue of certificate for Privy Council appeal—Judgment copy, time for — *Held* can be excluded.)

[See ('24) 11 AIR 1924 Bom 399 (404) : 48 Bom 442 : 80 Ind Cas 862 (DB), *Nagindas Motilal v. Nilaji Moroba*. (Per Marten J. — Entitled to deduct time for both copies.)]

5. ('25) 12 AIR 1925 Mad 1241 (1242) : 90 Ind Cas 601 : 48 Mad 939 (DB).

6. ('35) 22 AIR 1935 Lah 341 (341) : 158 Ind Cas 120 (DB). (('86 13 Cal 104 (FB), *Bani Madhub v. Matungini*, distinguished.)

application for leave to appeal, the time taken for the copy cannot be deducted. It is submitted that the decision is wrong and opposed to the express terms of sub-s. (2); and the reasoning is contrary to the principle of the ruling of the Privy Council referred to in Note 7.

Order 45 R. 2 of the Code of Civil Procedure speaks of a "petition" for leave to appeal and section 12 of the Limitation Act uses the word "application." But nothing turns on this difference in language. Otherwise, Art. 179 of the Act will not apply to "applications" for leave to appeal to the Privy Council and they will not be subject to any limitation.⁷

In computing the period of limitation for an application for leave to appeal to Privy Council time taken for obtaining copy of the order refusing review of the judgment and decree which is sought to be appealed against cannot be excluded.^{7a}

This section in so far as it purports to affect applications for leave to appeal to the Privy Council is not *ultra vires* of the powers of the Indian Legislature or in derogation of the prerogative of the Crown.⁸ In fact the section is now made applicable by the rules of the Privy Council to applications for leave to appeal to the Privy Council.⁹

See also Note 4 to Article 179.

28a. Application for leave to appeal in forma pauperis.—

As seen in Note 4 an application for leave to appeal in *forma pauperis* is an application for leave to appeal and will be governed by this section. In computing the period of limitation for filing such application not only the time taken for obtaining a copy of the decree is to be excluded under S. 12 (2) but also the time taken for obtaining the copy of judgment can be excluded.¹

29. Application for review. — Time for copies of decree¹ and the judgment² sought to be reviewed is to be excluded.

7. ('28) 15 AIR 1928 Nag 63 (64) : 105 Ind Cas 852 : 24 Nag L R 97 (DB), *Gulabchandji v. Gulab Singh*.

7a. ('46) 33 AIR 1946 Cal 10 (12) : 222 Ind Cas 475 (DB), *Dwarka Das v. Gajanan*.

8. ('14) 1 AIR 1914 Cal 679 (680, 681) : 42 Cal 35 : 24 I. C. 273 (DB). *Abdullah Husain v. Ananda Chandra*.

9. ('25) 12 AIR 1925 Mad 1241 (1242) : 90 Ind Cas 601 : 48 Mad 939 (DB), *In re Secretary of State by Collector of Chingleput*.

Section 12 — Note 28a

1. ('44) 31 AIR 1944 Mad 430 (431), *Mahalakshamma v. T. Mudaliar*. (Copy of judgment is necessary for preparing grounds of appeal which has to be filed along with the application—('25) 12 AIR 1925 Mad 1241 : 48 Mad 939 (DB), *In re Secy. of State*, Rel. on.)

('23) 10 AIR 1923 Lah 684 (684) : 77 Ind Cas 908, *Ashraf Ali v. Rameshwar*.

Section 12 — Note 29

1. ('25) 12 AIR 1925 Lah 377 (377, 378) : 88 Ind Cas 1019 (DB), *Fazal Dad v. Umar Baksh*.

2. ('93) 1893 Bom P J 167 (DB), *Lakshmibai v. Yeshwantrao*.

[See ('93) 7 C P L R 111 (111), *Hiralal Ramdhan v. Mt. Gangabai*.]

[But see ('99) 2 Oudh Cas 302(302), *Jagatpal Singh v. Jageswar Bakhsh Singh*.]

Section 12
Notes 30-31

30. Application to set aside award. — In computing the period of limitation for an application to set aside an award, the time requisite for a copy of the award is to be excluded.¹ When an award has been filed in Court, a period of thirty days is allowed for an application to set aside an award. (See Art. 158.) If no such application is made, the Court is within its jurisdiction to pass a decree on the award. It is not the business of the Court to ascertain and find out if any of the parties has applied for copies and wait for the full period available for the party to file an application. It is the duty of the party to bring it to the notice of the Court before it proceeds to pass a decree.² Even in a case where an application to set aside an award has been filed which is on the face of it out of time, it is the duty of the party to bring it to the notice of the Court that copies have been obtained and time was consumed thereby.³

31. Filing of an appeal with a copy of judgment or decree alone. — An appeal was filed with a copy of the judgment alone in time but a copy of the decree was not applied for as the same was not drafted by the office at the time of the presentation of the appeal. Within the limitation period as computed by adding the time requisite for the copy of the judgment, an application for copy of decree was made and the copy was produced in Court immediately it was obtained. It was held that the appeal was in time and in order.¹ But if the copy of the decree is produced in the appellate Court when the time for appeal *had expired*, the appeal is barred by limitation² as the presentation of appeal without the decree copy is no valid presentation of the appeal. (See Section 3 Note 6.)

Section 12 — Note 30

1. ('19) 6 AIR 1919 Cal 224 (225) : 46 Cal 721 : 53 Ind Cas 46 (DB), *Sova Chand Bhutoria v. Hury Bux Deora*.
- ('32) 19 AIR 1932 Mad 588 (588) : 140 Ind Cas 11, *Chendrayya v. Appalamma*.
- ('27) 14 AIR 1927 Mad 660 (660) : 101 I.C. 514, *Mangamma v. Peda Ammanna*.
- ('95) 1895 Bom P J 326 (DB), *Nathu v. Vithu*.
- ('07) 29 All 584 (586) : 1907 All W N 184 : 4 All L Jour 450 (DB), *Najm-ul-din Ahmed v. Albert Puech*.
- [See also ('33) 20 AIR 1933 Rang 38 (38) : 142 I. C. 835, *D. B. Das v. Dayalal & Sons*.
- ('02) 29 Cal 167 (182, 183) : 29 Ind App 51 : 4 Bom L R 161 : 12 Mad L Jour 77 : 6 Cal W N 226 : 8 Sar 154 : 1902 Pun Re No. 25 (PC), *Ghulam Khan v. Muhammad Hassan*.
- ('01) 5 Cal W N 813 (814), *Sm. Nobin Kally Dabee v. Ambica Churn Banerjee*.]
2. ('32) 19 AIR 1932 Mad 588 (588, 589) : 140 Ind Cas 11, *Chendrayya v. Appalamma*.
3. ('16) 3 AIR 1916 Mad 634 (634) : 29 Ind Cas 860, *Subramania Aiyar v. Pooparam Lala*.
- [See ('33) 20 AIR 1933 Rang 38 (38) : 142 Ind Cas 835, *D. B. Das v. Dayalal & Sons*.]

Section 12 — Note 31

1. ('24) 11 AIR 1924 All 162 (162, 163) : 74 Ind Cas 486, *Kidar Nath v. Nanak*.
2. ('22) 9 AIR 1922 Lah 170 (171) : 69 Ind Cas 895 (DB), *Municipal Committee, Chiniot v. Bashi Ram*.

32. Appeal in criminal cases. — In the case of a criminal appeal,¹ or an application for leave to appeal under S. 449, Criminal Procedure Code, the time taken for the necessary copies should be excluded.²

No exclusion can be made of the time taken to obtain copies of diary orders in a criminal case which were filed with the appeal.³

In the case of persons in jail, the officer in charge of jail must be regarded as representing the Court establishment. The said officer is responsible for forwarding applications for copies by prisoners and for receiving and delivering copies to them when received. The time, therefore, taken up in forwarding applications for copies on behalf of intending appellants in jail and in transmission of such copies to the jail must be excluded.⁴

33. Finding as to "time requisite" cannot be attacked in second appeal. — A finding as to the time requisite for obtaining copies is one of fact and is not open to question in second appeal.¹

34. Evidentiary value of dates endorsed on certified copies — Where an endorsement on the copy by the copying agency which is a Government department shows that a certain number of days was requisite for the supply of copies, it is to be presumed that that number of days was necessary, unless the endorsement shows that a demand for deposit of fee or stamp was made and was not complied with or that the applicant was otherwise negligent.¹ The endorsement by the office may, of course, be shown to be erroneous

Section 12 — Note 32

1. ('84) 10 Cal 642 (643) (DB), *In the matter of Jhabbu Singh*. ('70-71) 6 Mad H C R 349 (350) (DB), *In re Toti Chengan*. (Time taken for preparing a copy of sentence to be excluded.)
[See ('77) 1 Mad 304 (304) : 2 Weir 469 (DB), *In the matter of Subba Aitala*.]
2. ('27) 14 AIR 1927 Cal 307 (309) : 54 Cal 52 : 101 Ind Cas 657 : 28 Cri L Jour 481 (DB), *Gallagher v. Emperor*.
3. ('25) 12 AIR 1925 Rang 239 (240) : 3 Rang 220 : 89 Ind Cas 459 : 26 Cr. L. J. 1371 (DB), *U Zagriya v. Emperor*.
4. ('86) 9 Mad 258 (258, 259) : 1 Weir 789 (DB), *Queen-Empress v. Lingaya*. ('88) 1888 Pun Re Cri No. 5, p. 9 (9), *Ghamman v. Empress*.

Section 12 — Note 33

1. (22) 9 AIR 1922 Lah 423 (423) : 67 I. C. 478, *Bawa Singh v. Thakur Singh*. (('18) 5 AIR 1918 Lah 29, *Sher Singh v. Pem Raj*, followed.) ('23) 10 AIR 1923 Lah 696 (696) : 73 I. C. 447, *Ram Sarup v. Zorawar Mal*. (Much less in revision.) ('94) 1894 Pun Re No. 6, *Thanamal v. Mt. Nihali*. (The question was whether two separate periods were requisite in the case for obtaining copies of judgment and decree.)

Section 12 — Note 34

1. ('36) 23 AIR 1936 Lah 693 (694) : 165 Ind Cas 516, *Mani Singh v. Anand Parkash*. ('36) 23 AIR 1936 Lah 120 (122) : 158 Ind Cas 736, *Labhu Ram v. Bansi Dhar*. (Delay due to negligence of copying department.)
[See however ('98) 1 Oudh Cas 47 (48), *Ghafur Bakhsh v. Tilochan* (Delay in furnishing folios counted in favour of applicant by a subordinate official of copying department wrongly — Held party cannot take advantage of it.)]

Section 12
Notes 34-36

or fraudulent.² But unless there is very clear proof to the contrary, the information given in the endorsement of the copying department must be accepted as correct.³ When the correctness of an entry made on the copy is challenged, a report of the copyist made in a departmental enquiry started by the Court in the matter is not legal evidence without the sworn testimony of the copyist.⁴ But a *record* of the dates and events in the register of the copying department may be corroborative evidence of the correctness of the entries on the copies.⁵ An appeal filed out of time owing to the party being misled by the practice of the Court in allowing an appeal only by seeing the entries on the copy made by the department may be admitted under section 5.⁶

35. **Copies in appeals from orders.** — In the case of appeals from *orders*, time spent in obtaining not only the fair order (judgment), but also the *final order* (in the form of the decree) where such final order is drawn up, must be excluded.¹

36 **Section 5 and "time requisite."** — In determining the time requisite for obtaining copies, the Court has no discretion and is confined to ascertaining the time occupied by the office in preparing the estimate of costs, and, after payment of costs, the time occupied by it to prepare copies to be delivered to the party. If any delay takes place on the part of the appellant in the matter of making the application or supplying the folios or taking delivery, the question of excusing such delay under S. 5 does not arise as part of the said determination but only after it is made. Such delay cannot be considered in *making the computation*. Any *indulgence* by way of extension of the period of limitation can only be granted not under this section but under section 5.¹

2. ('14) 1 AIR 1914 Oudh 244 (244, 245) : 23 Ind Cas 209, *Rudra Pratab Singh v. Raghuraj Gir.*

[See ('20) 7 AIR 1920 Pat 278 (279) : 57 Ind Cas 266, *Fouda Uraon v. Ganpat Ram*. (Carelessness of office in giving information to applicant as to date when he should take delivery of copy.)]

3. ('19) 6 AIR 1919 Pat 38 (41) : 49 Ind Cas 1000 (DB), *Mt. Fakhrunnissa Bibi v. Rambhanjan Singh*.

4. ('28) 15 AIR 1928 Lah 643 (645) : 108 Ind Cas 619, *Nizam Din v. Md. Iqbal*. (Entry as to date of copy being ready for delivery.)

5. See ('19) 6 AIR 1919 Pat 38 (40) : 49 Ind Cas 1000 (DB), *Mt. Fakhrunnissa Bibi v. Rambhanjan Singh*.

[See also ('20) 7 AIR 1920 Pat 278 (280) : 57 I.C. 266, *Fouda Uraon v. Ganpat Ram*.]

6. ('07) 10 Oudh Cas 201 (203, 204) (DB), *Shambhu Ratan v. Seo Balak*. (Appellant obtained three copies on three different dates — Appeal filed with third copy attached.)

Section 12 — Note 35

1. ('20) 7 AIR 1920 Pat 844 (844) : 54 I. C. 630 (DB), *Mahesh Kant v. Ram Prasad* (('12) 14 Ind Cas 1006 (DB), *Kamala v. Tara, ada*, followed)

Section 12 — Note 36

1. ('90) 12 All 461 (490, 491, 493) : 1890 All W N 149 (FB), *Bechi v. Ahsan-Ullah Khan*. (('67) 7 Suth W R 337, *Raj Coomar v. Sheikh Mahomed Wais*, dissented from.)

('81) 9 Cal L R 293 (294) (DB), *Gopal Chunder Roy v. Brojo Behary M tter*. (Period between the date of copy being ready and the date of taking delivery)

13*. In computing the period of limitation prescribed for any suit, the time during which defendant's absence from the defendant has been absent from ^a[India] and certain other ^a[India] and from the territories beyond ^a[India] under the administration of ^b[the Central Government ^c[* *]] shall be excluded.

- a. The words as contained in the section originally were "British India". For these words, the words "the Provinces" and "the States" were substituted by A. C. A. O., 1948 and A. O., 1950 respectively. Recently for "the States" the word "India" was substituted by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 & Sch. [1-4-1951].
 - b. Substituted by A. O., 1937 for "the Government".
 - c. The words "or the Crown Representative" were omitted by A.C. A. O., 1948.
- Pakistan Adaptation.* — For "British India" substitute the words "the Provinces" and omit the words "or the Crown Representative."—(P) A. C. A. O., 1949.

Synopsis

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| <ul style="list-style-type: none"> 1. Legislative changes. [Omitted.] 2. Scope of the section. 3. "Any suit." 4. Absence from the Provinces. 4a. Absence from the Provinces on several occasions. 5. Absence of some of several defendants from the Provinces. | <ul style="list-style-type: none"> 6. Ignorance of plaintiff as to defendant's residence. 7. "Territories beyond the Provinces under the administration of the Central Government." 8. Procedure. |
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TOPIC INDICATOR.

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| Absence after or at the time of accrual of cause of action. See Note 4. | Plaintiff's absence from the Provinces—Section not applicable. See Note 4. |
| Burden of proof is on plaintiff. See Note 8. | Section not applicable to execution application. See Note 3. |
| Defendant represented by agent. See Note 4. | Section not qualified or affected by Section 9. See Note 2. |
| Defendant under imprisonment in the Provinces—Section not applicable. See Note 4. | Suit against Native Chiefs or Secretary of State. See Note 4. |

* Act of 1877 : S. 13.

Exclusion of time of defendant's absence from British India. In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded.

Act of 1871 : S. 14.

In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded unless service of a summons to appear and answer in the suit can during such absence be made under the Code of Civil Procedure, section 60.

Act of 1859 : S. 13.

In computing any period of limitation prescribed by this Act, the time during which the defendant shall have been absent out of the British territories in India shall be excluded from such computation, unless service of a summons to appear and answer in the suit can, during the absence of such defendant, be made in any mode prescribed by law.

Section 13
Notes 1-4

1. **Legislative changes.** — [Omitted].

2. **Scope of the section.**—In *Bhaee Chund v. Purtab Chund*¹ it was held by the Privy Council that the period of the defendant's absence beyond the jurisdiction of the East India Company's Courts could not be excluded. In *Ruckmaboyee v. Lulloobhoy Mottichund*,² however, the Privy Council applied the statute, 21 Jac. 1 c. 16, and held that such period could be excluded. The said statute excluded the period of the defendant's absence "beyond the seas," but their Lordships held that the expression "beyond the seas" must be interpreted as synonymous with the expressions "out of territories" or "out of the realm."

This section provides for the *exclusion* of the period of the defendant's absence from India in computing the period of limitation. It must be distinguished from S. 9 which provides that where once time has begun to run, no subsequent disability or inability to sue stops it. The absence of the defendant from India does not give rise to an "inability or disability to sue" on the part of the plaintiff. Further, there is no question under this section of *stopping* the running of time. It provides for the *computation* of the period in a particular manner, namely by *excluding* a certain period.³ This section is therefore in no way affected or qualified by section 9. See Notes 3 and 4 to section 9.

3. **"Any suit."** — The section applies only to *suits*. It does not apply to execution proceedings.¹

4. **Absence from India.** — In computing the period of limitation, the plaintiff is entitled to exclude, under this section, the time during which the defendant was absent from India.¹ This may

Section 13 — Note 2

1. ('66) 5 Suth W R P C 31 (33) : 1 Moo Ind App 154 (PC).
2. (1852) 5 Moo Ind App 234 (260) : 8 Moo P C 4 : 1 Sar 423 (PC).
3. ('95) 9 C P L R 72 (74), *Bhimraj v. Seth Sukh Lal*.

Section 13 — Note 3

1. ('40) 27 AIR 1940 Pesh 27 (28) : 189 Ind Cas 138, *A. M. Ahmad v. British-Medical Stores*. (Decree-holder wishing to execute his decree against judgment-debtor residing outside British India, cannot get any concession under S. 13.)
- ('81) 3 All 185 (186) (DB), *Ahsan Khan v. Ganga Ram*. (Section 13 not applicable to application for setting aside execution sale.)
- ('22) 9 AIR 1922 Oudh 131 (133) : 25 Oudh Cas 74 : 68 Ind Cas 205, *Badal v. Chattar Singh*.

Section 13 — Note 4

1. ('70) 2 N W P H C R 173 (175) (DB), *Mahomed Museehooddeen Khan v. Clara Jane Museehooddeen*.
- ('71) 1871 Pun Re No. 41, *Home v. Jamsetjee*.
- ('21) 8 AIR 1921 Bom 460 (461) : 45 Bom 1228 : 63 Ind Cas 959 (DB), *Ismailji Haji Halimbhai v. Ismail Abdul Kadar*.
- ('91) 1891 Pun Re No. 72, *Maharaja Sir Partab Singh v. Provincial Bank of India Ltd.*
- ('89) 1889 Pun Re No. 34, *Gulab Khan v. Pira*. (Land which was transferred to foreign territory by sudden change of course of river; it was re-transferred to its original position by the same cause. The period during which the land was foreign territory was excluded under S. 13, as defendants as well as subject-matter were outside British India.)

sometimes lead to very inconvenient results. A person may reside out of India for years, and according to the law of limitation of the country in which he resides, the remedy against him in respect of a cause of action may be lost, yet, on his coming to India, it will revive. But the words of the section are express and must be given effect to.² It must be remembered that the law of limitation is a law which bars the remedy, and *does not destroy the right*, and, therefore, if by any of its sections, an indulgence is shown to suitors, the Court is bound to give full effect to the language in which that indulgence is conceded.³ Reading the definition of "defendant" in S. 2 (4), into this section, the expression "time during which the defendant has been absent from India" must be read as "time during which the defendant or any person from or through whom the defendant derives his liability to be sued has been absent from India."^{3a}

The words "absent from India" do not necessarily imply that the defendant was present in India at the time the cause of action accrued or the period of limitation commenced to run.⁴ The section will apply equally to cases where the defendant was absent altogether from India at the time of the accrual of the cause of action, as to cases where he leaves India after the period of limitation has commenced to run.⁵ It is however necessary for the application of this section that the cause of action or the transaction which gave rise to the cause of action must have taken place in India.⁶

The fact that the defendant has a duly authorized agent or manager against whom the plaintiff could have filed a suit and obtained a valid decree, does not disentitle the plaintiff from claiming to exclude the period of the *defendant's* absence from India under

('33) 20 AIR 1933 Lah 741 (741) : 144 Ind Cas 641 (DB), *Dial Singh v. Davindar Singh*. (Possession not given to mortgagee as stipulated in mortgage deed—Suit for possession by mortgagee—One mortgagor residing outside British India for considerable time between date of suit and date of mortgage—Such period can be deducted for purposes of limitation as against such mortgagor.)

2. ('70) 2 N W P H C R 173 (175) (DB), *Mahomed Museehooddeen Khan v. Clara Jane Museehooddeen*.

('87) 14 Cal 457 (464) (DB), *Atul Kristo Bose v. Lyon & Co.*

3. ('70) 2 N W P H C R 173 (175) (DB), *Mahomed Museehooddeen Khan v. Clara Jane Museehooddeen*.

3a. ('45) 32 AIR 1945 Mad 315 (316): (1945) 1 Mad L Jour 275, *Akkandi Chetty v. Rethinagiri Chetty*.

4. ('86) 14 Cal 457 (461, 462) (DB), *Atul Kristo Bose v. Lyon & Co.*

[See also ('28) 15 AIR 1928 Mad 1088 (1089 to 1091) : 112 Ind Cas 139 (DB), *Rathina Thevan v. Packirisamy Thevan*. (*Quaere.*)]

5. ('87) 14 Cal 457 (463, 464) (DB), *Atul Kristo Bose v. Lyon & Co.*

(1853) 22 L J C P 217 (218) : 13 C B 813 : 1 C L R 339 : 17 Jur 624 : 1 W R 371, *Lafond v. Raddock*.

[See also ('41) 1941 A M L J 41 (42), *Balkishan v. Johri Lal*. (It is not a necessary concomitant of S. 13, Limitation Act, that he should have been at some time during the pendency of the debt resident in the Provinces.)]

6. ('44) 31 AIR 1944 Mad 437 (438) : (1944) 1 Mad L Jour 440, *Subramaniam v. Maruthamuthu*.

('28) 15 AIR 1928 Mad 1088 (1091) : 112 Ind Cas 139 (DB), *Rathina Thevan v. Packirisamy Thevan*.

Section 13
Notes 4-5

this section.⁷ But can this principle be applied to suits against the Secretary of State or against a Ruling Prince who always resides outside India? It has been held in *Sayaji Rao v. Madhavrao*,⁸ that in such cases, the section should be read consistently with the provisions contained in Part IV of the Code of Civil Procedure, for "suits in particular cases" against defendants who ordinarily would be always out of British India. In that case, Fawcett, Ag. C. J., observed as follows :

"Section 13 must, in my opinion, be read so as to avoid the obvious absurdity that arises, if such corporate bodies are deemed to reside out of British India, so that suits against them can never be barred at all. And this can be done by treating them as defendants, who, by reason of their *special* character, are not absent from British India within the meaning of the section, because they have not the same liberty as private individuals to reside personally in British India and attend to their affairs, and they must do so through agents or representatives. They can be held to reside in British India, in so far as they actually carry on their business through representatives in British India." (See Ss. 79 to 87 of the Civil Procedure Code.)

The plaintiff cannot under this section claim to exclude the period during which the defendant is under *imprisonment* in India,⁹ nor the period of his *own* absence from India, whether such absence is voluntary or involuntary (as, for instance, absence in consequence of transportation).¹⁰

4a. Absence from India on several occasions. — Where the defendant is absent from India on *several* occasions, all such periods of absence should be excluded.¹ The fact that during his absence the defendant paid occasional visits to India will not render the section inapplicable in so far as the periods of absence are concerned.²

5. Absence of some of several defendants from India. — A institutes a suit against B, C and D. D was absent from India for a

7. ('98) 25 Cal 496 (503, 504) : 2 Cal W N 269 (FB), *Poorno Chunder Ghose v. Sassoon*. (Overruling ('84) 10 Cal. 440 (DB), *Harrington v. Gonseh*.)

('87) 14 Cal 457 (463) (DB), *Atul Kristo Boss v. Lyon & Co.*

('95) 9 C P L R 72 (74), *Bhimraj v. Seth Sukh Lal*.

8. ('29) 16 AIR 1929 Bom 14 (20) : 115 Ind Cas 369 : 53 Bom 12 (DB).

9. ('69) 1869 Pun Re No. 39, *Janee v. Waris*.

See also Section 3 Note 3.

10. ('68) 10 Suth W R 253 (253) : 1 Beng L R (SN) 25 (DB), *A. Domun v. Shubul Koolall*. (By adverse holding for more than twelve years, a tenant gains a right of occupancy as against his predecessor, even if the latter's absence has been involuntary in consequence of transportation.)

1864 65) 2 Mad H C R 113 (113) (DB), *Venkatasubha Pattar v. Giri Ammal*. (Plaintiff's voluntary absence abroad after attaining majority does not bar the operation of Act XIV of 1859.)

[Compare ('18) 5 AIR 1918 P C 241 (247) (P C), *John v. Dodwell & Co. Ltd.* (Under Ceylon Prescription Ordinance 1871, Ss. 14 and 15, time does not run if plaintiff is beyond seas.)

('20) 7 AIR 1920 P C 208 (209) (P C), *Somasundaram Chetti v. Arunachalam Chetti*. (Do.)]

Section 13 — Note 4a

1. ('21) 8 AIR 1921 Bom 460 (461) : 45 Bom 1228 : 63 Ind Cas 959 (DB), *Haji Halimbhai v. Ismail Abdul*.

2. ('97) 1897 Pun Re No. 26, at p. 133, *Mt. Janki v. Manohar Lal*.

certain period after the cause of action arose in favour of A. In computing the period of limitation for the suit, can the period of D's absence be excluded under this section,

- (1) as against the defendant D,
- (2) as against *all* the defendants?

The answer to the question would seem to depend upon the nature of the liability of B, C and D. If their liability is a *several* or a *joint and several* one, the period of D's absence can be excluded only as against D, but not against B and C also. If without excluding such period it appears the suit is barred against B and C, it must be dismissed as against them, but can proceed against D.¹

Suppose now that the liability of B, C and D is a *joint* one and not a joint and several one. Under the English law, if B, C and D are *co-contractors*, their liability is a *joint* one and if D is absent beyond the seas at the time of the accrual of the cause of action, time *does not run* against any of them until the return of D. If D dies beyond the seas, the survivors, i. e., B and C, may be sued within six years of his death.² Before the enactment of statute 19 and 20 Vict., Chapter 97, Section 11, the same principles applied in the case of co-debtors. Under the said enactment, however, it was provided that time ran against the co-debtors within the seas and they could be sued during the absence of the co-debtor. The absent co-debtor could also be sued within the statutory period computed from the date of his return.

The above provisions of the English law are plainly inapplicable to cases arising in this country. Under this section the question is not whether *time runs* against the absent person but whether the period of his absence should be *excluded* in computing the period of limitation. But it is conceived that, in the above illustration, the period of D's absence must be excluded not only against D but against *all*. The reason is that, their liability being assumed to be *joint*, the cause of action against them is *single* and indivisible and some of them alone cannot be sued in the absence of the others. If the period of D's absence from India is not excluded against them all, the result will be that the plaintiff cannot sue B and C alone during the absence of D and cannot sue them after D's return because the suit would be barred against them; nor can he sue D alone after his return because the suit would not be a validly constituted one in the absence of B and C though there is no question of limitation against him. The plaintiff, in such cases, will be without any remedy and the indulgence given by this section will practically become useless.

Section 13 — Note 5

1. ('18) 5 AIR 1918 Mad 238 (240): 44 Ind Cas 466: 41 Mad 446 (DB), *Palaniappa Chettiar v. Veerappa Chettiar*.
2. (1845) 68 R R 573 (579, 580): 14 L J Q B 282: L R 7 Q B 811: 9 Jur 969, *Fannin v. Anderson*.
(1855) 100 R R 648 (657, 661): 16 CB 123: 3 C L R 281: 24 L J C P 89: 1 Jur (NS) 355, *Towns v. Mead*.
Halsbury's "Laws of England" (Hailsham Edition), Vol. 20, page 643.

Section 13
Note 5

In the case of defendants who are co-promisors, S. 43 of the Indian Contract Act provides that the promisee may, in the absence of any contract to the contrary, compel *anyone* or more of such joint promisors to perform the whole of the promise. This liability has generally been construed to be a *joint and several one*,³ and it has been held that the provision is a departure from the principle of the decision in *King v. Hoare*⁴ that the liability of joint promisors is a *joint one*. Thus, where in a suit against a partnership firm it appeared that some of the partners were absent from British India for a certain period, it was held that the liability of the partners was joint and several under the Contract Act, S. 43 and S. 249 (which is now S. 25 of the Partnership Act of 1932), and that the plaintiff was entitled to exclude the period of the absence of the said partners *only as against them* but not against the partners who were not so absent. It was also held that if a judgment had been obtained against those within British India, but had not been fully satisfied, a suit for the unsatisfied portion of the claim would lie against the others.⁵

According to some decisions of the High Court of Calcutta, however, S. 43 of the Contract Act merely prevents a person sued on a joint promise by him and others, from objecting that the others are not made parties to the suit but does not make their liability a joint and several one.⁶ Where the plaintiff obtained a judgment against A alone on a joint promise by A and B, B having been absent from British India at the time of the suit against A, and, the judgment not being fully satisfied, the plaintiff instituted a suit against B after his return for the unsatisfied portion of the claim, it was held by Garth, C. J., applying the decision in *King v. Hoare*,⁴ that the liability of A and B was a *joint one*, that consequently the cause of action was a *single one*, which was exhausted on obtaining judgment against A, and that the suit against B did not lie.⁷ His Lordship further observed as follows :

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- 3 ('10) 5 I. C. 735 (737) : 33 Mad 317 (DB), *Ramanjulu v. Aramudu Iyengar*.
(193) 17 Bom 6 (11) : Chitty's S C C R 336 (DB), *Motilal Bechardas v. Ghellabhai Hari Ram*.
(1924) 11 AIR 1924 Cal 209 (211) : 50 Cal 718 : 74 Ind Cas 1021 (DB), *Chand Mall v. Ban Behari Bose*.
(1933) 20 AIR 1933 Bom 407 (408, 409) : 145 Ind Cas 619, *In re Vallibhai Adamji*.
(1933) 20 AIR 1933 Mad 382 (383) : 144 Ind Cas 726, *Sadasiva Suryanarayana Rao v. Rajalingam*.
(1933) 20 AIR 1933 Nag 324 (326) : 144 Ind Cas 117, *Nathusa Pasusa v. Mahadeo*.
(1935) 163 Ind Cas 331 (334) : 62 Cal 612 (DB) *Moselle Solomon v. Martin & Co.* (Per Jack, J)
4. (1844) 67 R R 694 (702, 703, 704) : 13 M & W 494 : 14 L J Ex 29 : 2 Dowl & L 382 : 8 Jur 1127.
5. (1918) 5 AIR 1918 Mad 238 (240) : 41 Mad 446 : 44 Ind Cas 466 (DB), *Palaniappa Chettiar v. Veerappa Chettiar*.
6 ('78) 3 Cal 353 (359 to 363) : 1 Cal L R 488 : 2 Ind Jur 758 (DB), *Hemendro Coomar Mullick v. Rajendrololl Moonsee*.
(1935) 163 Ind Cas 331 (334, 335) : 62 Cal 612 (DB), *Moselle Solomon v. Martin & Co.* (Per Lort-Williams, J. : Jack J., contra.)
7. ('78) 3 Cal 353 (360) : 1 Cal L R 488 : 2 Ind Jur 758 (DB), *Hemendro Coomar Mullick v. Rajendrololl Moonsee*.

"It is true that the rule upon which I am acting may possibly lead to some hardship in cases when one or more of several co-contractors is out of the jurisdiction, and the plaintiff, if he waits for his return, would be barred by the statute of limitation. But this is an injustice which the Legislature, if they so pleased, could easily remedy, and which has been, in fact, remedied in England by the Statute of 19 & 20 Vict, c. 97."

It is not clear as to what his Lordship meant by the words "and the plaintiff, if he waits for his return, would be barred by the statute of limitation." If S. 13 is applied, there would be no bar against the absent person. If his period of absence is excluded as against the other persons also, there is no hardship of any kind.

6. Ignorance of plaintiff as to defendant's residence. — The plaintiff's ignorance of the defendant's residence is by itself not a ground of exclusion under the Limitation Act, but where the defendant has resided out of India, the period of such residence can be excluded independently of any question of knowledge of that fact by the plaintiff.¹

7. "Territories beyond India under the administration of the Central Government." — Where during the war, Basra was under the *military occupation* of the Indian Expeditionary Force sent by the Government of India, such occupation did not make it a territory under the *administration* of the Government of India within the meaning of this section; and, therefore, if the defendant was at Basra, the plaintiff was entitled to deduct the period of such absence under this section.¹ Secunderabad is under the administration of the Government of India.²

8. Procedure. — In case the plaintiff claims exclusion of the period of the defendant's absence from India, he should specifically plead (See Order 7, Rule 6 of the Civil Procedure Code) and prove strictly that the defendant was absent from India during the period for which the exclusion is claimed.¹ The burden is on him also to prove that the defendant was absent from territories under the administration of the Government of India.²

Section 13 — Note 6

1. ('70) 2 N W P H C R 173 (175) (DB), *Mahomed Museeh-ood-deen Khan v. Clara Jane Musee-hood-deen*.
See also Section 3 Note 3.

Section 13 — Note 7

1. ('23) 10 A I R 1923 All 64 (65) : 45 All 18 : 68 Ind Cas 973 (DB), *Fakrullah Khan v. Ram Sarup*.
2. ('38) 25 AIR 1938 Lah 225 (225) : 176 Ind Cas 255 (DB), *Ali Shah Khan v. Ahmad Nawaz Khan*. (('93) 21 Cal 177, *Hossain Ali v. Abid Ali* and ('33) A I R 1933 P C 134 (P C), *Anantapadamanabhaswami v. Offl. Recr., Secunderabad*, referred.)
- ('37) 24 AIR 1937 Bom 242 (243) : 169 Ind Cas 651, *Ezra Sion & Co. v. Kailas Viraiiah*. (AIR 1933 P C 134 relied on.)

Section 13 — Note 8

1. ('10) 9 Ind Cas 568 (568) (Mad), *Periyanna Pillai v. Arasu Thevan*.
2. ('37) 24 A I R 1937 Bom 242 (243) : 169 Ind Cas 651, *Ezra Sion and Co. v. Kailas Viraiiah*.

Section 14

14. *(1) In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from

* Act of 1877 : S. 14.

In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Exclusion of time of proceeding bona fide in Court without jurisdiction.

In computing the period of limitation prescribed for a suit, proceedings in which have been stayed by order under the Code of Civil Procedure, section 20, the interval between the institution of the suit and the date of so staying proceedings, and the time requisite for going from the Court in which proceedings are stayed to the Court in which the suit is re-instituted, shall be excluded.

Like exclusion in case of order under Civil Procedure Code, section 20.

In computing the period of limitation prescribed for any application, the time during which the applicant has been making another application for the same relief, shall be excluded, where the last-mentioned application is made in good faith to a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to grant it.

Like exclusion in case of application.

Explanation 1. — In excluding the time during which a former suit or application was pending or being made, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

Explanation 2. — A plaintiff resisting an appeal presented on the ground of want of jurisdiction shall be deemed to be prosecuting a suit within the meaning of this section.

Act of 1871 : S. 15.

In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another suit, whether in a Court of first instance or in a Court of appeal, against the same defendant or some person whom he represents, shall be excluded, where the last-mentioned suit is founded upon the same right to sue, and is instituted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to try it.

Exclusion of time of issuing bona fide in Court without jurisdiction.

Explanation 1. — In excluding the time during which a former suit was pending, the day on which that suit was instituted, and the day on which the proceedings therein ended, shall both be counted.

Explanation 2. — A plaintiff resisting an appeal presented on the ground of want of jurisdiction, shall be deemed to be prosecuting a suit within the meaning of this section.

defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Section 14

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Explanation I. — In excluding the time during which a former suit or application was pending, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

Explanation II. — For the purposes of this section, a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding.

Explanation III. — For the purposes of this section misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope and applicability of the section. 3. Effect of section is not to render second suit a continuation of the first. 4. Limitation, if suspended during the period spent in prior proceeding in wrong Court. 5. Proceedings to which this section is applicable. 6. Sections 5 and 14 of the Act. 7. Sections 4 & 14, joint operation. 7a. Section 14 and Article 182 (5). 8. Section 14 and withdrawal of proceedings. | <ol style="list-style-type: none"> 9. "In computing the period of limitation prescribed." 10. Plaintiff prosecuting — Explanation II. 11. "Due diligence." 12. "Another" proceeding. 13. "Civil proceeding" in a "Court." 14. "Court of appeal," if includes Court of revision. 15. "Court of appeal" — Second or further appeal. 16. Parties must be the same. 17. Suit must be based on the same cause of action — Application must be for the same relief. |
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Act of 1859 : S. 14.

In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bona fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation.

Computation of period of limitation in case of suit prosecuted bona fide, but in wrong Court.

Section 14
Note 1

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| <p>18. "Same cause of action" — Sub-section (1).
 19. "For the same relief" — Sub-section (2).
 20. "In good faith."
 21. "Good faith," whether a question of fact.
 22. "Which, from defect of jurisdiction, is unable to entertain it."
 23. "Jurisdiction."</p> | <p>24. "Other cause of a like nature".
 25. "Unable to entertain."
 26. Misjoinder—Explanation III.
 27. Explanation I.
 28. Time for obtaining copy of the order in prior proceedings — Explanation I.
 29. Exclusion of a portion of the time.
 30. Failure to plead the exemption under this section.</p> |
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TOPIC INDICATOR.

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| <p>Applicability of section to appeals. See Notes 5 and 6.
 Arbitration proceedings. See Note 5.
 Different causes of action — Instances. See Note 18.
 Different reliefs — Instances. See Note 19.
 Execution proceedings. See Notes 5 and 12.
 Honest doubt as to Court where suit lies. See Note 20.
 Insolvency proceedings. See Note 12.
 Mistake of law. See Note 20.</p> | <p>Prior proceedings in foreign Courts. See Notes 5 and 10.
 Resisting appeal — If "prosecuting." See Note 10.
 Resisting suit — Whether "prosecuting." See Note 10.
 Revenue Courts are "Courts." See Note 13.
 Same person suing or sued in different capacities. See Note 16.
 Section to be liberally construed. See Note 2.
 Wrong choosing of forum See Note 20.
 Wrong valuation of suit. See Note 20.</p> |
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1. Legislative changes.

- (1) Section 14 of the Act of 1859 and S. 15 of the Act of 1871, corresponding to this section, applied to the computation of the period of limitation prescribed for *suits* and not for *applications*.¹
- (2) The Act of 1877 extended this principle to the computation of the period prescribed for *applications* also, but restricted its applicability by providing that only the time during which *another application* was prosecuted in good faith in a wrong Court could be excluded.²
- (3) Under the present section the time during which the plaintiff or the applicant has been prosecuting *another civil proceeding* can be excluded.

Explanation III is new.

Section 14 — Note 1

1. (1865) 4 Suth W R Misc 18 (18) (DB), *Khetturnath Dey v. Gossain Doss Dey*. (Case under Act of 1859.)
 ('67) 7 Suth W R 327 (329) (DB) *Sheo Narain v. Jhoogul Kishen Ram*. (Do.)
 ('75) 24 Suth W R 405 (405, 406) (DB), *Banu Kant Ghose v. Haran Kisto Ghose*. (Case under Act of 1871—McDonnell, J., *contra*.)
 ('77) 1877 Pun Re No. 79, *Abdul Rehman v. Ghulam Kadir*. (Case under Act of 1871.)
 ('75-77) 1 All 97 (99, 100) : 11 Mad Jur 258 (FB), *Jiwan Singh v. Sarnam Singh*. (Case under Act of 1871—Stuart, C. J. dissenting.)
 ('75-76) 8 Mad H C R 99 (100) (DB), *Krishna Chetty v. Rami Chetty*.
2. ('82) 1882 All W N 184 (184) (DB), *Jadunath Sahai v. Partab Ram*.
 ('86) (1886) Pun Re No. 63, *Sheoji Ram v. Sheo Chund Rai*.
 See also Article 163 Note 11.

2. Scope and applicability of the section. — The principle of the section is the protection against the bar of limitation of a person honestly doing his best to get his case tried on the merits, but failing through the Court being unable to give him such a trial; and this principle is applicable not only to cases where the person brings his suit in the wrong Court, but also where he brings his suit in the right Court but is nevertheless prevented from getting a trial on the merits by something which, though not a defect of jurisdiction, is analogous to that defect.¹ In *Ramdutt Ramkissen v. E. D. Sassoon & Co.*,² Lord Salvesen in delivering the judgment of the Privy Council observed as follows:

"It may be assumed that it had been ascertained before these provisions (i.e., S. 14) were formulated that there was a serious risk of injustice arising if the period of limitation, which is in many cases shorter than in England, should be too strictly applied. In Indian litigation it is consistent with the experience of their Lordships that the time necessary for the decision in a suit may be of much longer duration than one is accustomed to in the Courts of Great Britain. Hence, the necessity for some provision to protect a *bona fide* plaintiff from the consequences of some mistake which had been made by his advisers in prosecuting his claim."

It has been held that the section ought to be liberally construed.³

Section 14 — Note 2

1. ('49) 36 AIR 1949 Cal 24 (44), *Sarojendra Kumar v. Purnachandra*. (A I R Commentaries on Lim. Act approved.)
(1900) 22 All 248 (253, 258); 1900 All W N 64 (FB), *Mathura Singh v. Bhavani Singh*. (Misjoinder of plaintiffs and causes of action in former suit.)
(75) 23 Suth W R 274 (274, 275) (DB), *Chandee Roy v. Isree Pershad Narain Singh Bahadur*. (Time occupied by judgment-creditor in prosecuting his claim in Civil Court according to the directions of the Collector allowed to be deducted.)
(71) 15 Suth W R 125 (126) (DB), *Khuthur Paul Singh v. Luckhee Narain*.
(37) 24 AIR 1937 Mad 357 (359) : ILR (1937) Mad 161 : 170 Ind Cas 524 (DB), *Dugarajulum Garu v. Aryon Bank of Vizagapatam*. (Principle of S. 14 applies equally to steps taken after decree as to steps taken prior to decree.)
[See also ('78-80) 2 All 792 (797) : 7 Ind App 167 : 6 Cal L R 561 : 4 Sar 157 : 3 Shome L R 211 : 4 Ind Jur 426 : 3 Suther 761 (PC), *Hira Lall v. Badri Dass*.
(1865) 4 Suth W R 1 C 63 (65) : 8 Moo Ind App 308 : 1 Suther 427 : 1 Sar 774 (PC), *Doorgapersad Roy Choudhury v. Taraprasad Roy Chowdhury*. (Decided under S. 14 of Regulation III of 1793.)
(84) 10 Cal 669 (674) : 8 Ind Jur 619 (DB), *Juggut Chunder v. Rada Nath*.
(66) 5 Suth W R 51 (52) (DB), *Huromonee Gooptia v. Gobind Coomar Chowdhry*. (Decided under S. 14, Regulation III of 1793.)
(1865) 2 Suth W R 256 (257) (DB), *Purbhoo Narain v. Raja Keelanund*.]
[See however (1865) 2 Suth W R 45 (45) (DB), *Okhetoonoonissa v. Koochil Sirdar*.
(1864) 1 Suth W R 328 (328) (DB), *Sham Kant v. Baboo Gopal Lal*.]
2. ('29) 16 AIR 1929 P C 103 (107) : 115 I. C. 713 : 56 I. A. 128 : 56 Cal 1048 (PC).
3. ('51) 38 AIR 1951 Hyd 57 (Para 4) (DB), *Muslim Bank v. Hasan Shiraza*.
(49) 36 AIR 1949 Pat 293 (296) : 28 Pat 102 (FB), *Lal Bihari v. Bani Madhava*.
(26) 13 AIR 1926 Mad 1081 (1082) : 98 I. C. 14, *Venkamma v. Parthasarathi*.
(23) 10 AIR 1923 Mad 347 (348) : 73 Ind Cas 139 (DB), *Kunhi Kuttiali v. Kunhammad*.
(33) 20 AIR 1933 Bom 276 (284) : 145 I. C. 190 (DB), *Shri Sharada Peeth Math Dwarka v. Shri Rajrajeshwarashram*.
(19) 6 AIR 1919 Mad 1071 (1074) : 41 Mad 701 : 46 I. C. 265 (DB), *Kannusami Pillai v. Jagathambal*. (Words "other cause" to be construed liberally.)

Section 14
Notes 2-4

In cases coming under S. 71 (2) of the U. P. Village Panchayat Act of 1920, S. 14 must be treated as abrogated, the former being a *special* provision.⁴

3. Effect of section is not to render second suit a continuation of the first. — The real effect of the provisions contained in this section is to extend the period of limitation prescribed by the period for which the suit or other proceeding had been prosecuted with due diligence and in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it.^{1a} It is well established that the effect of this section is not to render the suit after refile in the proper Court a continuation of the original suit, and consequently the period of limitation has to be determined for that suit as if it was a new suit, and the period will be that which was prescribed for the original suit, but excluding the period during which the suit was being prosecuted *bona fide* in a wrong Court.^{1b} In *Ramdutt Ramkissen v. E. D. Sassoon & Co.*,¹ their Lordships of the Privy Council observed: "It is quite clear that where a suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a *continuation* of the first, even though the subject-matter and the parties to the suits were identical." (See Note 12 and S. 3 Note 5.)

4. Limitation, if suspended during the period spent in prior proceeding in wrong Court. — As has been seen in the Notes under S. 9, where limitation has once begun to run, it will continue to do so and the only exception recognized is that provided in the proviso to that section. It is clear, therefore, that during the period of the prosecution of the prior civil proceeding in the wrong Court, limitation is not *suspended*, for otherwise, it would amount to a recognition of another exception to the general rule stated above. It has been held that this cannot be done.¹ In *Ramcharan Sahu v.*

4. ('41) 28 AIR 1941 Oudh 276 (276) : 16 Luck 512 : 192 Ind Cas 840, *Ram Sagar v. Ram Nath*.

Section 14 — Note 3

1a. ('48) 52 Cal W N 316 (318), *Anil Kumar v. Promatha Nath*.

1b. ('48) 52 Cal W N 316 (318), *Anil Kumar v. Promatha Nath*.

See also cases cited under F. N. (1) to Note 12.

1. ('29) 16 AIR 1929 P C 103 (107) : 115 I. C. 713 : 56 I. A. 128 : 56 Cal 1048 (PC).

Section 14 — Note 4

1. ('20) 7 AIR 1920 Mad 1 (7, 13) : 43 Mad 185 : 54 Ind Cas 66 (FB), *Mathu Korakhi Chetty v. Mahamad Madar Ammal*.

('85) 22 AIR 1935 All 323 (326, 327) : 153 I. C. 1058 (DB), *Muhammad Yunis v. Tilokchand*. ('68) 12 Moo Ind App 244 (PC), *Surno Moyee v. Shooshee Mokhee* and ('16) AIR 1916 P C 96 (PC), *Nrityamony v. Lakhan Chandra*, distinguished and explained.)

('34) 21 AIR 1934 Rang 329 (331) : 154 Ind Cas 153 : 13 Rang 43, *M. S. Chettiar Firm v. S. E. Bholat*.

('27) 14 AIR 1927 Mad 597 (597) : 100 Ind Cas 776 : 50 Mad 417 (DB), *Satya Narayana Brahaman v. Seethayya*.

[See ('24) 11 AIR 1924 Lah 40 (41) : 71 Ind Cas 495 : 4 Lah 90 (DB), *Hukam Chand v. Shahab Din*.

Goga,² their Lordships of the Allahabad High Court observed:

"The Indian Limitation Act is undoubtedly an exhaustive Code governing the law of limitation in India. The cases in which the running of limitation can be suspended are contained in sections of the Act. It would be dangerous to lay down generally that there is some principle outside the Limitation Act under which limitation can be suspended."

Some cases,³ however, appear to lay down that limitation would be suspended during such period. But an examination of the cases shows that most of them have reference to different circumstances from those arising in cases covered by the specific terms of this section; these cases deal with suspension of a cause of action or the right to sue rather than with suspension of limitation.

See also Notes 5, 11 and 12 to section 9.

('29) 16 AIR 1929 Pat 694 (700) : 9 Pat 385 : 122 Ind Cas 817 (FB), *Mahabir Prasad v. Bhupal Ram*.

(1862-63) 1 Mad H C R 320 (321, 322) (DB), *Ramakrishnasastrulu v. Lakshmi-devamma*.]

2. ('27) 14 AIR 1927 All 446 (449) : 49 All 565 : 102 Ind Cas 96 (DB).

3. ('16) 3 AIR 1916 P C 96 (101, 102) : 43 Cal 660 : 33 I. C. 452 (PC), *Nrityamony Dassi v. Lakhna Chandra Sen*.

('03) 30 Cal 1033 (1043) : 30 Ind App 177 : 8 Cal W N 1 : 8 Sar 529 (PC), *Hem Chandra Chowdhry v. Kali Prosanna Bhaduri*.

(1857-59) 7 Moo Ind App 238 (258, 259) : 1 Sar 633 (PC), *Rajah Enayat Hossain v. Sayud Ahmad Reza*.

('69) 11 Suth W R P C 5 (6) : 12 Moo Ind App 244 : 2 Suther 173 : 2 Sar 424 : 2 Beng L R P C 10 (PC), *Rani Swarnomayee v. Shooshe Mukhi Barmani*. (Fresh cause of action.)

('20) 7 AIR 1920 Mad 663 (664) : 43 Mad 845 : 59 Ind Cas 472, *Muthuveerappa Chetty v. Adikappa Chetty*.

('20) 7 AIR 1920 Mad 948 (951, 961) : 59 Ind Cas 98 (SB), *Secretary of State v. Vegayammappeta Estate*.

('20) 7 AIR 1920 Pat 786 (786) : 59 I. C. 314, *Midnapore Zamindari Co., Ltd. v. Jaga Nath Sarangi*. (Right to recover rent from tenants held to be in suspense pending result of a suit for apportionment as among the co-sharer zamindars.)

('11) 10 Ind Cas 21 (22, 23) (Oudh), *Amir Chand v. Narsingh Narain*. (In this case it was held that there were no legal or equitable grounds for such suspension.)

('08) 35 Cal 209 (217, 218) : 7 Cal L Jour 59 : 12 Cal W N 326 (DB), *Lakhna Chandra Sen v. Madhu Sudan Sen*.

('71) 16 Suth W R 79 (80) : 8 Beng L R 537n (DB), *Eshan Chunder Roy v. Khajah Assanoolah*. (Suit for arrears of rent — Prior suit for ejectment of same defendants as trespassers — Time excluded — 11 Suth W R P C 5 followed.)

[See ('02) 29 Cal 626 (632) : 6 Cal W N 776, *Chowdhry Kesri Sahay v. Glani Roy*.

('25) 12 AIR 1925 Pat 369 (371) : 86 Ind Cas 358 : 4 Pat 378, *Gobind Prasad v. Jugdip Sahay*. (Analogy of Section 14 applied.)

('83) 9 Cal 255 (259) : 9 Ind App 82 : 12 Cal L R 129 : 4 Sar 363 : 6 Ind Jur 546 (PC), *Hurro Pershad Roy v. Gopal Dass Dutt*. (('68) 12 Moo Ind App 244 (PC), *Surno Moyee v. Shooshee Mokhee*, construed.)

('77) 3 Cal 6 (12, 13) : 2 Ind Jur 209, *Watson & Co. v. Dhonedra Chunder*.

('77) 3 Cal 817 (822) : 2 Cal L R 450, *Hurro Pershad Roy v. Gopal Dass Dutt*.

('18) 5 AIR 1918 Mad 548 (550) : 41 Ind Cas 581, *Doraisamy Padayachi v. Vaithilinga Padayachi*. (A I R 1916 P C 96 held to favour equitable suspension of limitation apart from statute.)

('24) 11 AIR 1924 Cal 600 (609) : 79 Ind Cas 520, *Dwijendra v. Jogees Chendra*.]

[See also ('73) 19 Suth W R 18 (19), *Huronath Roy Chowdhury v. Golucknath Chowdhry*. (Prior suit for ejectment as trespasser — Subsequent suit for rent — Prior suit must have been in *bona fide* belief that defendants were trespassers.)]

Section 14.
Note 5

5. Proceedings to which this section is applicable.—The section applies, in terms, to suits and applications.¹ In the under-mentioned cases,² it has, however, been held that the section does not apply to *applications*. It is submitted that they are not correct, being obviously opposed to the section.

A 'suit,' as defined in S. 2, does not include an appeal. It has been held by their Lordships of the Privy Council in *Brij Indar Singh v. Kanshi Ram*,³ that the section does not, in terms apply to *appeals*, but that the circumstances contemplated in the section may be ordinarily taken to constitute a 'sufficient cause' within the meaning of S. 5 of the Act. (See Note 9 under S. 5.) A contrary view, namely that this section will apply to appeals has been taken in the under-mentioned cases.⁴ It is submitted that these cannot be accepted as correct.

In *Ramdutt Ramkissen v. E. D. Sassoon & Co.*,⁵ their Lordships of the Privy Council held that though the Limitation Act had no application, in terms, to proceedings before an arbitrator, the analogy of the Limitation Act required that an arbitrator should exclude the time spent in prosecuting, in good faith, the same claim before an

Section 14 — Note 5

1. ('40) 27 AIR 1940 Pat 677 (681) : 19 Pat 354 : 191 I. C. 695 (DB), *Bhishundeo Narain v. Raghunath Prasad*. (Execution application.)
- ('32) 19 AIR 1932 Lah 531 (532) : 138 Ind Cas 646 : 14 Lah 106, *Kala Singh v. Gehna Singh*. (Section 14 covers execution applications.)
- ('94) 18 Bom 734 (736) (DB), *Navalchand Nemchand v. Ami Chand Talakchand*. (Do.)
- ('93) 20 Cal 29 (32) (DB), *Raj Bullubh Sahai v. Joy Kishen Pershad*. (Prior execution application in a wrong Court saves time for later application.)
- ('75) 24 Suth W R 303 (303) (DB), *Rajah Promotho Nath Roy Bahadoor v. Robert Watson & Co.* (Execution application.)
- ('32) 19 AIR 1932 All 340 (342) : 54 All 423 : 140 Ind Cas 178, *Raghunandan v. Bhuwal Tewari*. (Application for rehearing appeal.)
2. ('26) 13 AIR 1926 All 345 (345) : 93 Ind Cas 292, *Ramraj v. Mt. Umraji*. (Section 14 held not to apply to execution applications.)
- ('23) 10 AIR 1923 All 319 (320) : 45 All 332 : 84 Ind Cas 538, *S. T. Gadre v. Brjnandan Saran*. (Application to set aside an ex parte decree)
3. ('17) 4 AIR 1917 P C 156 (158) : 45 Cal 94 : 44 Ind App 218 : 1917 Pun Re No 104 : 42 Ind Cas 43 (PC).
4. ('43) 30 AIR 1943 Oudh 52 (53) : 18 Luck 480 : 204 Ind Cas 215 (DB), *Pratap Narain v. Silla Bux*. (Assumed.)
- ('28) 15 AIR 1928 Lah 136 (137) : 106 I. C. 812, *Maula Bakhsh v. Udham Singh*.
- ('13) 18 Ind Cas 92 (93) (DB) (Oudh), *Rahat-Ullakhan v. Ibadullakhan* (Appeal filed in wrong Court — *Bona fide* mistake Due diligence — Section 14 assumed to apply.)
- ('23) 10 AIR 1923 Cal 291 (291) : 68 Ind Cas 200 (DB), *Purna Chandra Chattopadhyay v. Mabub Bakhsh*. (Appeal after an infructuous review application.)
- ('08) 1908 Pun W R No 66, p 240, *Jagatram v. Jacob*. (Do.)
- ('21) 62 Ind Cas 957 (959) (DB) (Cal), *Thakamani Dasi v. Pitambar Bhuya* (Do.)
- ('30) 17 AIR 1930 Pat 307 (308) : 129 Ind Cas 660 (DB), *Jivan Ram Ram Chander v. Hazari Lal*. (Appeal after an infructuous suit in a claim matter falling under Section 47, Civil Procedure Code.)
5. ('29) 16 AIR 1929 P C 103 (107, 108) : 56 Ind App 128 : 56 Cal 1048 : 115 Ind Cas 713 (PC). (An arbitrator is a Court constituted by parties.)

arbitrator who was without jurisdiction. Now, after the enactment of the Arbitration Act, X of 1940, the above result will follow from s. 37 of that Act under which the provisions of the Limitation Act apply to arbitrations as they apply to proceedings in Courts.

Foreign Courts.—The section does not apply to prior proceedings in foreign Courts⁶ or in Courts, which are not in British India.⁷

Special or local Acts.—As to the application of this section to special or local Acts, see Notes under section 29.

The section applies to suits under s. 104 of the C. P. Tenancy Act.^{7a}

This section is restricted to *civil* proceedings; hence a complaint under s. 9 of the Child Marriage Restraint Act (XIX of 1929) made to a wrong Court, will not save time, under this section, for a subsequent complaint to the proper Court.⁸

The section is not applicable to a complaint under the Cattle Trespass Act.⁹

6. Sections 5 and 14 of the Act.—There is a clear distinction between the two sections. Section 14 provides for the *exclusion* of time during which another civil proceeding was pending, whereas s. 5 affords an *extension* of time for good cause shown. The power to excuse delay and grant an extension of time under s. 5 is discretionary, whereas under s. 14, exclusion of time is mandatory, if the requisite conditions are satisfied.¹ As has been already seen in Note 5, though s. 14 may not, in terms, apply to a particular case, as for example *an*

6. ('37) 169 Ind Cas 788 (793) : ILR (1937) 1 Cal 541, *Mayadas Bhagat v. Commercial Union Assurance Company Ltd.* (Court in Kashmir State)

('27) 14 AIR 1927 Lah 200 (208) : 8 Lah 54 : 102 Ind Cas 523 (DB), *Hari Singh v. Muhammad Said.* (Court in Poonch State.)

('10) 8 Ind Cas 645 (646, 647) : 35 Bom 139 (DB), *Chanmalappa v. Abdul Vahab Muhammad Hussain.* (Court in Mysore State.)

[See ('78-80) 2 Mad 407 (412) : 5 Ind Jur 188 (DB), *Parry and Co. v. Appasamy Pillai.* (No opinion expressed on the question.)]

7. ('23) 10 AIR 1923 Nag 321 (321) : 76 Ind Cas 305 (DB), *Rajanna v. Narayan.* (A Berar Court.)

7a. ('50) 37 AIR 1950 Nag 37 (Pr. 5) : I L R (1949) Nag 743, *Sharifjan v. Vishnupriya Devi.* (Observation in AIR 1936 Nag 180 : I L R (1936) Nag 5, *Baburao v. Sandu*, dissent.)

8. ('39) 26 AIR 1939 Mad 512 (513) : 183 Ind Cas 595, *Venkata Narasimham v. Satyanarayana Rao.*

9. ('51) 38 AIR 1951 Orissa 40 (Pr. 3) : ILR (1950) Cut 149, *Padma Charan v. Rangadhar.*

Section 14 — Note 6

1. ('15) 2 AIR 1915 Low Bur 145 (146) : 27 I. C. 829 : 8 Low Bur Rul 146 (DB), *Maung Tun U v. Palaniappa Chetty.*

('02) 25 Mad 166 (178) : 11 Mad L Jour 406 (DB), *Kichilappa Naickar v. Ramanujam Pillai.*

('13) 20 Ind Cas 3 (6) (DB) (Lah), *Mt. Husaina v. Mt. Sahib Nur.*

[But see ('38) 25 AIR 1938 Oudh 100 (101) : 14 Luck 4 : 173 Ind Cas 648 (DB), *Jogdeo Prasad v. Pearey Lal.* (The words "discretion exercised under s. 14" in the judgment are probably used to denote a finding on the question whether the earlier proceedings were in good faith or not.)]

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Notes 6-7a

appeal, the *circumstances* contemplated in S. 14 might and ordinarily would constitute a "sufficient cause" in the sense of S. 5. (See Note 9 under section 5.)

7. Sections 4 and 14, joint operation. — It has been seen in Note 7 to S. 4, that where the period of limitation, after excluding the period allowed under S. 14, expires on a day on which the Court is closed, the suit or other proceeding may be filed on the re-opening day. But the day on which the Court was closed *prior* to the commencement of the period of exclusion under this section cannot be excluded either under this section or under section 4.¹ Thus, where the period of limitation for a suit expired on 1st June 1913, which was a Sunday, and the suit was filed on 2nd June 1913, but in a wrong Court, and was, consequently, returned to be presented to the proper Court, it was held that the period of one day between the 1st and 2nd June could not be excluded under this section.² See also S. 4 Note 13.

7a. Section 14 and Article 182 (5).—Section 14 and Art. 182 (5) deal with quite different matters. Section 14 relates to the method of *calculation* of the period of limitation after it has started, while Art. 182 (5) fixes the point from which limitation begins to run. A prior application for execution which is not in accordance with the law and is not made to the proper Court will not be sufficient to give a fresh starting point of limitation under Article 182 (5) but may fall under this section and entitle the applicant to the deduction of the period occupied by such application in calculating the period of limitation for a subsequent application for execution.¹

Section 14 — Note 7

1 ('23) 10 AIR 1923 Mad 114 (116, 119) : 69 Ind Cas 724 (DB), *Govindaswamy v. R. Sami*.

('21) 8 AIR 1921 Mad 654 (655, 657) : 44 Mad 817 : 63 Ind Cas 924 (DB) *Ummathu v. Puthamma*.

('19) 6 AIR 1919 Mad 845 (845, 846) : 47 I. C. 624 (DB), *Ramalingam v. Subbaier*.

('29) 16 AIR 1929 Lah 425 (426) : 116 Ind Cas 314 : 11 Lah 12 (DB), *Dharman Ram v. Ganga Ram*.

[But see ('21) 8 AIR 1921 Bom 379 (380) : 45 Bom 443 : 59 Ind Cas 743 (DB), *Basavanappa v. Krishnadas*. (Dissenting from ('11) 36 Mad 131 (DB), *Mira Mohidin v. Nallaperumal*.)]

2. ('20) 7 AIR 1920 Lah 346 (347) : 55 Ind Cas 55, *Banomal v. Banomal*. (A I R 1916 All 222 relied on.)

('16) 3 AIR 1916 All 222 (223) : 35 Ind Cas 292 (DB), *Mukund Ram v. Ramraj*. [See also ('37) 24 AIR 1937 Lah 464 (464, 465) : 173 I. C. 740, *Bujamal Gaiinda Mal v. Mukta Parshad*.

('37) 24 AIR 1937 Nag 215 (215, 216) : ILR (1937) Nag 217 : 170 Ind Cas 798, *Wamanrao Anandrao v. Umrao Tulsiramji*.]

Section 14 — Note 7a

1. ('49) 36 AIR 1949 Mad 849 (849) : (1949) 1 Mad L Jour 432, *Akkal Naicker v. Kumarasami Reddiar* (Successive executive applications filed in wrong Court — Subsequent execution application before proper Court — Period during which previous execution applications were pending before wrong Court, can be deducted under S. 14.)

('40) 27 AIR 1940 Pat 677 (681) : 19 Pat 354 : 191 Ind Cas 695 (DB), *Bhishundeo Narain v. Raghunath Prasad*.

8. Section 14 and withdrawal of proceedings.— This section does not apply where the plaintiff himself withdraws the suit under O. 23, R. 1 of the Civil Procedure Code.¹ Order 23, R. 2 lays down that in case of withdrawal of a suit under that provision, the suit so withdrawn must be deemed to be non-existent for purposes of limitation for a fresh suit. This is a special provision in the nature of an exception to S. 14 and must be held to prevail, on the principle *generalia specialibus non derogant*. But there is no real conflict between S. 14 of the Act and O. 23, R. 2, Civil Procedure Code, as the words “is unable to entertain it” in S. 14 do not merely mean that the Court has expressed its mind as to the defect in the suit but also that it has passed an *order terminating* the proceeding on the ground that it cannot proceed.² The above principles will also apply to the withdrawal

Section 14 — Note 8

1. ('47) 1947-2 Mad L Jour 337 (338), *Pankala Rao v. Venkatasubbayya*. (('16) AIR 1916 Mad 944 : 39 Mad 936, (DB) followed.)
- ('43) 30 A I R 1943 Mad 80 (81) : 206 Ind Cas 394 (DB), *Virupakshappa v. Veerabhadra*.
- ('39) 26 AIR 1939 Cal 625 (625, 626) : ILR (1939) 2 Cal 316 : 184 Ind Cas 631 (DB), *Mohanlal Baheti v. Tabizuddin Ahmed*. (Plaintiff feeling difficulty regarding question of jurisdiction asking leave to withdraw suit with liberty to bring fresh suit — Court granting permission without deciding point of jurisdiction — S. 14, Limitation Act does not apply.)
- ('38) 25 AIR 1938 Bom 281 (282) : I L R (1938) Bom 327 : 175 Ind Cas 528 (DB), *Achut Dadaji v. Parashram Vasudev*. (Suit on promissory note filed in High Court having jurisdiction to entertain it under Cl. 12 of Letters Patent Defendants raising plea that they were agriculturists — Plaintiff withdrawing suit under O. 23, R. 1, C. P. C., and bringing fresh suit — Case comes under O. 23, R. 2 and not under S. 14, Limitation Act.)
- ('34) 21 AIR 1934 All 688 (692) : 57 All 145 : 150 Ind Cas 135 (FB), *Sadayatan Pande v. Ram Chandra Gopal*.
- ('28) 15 AIR 1928 All 402 (402, 403) : 114 Ind Cas 910, *Rahim Ali v. Yehia Khan*.
- ('16) 3 AIR 1916 Mad 944 (945) : 31 Ind Cas 234 : 39 Mad 936 (DB), *Arunachallam Chettiar v. Lakshmana Aiyar*.
- ('13) 20 Ind Cas 205 (206) (DB) (Cal), *Upendra Nath Nag Choudhury v. Surya Kanta Roy Chowdhury*.
- ('05) 29 Bom 219 (225, 226) : 7 Bom L R 90 (DB), *Varajlal v. Shomeshwar*.
- ('88) 12 Bom 625 (633) : 1887 Bom P J 337 (DB), *Krishnaji Lakshman v. Vithal Ravji Renge*.
- ('82) 6 Bom 681(683)(DB), *Pirjade v. Pirjade*. (Same rule applies to applications.)
- ('35) 22 AIR 1935 Bom 259 (260) : 157 Ind Cas 592, *Kondaji Bagaji v. Dagadu Gajaba*.
- [See also ('32) 19 AIR 1932 All 377 (378) : 138 Ind Cas 108 (DB), *Mt. Rampati v. Phool Singh*.
- ('25) 12 AIR 1925 Cal 845 (851) : 88 Ind Cas 637 : 52 Cal 894 (FB), *Becharam Choudhuri v. Purna Chandra Chatterjee*. (Per Suhrawardy J.)]
2. ('40) 27 AIR 1940 Sind 125 (127) : ILR (1940) Kar 225 : 199 Ind Cas 328 (DB), *Kaliandas v. Muhammad Akbar*. (AIR 1934 All 688 (FB) relied on.)
- ('39) 26 AIR 1939 Cal 625 (625, 626) : ILR (1939) 2 Cal 316 : 184 Ind Cas 631 (DB), *Mohanlal Baheti v. Tabizuddin Ahmed*.
- ('37) 24 AIR 1937 All 124 (126) : 167 Ind Cas 371 (DB), *Ram Manohar v. Baboo Singh*. (The observation that in cases of withdrawal the suit does not fail for defect of jurisdiction or other cause of like nature is not however correct as withdrawal may be permitted where the Court is satisfied that the suit must fail by reason of ‘some formal defect’ which expression will include defect of juris-

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Notes 8-9

of proceedings other than suits.³

Where the plaintiff brought a suit against the Governor-General within 2 months of the notice under S. 80, Civil P. C., but withdrawn it with the leave of the Court to sue afresh on the same cause of action, it was held that the plaintiff was entitled to exclude the period during which the previous suit was pending.^{3a} This view is supportable on the ground that the previous suit was one over which the Court had no *jurisdiction* owing to the non-expiry of the notice period and hence, O. 23, Rr. 1 and 2 did not apply to it. (See A. I. R. Commentary on C. P. C., O. 23, R. 2.)

Where a plaintiff is honestly in doubt as to in which of two Courts his suit lies and institutes it in one of such Courts with due care and caution, but at a subsequent stage it is found that a wrong forum has been chosen, and on an admission to that effect the Court returns the plaint for presentation to the proper Court, it is not a case of *withdrawal* of the suit by reason only of such an *admission*. To such a case, section 14 will apply.⁴

9. "In computing the period of limitation prescribed."

— The section applies only where a period of *limitation has been prescribed*. The period of two years, referred to in S. 53¹ or the period of three months prescribed under S. 9 (1) (c)^{1a} of the Provincial Insolvency Act, 1920, is not a "period of limitation prescribed" within the meaning of this section. But the section applies to the computation of the period of limitation prescribed by the Bengal Tenancy Act.²

diction or other defect of like nature — See A. I. R. Commentary on the Code of Civil Procedure, 5th (1950) Edn., Order 23 Rule 1, Note 25.)

('81-82) 6 Bom 681 (683) (DB), *Pirjade v. Pirjade*. (The criticism contained in the foot-note remark under AIR 1937 All 124 above cited is also applicable to this case.)

('34) 21 AIR 1934 All 688 (691, 692): 57 All 145: 150 Ind Cas 135 (FB), *Sadayatan Pande v. Ram Chandra Gopal*.

3. ('38) 25 AIR 1938 Cal 517 (518) : ILR (1938) 1 Cal 262 : 177 Ind Cas 948 (DB), *Hrishikesh Mitra v. Barada Prosad Roy*. (Withdrawal of certificate proceedings under the Bengal Tenancy Act.)

3a. ('51) 38 AIR 1951 Pat 382 (Para 9): 28 Pat 621 (DB), *G. G. in Council v. G. S. Mills Ltd.* (30 Ind App 177 : 30 Cal 1033 (FC), *Hemchandra v. Kali Prosanna*, Foll.)

4. ('32) 19 AIR 1932 All 377 (378): 138 I.C. 109 (DB), *Mt. Rampati v. Phool Singh*.

Section 14 — Note 9

1. ('17) 4 AIR 1917 Mad 144 (144) : 36 Ind Cas 828 (DB), *Mahommed Maraikkar v. Official Receiver, Tinnevely*. (Case under Section 36 of Act III of 1907, which is same as Section 53 of Act V of 1920.)

1a. ('48) 35 AIR 1948 Nag 385 (387) : ILR (1948) Nag 523, *Chintaman v. Ramgopal*. ('Three months' period prescribed under S. 9 (1) (c), Provincial Insolvency Act is not period of limitation but a condition precedent — Delay in filing petition cannot be condoned under Ss. 5 and 14, Limitation Act — S. 78 (1), Provincial Insolvency Act contemplates application — S. 9 (1) (c), Provincial Insolvency Act contemplates petition and not application.)

2. ('29) 16 AIR 1929 Cal 325 (326) : 56 Cal 805 : 121 Ind Cas 673 (DB), *Sati Prosad Garga v. Govind Chandra*.

('38) 25 AIR 1938 Cal 517 (520) : ILR (1938) 1 Cal 262 : 177 Ind Cas 948 (DB), *Hrishikesh Mitra v. Barada Prosad Roy*.

As to the applicability of the section to the computation of the twelve 'years' period under s. 48 of the Civil Procedure Code, see section 29 Note 6a.

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It is extremely doubtful if this section can be available to a plaintiff or applicant, as the case may be, where a named date is prescribed within which the suit or application has to be filed.³

10. Plaintiff prosecuting — Explanation II. — Where the plaintiff in the second suit was a *plaintiff* in the prior proceeding and the other circumstances specified in the section exist, the section clearly applies. But where the present plaintiff was only a *defendant* in the prior proceeding, does the section apply? It has been held that it will apply, provided he had *claimed* therein the *rights* sought for in the present suit.¹ In other words, he must have had in the prior suit interests in the *nature of those of a plaintiff*.^{1a} If he was merely

3. ('48) 35 AIR 1948 Cal 226 (229): 1LR (1948) 2 Cal 334 (DB), *Hariprosad Roy v. Balental Chaukhani*. (Case under Calcutta House Rent Control Order (1943) Para 9B.)

Section 14 — Note 10

1. ('38) 25 AIR 1938 Sind 50 (52, 53): 32 Sind L R 151: 174 Ind Cas 172 (DB), *Aildas Madnowdas v. Sobhomal Pursomal*. (Application to file award under Arbitration Act, 1899—Prior proceeding for the same purpose failing on account of want of jurisdiction in Court—The fact that in prior proceeding the party in whose favour the award had been passed moved the arbitrator to present the award in Court instead of himself doing so and that under the rules of the Court he was known as a "respondent" does not disentitle the party to the benefit of this section.)

('16) 3 AIR 1916 P C 96 (101, 102): 43 Cal 660: 33 Ind Cas 452 (PC), *Sm. Nriyamoni Dassi v. Lakhani Chandra Sen*.

('23) 10 AIR 1923 Mad 347 (347, 348) 73 Ind Cas 139 (DB), *Kunhi Kuttiali v. Kunhammad*.

('01) 4 Oudh Cas 281 (282, 283), *Prabhu Dayal v. Abadi Begam*. (Plaintiff in present suit claiming set-off as defendant in prior proceedings in respect of the amount claimed in present suit.)

(1864) 1 Suth W R 309 (310) (DB) *Maharajah Jugutendur Bunwaree v. Din Dyal Chatterjee*. (Claim of set off in prior suit.)

[See ('08) 13 Cal L R 214 (215, 216) (DB), *Hafizunnissa Khatun v. Bhyrab Chunder Das*. (Rent claimed by plaintiff in present suit claimed to be set off in a prior suit instituted by the defendant.)]

[See also ('36) 23 AIR 1936 Cal 400 (402): 165 Ind Cas 756 (DB), *Abdul Sattar v. Abdul Rusan*.]

1a. ('19) 6 AIR 1919 Lah 23 (23): 1919 Pun Re No. 89: 52 Ind Cas 561, *Nazim Khan v. Alam Khan*. (Present plaintiff merely defending previous suit as defendant—S. 14 held inapplicable.)

('33) 20 AIR 1933 Sind 379 (381): 147 Ind Cas 94: 27 Sind L R 422 (DB), *Pri-bhadinomal Methumal v. Mt. Chutti*.

('11) 10 Ind Cas 21 (22) (Oudh), *Amir Chand v. Narsing Narain*.

('72-73) 6 Mad H C R 234 (237, 238) (DB), *Sami Ayyan v. Ammai Ammal*. (Prior suit by mortgagor to set aside a mortgage will not save limitation for a subsequent suit on the mortgage.)

('35) 22 AIR 1935 Cal 333 (334, 335): 62 Cal 66: 158 I O 191 (DB), *Jateendra-chandra v. Rabattee Mohan Das*.

('25) 12 AIR 1925 Mad 675 (680, 681): 91 I. O. 883, *Achuthan v. Kunnambath Abdu*. (Same right must be under litigation in both suits.)

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resisting the suit of the other party against him, it cannot be said that he was "prosecuting" any proceeding against the other party.^{1b}

Illustrations.

1. Plaintiff claimed a share in certain properties. Some of the defendants in the suit also claimed a share therein, and an adjudication was actually made in favour of those defendants in the trial Court. But on appeal the said adjudication was set aside on the technical ground that as they were defendants and not plaintiffs the adjudication should not have been made, and the defendants were referred to a separate suit. In the separate suit subsequently filed by them as plaintiffs, the question of limitation was decided in their favour by the Privy Council, the period during which the prior suit was prosecuted being excluded from computation.²

2. Some of the trustees of a mosque brought a suit against its manager for his removal and for the appointment of a receiver to the property of the mosque. The manager contested the suit and made a claim for a sum of money as due to him by the mosque. An issue was raised on the question of the amount, if any, due to the manager by the mosque and it was decided that a certain sum of money was so due and a receiver was appointed to collect the rents and profits and pay the manager. The receiver made the collections and also paid a portion of the dues to the manager. The trustees, however, appealed from the decree and in the appeal the suit was dismissed for non-joinder of other trustees. The manager subsequently filed a suit for the recovery of the balance of the amount due to him. In that suit the period of the prior litigation started by the trustees was excluded in computing the period of limitation therefor.³

('96) 164 Ind Cas 651 (653, 654) (Cal), *Abdul Sattar Chowdhury v. Abdul Rusan*. (He must have been a plaintiff or applicant in the prior suit—Explanation II is said to point to this construction.)

[See also ('42) 29 AIR 1942 Sind 37 (40) : ILR (1941) Kar 495 : 199 Ind Cas 438 (DB), *Madhavdas Parmanand v. Jan Mahomed Ghulam Hyder*. (S. 14 does require that the earlier proceeding must have been initiated by the plaintiff subsequently seeking advantage from the section.)

('25) 12 AIR 1925 Mad 922 (926, 928, 929) : 91 I. C. 202 (DB), *Muddana Adenna v. Muddana Subbanna*. (Suit for partition — Prior suit for partition in which present plaintiffs were defendants — They claimed no relief and got none — They had only prayed for dismissal of suit — Reversed on another point in ('30) AIR 1930 P C 18 (PC), *Virayya v. Adenna*.)

('27) 14 AIR 1927 Lah 785 (786) : 104 Ind Cas 726 (DB), *Mt. Sat Bhirai Khurd v. Ahmad*.

1b. ('44) 31 AIR 1944 Mad 67 (69) : ILR (1944) Mad 410 : 215 Ind Cas 318 (DB), *Chidambaram Chettiar v. Meyyappa Chettiar*.

('39) 26 AIR 1939 Bom 1 (9, 21) : ILR (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jivaji v. Gurunath Gouda*. (The fact that the Court in the previous suit would not have been competent to entertain a counterclaim by the defendant if one had been raised by him is no ground for applying the section to him.)

('24) 11 AIR 1924 Bom 39 (40) : 76 I. C. 557 (DB), *Somshikharswami v. Shivappa*.

('16) 3 AIR 1916 Mad 57 (59) : 38 Mad 260 : 28 Ind Cas 290 (DB), *Kaliba Mavulvija v. Saran Bivi Saila Ammal*.

[See also ('45) 32 AIR 1945 P C 5 (7) : ILR (1945) Kar (P C) 43 (PC), *Narayan Paril v. Puttabai*. (Injunction in earlier suit restraining defendant from interfering with plaintiff's possession. Subsequent suit by former for possession — Period of pendency of earlier suit or continuance of injunction cannot be excluded — S. 14 does not apply.)

2. ('16) 3 AIR 1916 P C 96 (100, 102) : 43 Cal 660 : 33 Ind Cas 452 (PC), *Sm. Nrityamoni Dass v. Lakhan Chundra Sen*.

3. ('23) 10 AIR 1923 Mad 347 (347, 348, 349) : 73 Ind Cas 139 (DB), *Kunhi Kut-tiali v. Kunhammad*.

3. Where *A* has obtained a decree for possession as against *B* but *B* subsequently files a suit to have the decree set aside on the ground of fraud and *A* resists the same, *A* cannot claim to exclude the period of the said suit in computing the period of limitation for an application by him for execution of his decree for possession.⁴

4. Where the executant of a promissory note sued for a declaration that the promissory note was discharged and was unenforceable, it was held that the period of the pendency of the suit could not be deducted in computing the period of limitation for a suit on the promote by the payee.⁵

5. Where the plaintiff obtains an *ex parte* decree in a foreign Court, the period, during which the defendant was taking proceedings to have the *ex parte* decree set aside, cannot be excluded in computing the period of limitation for a suit by the plaintiff in a British Indian Court on the foreign judgment.⁶

No doubt, explanation II construes the resisting of a proceeding, viz., an appeal, as prosecuting a proceeding. But the appeal contemplated is from the decision *in his favour* in the proceeding which the plaintiff himself started.⁷

The fact that a *third* party was prosecuting an application to get a deed, on which the decree is based, set aside, will not save limitation running against a decree-holder for the execution of his decree.⁸

It has been held that in computing the period of limitation for an application for execution, the decree-holder is not entitled to the exclusion of the period during which an application by the judgment-debtor to enter satisfaction of the decree has been pending.⁹

The time that can be excluded under this section is merely the time during which the prior proceeding is actually *being prosecuted* with due diligence. Where there were long gaps between one execution application and another, all of which were dismissed for default, and the decree-holder has been doing nothing during those long periods, he cannot be said during such intervals to have been *actually prosecuting* a proceeding within the meaning of this section.¹⁰

11. "Due diligence."

1. Return of the plaint for presentation to the proper Court. — The time during which a Court holds up a case, while it is discovering that it ought to have been presented in another Court, must be

4. ('24) 11 AIR 1924 Bom 39 (39, 40) : 76 Ind Cas 557 (DB), *Somshikharaswami v. Shivappa*.

5. ('33) 20 AIR 1933 Nag 13 (14, 15) : 28 Nag L R 348 : 141 Ind Cas 34, *Hiralal v. Kripal Singh*.

6. ('27) 14 AIR 1927 Lah 200 (207, 208, 209) : 102 Ind Cas 523 : 8 Lah 54 (DB), *Hari Singh v. Mahomed Said*.

See also Article 117 Note 4.

7. ('25) 12 AIR 1925 Cal 67 (67, 68, 72) : 83 Ind Cas 110 (DB), *Niranka Chandra v. Atul Krishna*.

8. ('91) 1891 All W N 128 (129), *Gokul Singh v. Tika Ram*.

9. ('17) 4 AIR 1917 Cal 460 (460) : 32 I C 931 (DB), *Kartic Chandra v. Nilmani*.

10. ('46) 33 AIR 1946 Pat 301 (303) : 25 Pat 50 : 226 Ind Cas 195 (DB), *Inderdeo Prosad Rai v. Deonarayan*. (No doubt, if the interval has been short and such as has been necessary for taking steps, acquiring information and so on different considerations might arise.)

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Note 11

excluded as the delay of the Court cannot affect the due diligence of the party.¹

After the plaint has been ordered to be returned, the party may be entitled to the deduction of the time taken in appeal or revision from that order,² (see also Note 27) but if the appeal or revision should go against him, he should lose no time in presenting it to the proper Court; and if he has not taken return of the plaint immediately after the return was ordered, but waited till the appeal or revision was concluded, any subsequent delay in taking the return and making the presentation will amount to want of due diligence.³ If, however, on

Section 14 — Note 11

1. ('22) 9 A I R 1922 All 404 (404) : 70 I. C. 613, *Mt. Maryam Bibi v. Ram Das*. (Court taking two years to return plaint.)
(30) 17 AIR 1930 Bom 187 (188, 189) : 124 Ind Cas 791 (DB), *Duni Chand Bishandas v Comptior National D'Escompte D'Paris*.
(25) 12 AIR 1925 Mad 1270 (1271) : 91 I. C. 497 (DB), *Viraswamy v. Nayulama*.
(25) 12 AIR 1925 Nag 54 (57) : 80 Ind Cas 286, *Venkat Bhat v. Mt. Yamuna*.
(35) 22 A I R 1935 All 759 (760) : 155 Ind Cas 1092, *Abdul Shakur Khan v. Rajendra Kishore Saran*.
(30) 17 AIR 1930 Lah 503 (503, 504) : 128 Ind Cas 63 : 11 Lah 308 (DB), *Mt. Nihal Kaur v. Surat Singh*.
(11) 9 I. C. 157 (157, 158) (DB) (Mad), *Yereni Anjayya v. Vappulapati Bapaya*.
(08) 35 Cal 924 (927, 928) : 12 Cal W N 921, *Ramdeo v. Goaneshnarain*.
[See ('21) 8 AIR 1921 Bom 209 (209) : 45 Bom 1132 : 62 Ind Cas 221 (DB), *Shant Murti Devappa v. Narayan Ramchandra*.]
 2. ('39) 26 AIR 1939 Lah 47 (48) : 182 Ind Cas 732, *Gurdit Singh v. Mota Singh*. (Appeal)
(18) 5 AIR 1918 All 180 (180) : 45 Ind Cas 991 (DB), *Hamida Bibi v. Fatima Bibi*. (A case of revision in a small cause suit — Right to deduct time occupied by revision assumed without being decided.)
(66) 5 Suth W R S C C Ref 8 (9) (DB), *Shumboonath Biswas v. Kisto Dhun Sirkar*. (Appeal.)
(37) 24 AIR 1937 Nag 1 (4) : 167 Ind Cas 48 : ILR (1937) Nag 291 (DB), *Kastur Chand v. Mt. Wazir Begam*. (Do.)
[See also ('29) 16 A I R 1929 Nag 219 (220, 221) : 25 Nag L R 99 : 116 Ind Cas 509, *Chintaman v. Kisan*. (But if the plaintiff in acceptance of the order of the first Court presents the plaint in the proper Court and also appeals from the order of return, the appeal is not prosecution in good faith.)
(67) 6 Suth W R 308 (309) (DB), *Raj Kristo Roy v. Beer Chunder Joobraj*. (Dismissal for want of jurisdiction — Appeal against dismissal — Period between decision of first Court and disposal of appeal excluded.)]
- See also Article 11 Note 21.
3. ('51) 38 AIR 1951 T C 26 (Prs 16, 17) (DB), *Perumal v. Pandaram*. (Suit for possession filed in Munsif's Court on 4-1-1100 — Valuation given in plaint questioned by defendant — Order on 28-12-1101 returning plaint for presentation to proper Court — Appeal to District Court — Appeal dismissed on 28-5-1102 — Revision — Revision dismissed on 15-11-1103 — Plaintiff getting back plaint on 31-11-1103 and presenting it in District Court on 3-12-1103 — Period from 4-1-1100 to 31-11-1103 held could be excluded under S. 14.)
(46) 33 AIR 1946 Oudh 116 (118) : 21 Luck 350 : 222 Ind Cas 355, *Ram Adhin v. Gulzari Singh*.
(18) 5 AIR 1918 All 180 (180, 181) : 45 Ind Cas 991 (DB), *Hamida Bibi v. Fatima Bibi*.
(19) 6 A I R 1919 Oudh 378 (378, 379) : 22 Oudh Cas 39 : 51 Ind Cas 590, *Ram Sahu v. Imdad Hussain*. (Delay in taking back plaint after High Court orders.)

the date of the presentation to the proper Court, the suit was in time after deducting only the period during which it was pending in the wrong Court, the fact that after taking the return of the plaint the plaintiff made some delay in re-presentation does not matter.⁴

Where the plaintiff had to amend his plaint, and after the amendment, the jurisdiction became altered to the knowledge of the plaintiff and he re-presented it, as amended, to the same Court, it was held that he was not prosecuting the suit with due diligence.⁵

A finding that the plaintiff did not act with due diligence in re-presenting the plaint to the proper Court is a finding of fact.^{5a}

2. When some alone of the parties, who could have prosecuted the prior proceedings, were engaged in those proceedings, the others, who did not do so, cannot claim the benefit of the section.⁶

3. Proceedings struck off for default of prosecution cannot be said to be carried on with due diligence.⁷

4. When the plaintiff was non-suited for neglect to state the boundaries of his land⁸ or to implead a necessary party,⁹ it cannot be said that there was due diligence.

5. In an insolvency matter, a creditor took no part either by opposing the adjudication or by filing a proof of his claim. In a subsequent suit by him on his debt, it was held that he could not claim a deduction of the period of the pendency of the insolvency proceedings, as he was not *prosecuting* them.¹⁰

6. The fact that the prior suit¹¹ or execution application¹² was filed on the last day of limitation cannot negative due diligence so long as it was in time.

(188) 1888 All W N 168 (169) (DB), *Banni Jan v. Munawar Khan*. (Delay after return of plaint by the Appellate Court.)

(193) 3 Mad L Jour 190 (191), *Krishna Variar v. Kunji Taravanar*.

4. (135) 22 AIR 1935 Oudh 444 (444, 445) : 157 Ind Cas 629, *Ganga Prasad v. Karim Khan*.

5. (15) 2 AIR 1915 Lah 459 (460) : 28 Ind Cas 347, *Radha Kishan v. Ladha Mal Ram Chand*.

(81) 1881 Pun Re No. 115, *Narain Singh v. Muhammad Amir Khan*.
See also Note 29.

5a. (146) 33 AIR 1946 Oudh 116 (118) : 21 Luck 350 : 222 Ind Cas 355, *Ram Adhin v. Gul ari Singh*.

6. (101) 23 All 434 (435) : 1901 All W N 123 (DB), *Dasarath Bai v. Bhirgu Bai*.

7. (146) 33 AIR 1946 Pat 301 (303) : 25 Pat 50 : 226 Ind Cas 195 (DB), *Inderdeo Prosad Rai v. Deonarayan*.

(1864) 1864 Suth W R (Gap) 378 (378) (DB), *Gholam Durbesh Chowdhury v. Sham Kishore Roy*.

8. (166) 6 Suth W R 184 (185, 186) : Beng L R Sup Vol 553 (FB), *Chunder Madhub Chukerbutty v. Ram Coomar Chowdhry*.

9. (116) 3 AIR 1916 Lah 234 (235, 236) : 1916 Pun Re No. 41 : 32 Ind Cas 497 (DB), *Kalu v. Mehru Mal*.

10. (120) 7 AIR 1920 Low Bur 148 (149) : 64 Ind Cas 50, *Greenburgh v. Xavier*.

11. (150) 37 AIR 1950 Nag 37 (Pr 9) : 1 L R (1949) Nag 743, *Sharijjan v. Vishnu-priya Devi*.

(193) 6 C P L R 85 (86), *Jagannath v. Mt. Chandbi*.

12. (138) 25 AIR 1938 Cal 791 (791) : 179 Ind Cas 160, *Debi Prosanna Ghosh v. Indra Narain Pal*.

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Notes 11-12

7. Failure on the part of a counsel to cite an important ruling before the Court does not by itself prove want of due diligence on the part of the client.¹³

8. Chamber applications are frequently adjourned from time to time to suit the convenience of counsel on both sides and it will be unreasonable and unjust to impute want of diligence to the parties for such adjournments.¹⁴ So also, the fact that the defendant consented to the adjournments may well be taken as *prima facie* evidence as negating any want of diligence on the part of the party concerned.¹⁵ See also the undermentioned cases.¹⁶

12. "Another" proceeding.

1. *Return of plaint.*—When a plaint presented in time to a Court is subsequently ordered to be returned for presentation to the proper Court and the same is presented to the proper Court, the case is not one of a continuation of prior proceedings; to such a case this section applies.¹ (See also Note 3 and section 3 Note 5.)

13. ('40) 1940 A M L J 120 (124), *Achal Das v. Sunda Ram*. (It would be most unfair to saddle a client with the consequences of such an omission on the part of his counsel.)

14. ('49) 36 AIR 1949 Cal 24 (44), *Sarojendra Kumar v. Purnachandra*.

15. ('49) 36 AIR 1949 Cal 24 (44), *Sarojendra Kumar v. Purnachandra*.

16. ('50) 37 AIR 1950 Nag 37 (Pr 8) : ILR (1949) Nag 743, *Sharifjan v. Vishnu-priya Devi*. (The pleader who had correctly entered the Court in the heading of the plaint being away, the plaintiff's *mukhtyar* presented it to the civil Nazir who took it to the wrong Court and the Judge entertained it thinking at the time that he had jurisdiction—Held that there was due diligence on the part of the plaintiff.)

('49) 36 A I R 1949 Pat 362 (363) : 27 Pat 137 (DB), *Ramanand v. Gaya Prasad*. (Appeal dismissed by High Court—High Court pointing out that proper remedy was by way of application to set aside execution sale — Plaintiff persisting in attempting to obtain review of appellate decision instead of adopting course that was pointed out — Held plaintiff was not pursuing litigation with due diligence after dismissal of appeal.)

('43) 30 A I R 1943 Nag 335 (338) : I L R (1944) Nag 370 : 214 Ind Cas 12 (DB), *Manorath v. Atmaram*. (Decree certified as satisfied — Decree-holder applying for re-consideration on ground of mistake — Application treated by Court as one for review — In revision, review, held not tenable — Fresh application under Ss. 47 and 151, Civil P. C. — Held, that the decree-holder was entitled to the benefit of S. 14.)

Section 14 — Note 12

1. ('48) 52 Cal W N 316 (318), *Anil Kumar v. Promatha Nath*.

('44) 31 AIR 1944 Mad 253 (254) : 219 Ind Cas 62, *Mangamma v. Maharajah of Pithapuram*. (Suit filed in Civil Court in time directed to be filed before Revenue Court — Claim barred on date of re-presentation in revenue Court — Held that in absence of charge of lack of good faith on part of plaintiff, time taken in Civil Court could be excluded under S. 14.)

('32) 19 A I R 1932 All 377 (378) : 138 Ind Cas 108 (DB), *Mt. Ram Pati v. Phool Singh*.

('34) 21 AIR 1934 Lah 412 (412) : 150 Ind Cas 739 (DB), *Topan Dass v. Thariya Ram*. (Plaint amended on appeal and remanded for trial.)

('28) 15 A I R 1928 Bom 421 (422, 425) : 52 Bom 548 : 113 Ind Cas 511 (DB), *Hirachand v. G. I. P. Ry. Co., Ltd.*

('14) 1 A I R 1914 Cal 858 (860) : 24 Ind Cas 232 (DB), *Bhupendra Kumar Chakravarti v. Purna Chandra Bose*.

A instituted a suit for rent in Court X and the suit was decreed, but was dismissed on appeal on the ground that Court X had no jurisdiction. By that time, Court X was invested with jurisdiction over such matters and A instituted a fresh suit in Court X on the same cause of action. It was held that A was entitled to claim the benefit of this section when he came up on the second occasion with the original plaint or with a new one,² provided the new plaint was on the same cause of action,³ and the prior proceedings were prosecuted with diligence and in good faith.⁴

The expression "another" civil proceeding does not mean that the prior proceeding must have been in a *different Court*.⁵ But in a case, where the plaint is returned for presentation to the proper Court for want of jurisdiction, the plaintiff abandons a part of the claim and again presents it to the same Court after the period of limitation, no exclusion can be claimed under this section.⁶

('12) 13 Ind Cas 377 (380, 381) (DB) (Cal), *Hedlot Khasia v. Ka Ran Khasiani*.

('29) 16 A I R 1929 Lah 877 (878) : 117 Ind Cas 900, *Surat Singh v. Nihal Kaur*. (Any change in the law of the period of limitation would affect the suit as re-presented.)

('12) 14 Ind Cas 157(158):36 Mad 482 (DB), *Seshagiri Rao v. Velayudham Pillai*.

('11) 12 I. C. 58 (59,60):36 Mad 131(DB), *Mira Mohideen v. Nallaperumal Pillai*.

('93) 16 Mad 274 (276, 277) (DB), *Saminadha v. Samban*.

('33) 20 AIR 1933 Sind 117 (117, 118) : 144 I. C. 56 (DB), *Gouri Dutt Jankidas v. P. T. S. Shanker*.

('09) 3 Ind Cas 79 (80) (DB) (All), *Jadu Rai v. Ganesh Parshad*.

[See ('23) 10 AIR 1923 Lah 591 (592) : 82 Ind Cas 866 (DB), *Sukhbir Singh v. Piarelal*.

('16) 3 AIR 1916 Lah 432 (433) : 33 I. C. 438 (DB), *Jetha Ram v. Mehnga Ram*.

[See also ('29) 16 A I R 1929 P C 103 (107) : 56 Cal 1018 : 56 Ind App 128 : 115 Ind Cas 713 (PC) *Ramdutt v. E. D. Sassoon & Co.* (Where a suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject-matter and the parties were identical — Prior arbitration proceedings failing for want of jurisdiction of the arbitrator appointed — Fresh arbitration proceedings before newly appointed arbitrator not a continuation of the prior proceedings.)]

[See however ('41) 28 AIR 1941 Mad 711 (712) : 196 Ind Cas 521 : 1941-1 Mad L Jour 629 (633) (DB), *Ramaswami Iyer v. Veerarayan Raja*. (Suit instituted in Court having jurisdiction to entertain it but not being Court of lowest grade competent to try it under S. 15, O. P. C. — Plaint returned for presentation to latter Court — Date of institution of suit is the date on which the plaint was originally filed and not the date on which it was re-presented.)]

[But see ('15) 2 A I R 1915 All 344 (344) : 30 Ind Cas 544 (DB), *Ganga Prasad Rai v. Ramanand Gir*.]

See also Note 25.

2. ('35) 22 AIR 1935 Pat 82 (82, 83) : 153 Ind Cas 155 (DB), *Brijlal v. Janendra Narain*.

3. ('98) 1 Oudh Cas 272 (277), *Mt. Tulsha v. Mahadeo Pershad*.

4. ('41) 28 AIR 1941 Oudh 161 (164) : 16 Luck 402 : 191 Ind Cas 708 (DB), *Abdulla Khan v. Tirbhuan Dutt Singh*.

5. ('21) 8 AIR 1921 Sind 13 (14) : 62 Ind Cas 507 : 15 Sind L R 11 (DB), *Ibrahim v. Ghulim Hussain*.

6. ('40) 27 AIR 1940 Mad 689 (691) : 194 Ind Cas 646 (DB), *Chandrayya v. Seethanna*. (('39) AIR 1939 Mad 397, *Chehndrayya v. Seethanna*, reversed —

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2. Where a plaintiff institutes a suit against a person, who is dead before its institution, and then impleads the legal representatives as defendants, there are no two proceedings and section 14 has no application.⁷

3. The period of the prosecution *bona fide* in an administration suit of a claim by a creditor, under a promissory note executed by the deceased debtor, will be excluded in computing the period of limitation for a subsequent suit on the promissory note.⁸

4. The time taken by a creditor in filing a proof of claim in the insolvency Court can be excluded in computing the period of limitation for a suit by him on the claim after the annulment of adjudication.⁹

5. *Execution proceedings*.—The words 'another civil proceeding' will include execution proceedings in another suit.^{9a} In *Dugarajulum Garu v. Aryan Bank, Vizagapatam*,¹⁰ Varadachariar, J. observed as follows :

"The reason of the rule (S. 14) seems to us equally to apply to the steps taken by him after the decree as to the steps taken by him prior to the decree. The fact that for processual purposes the Code makes a distinction between steps prior to the decree and steps subsequent to the decree does not affect the underlying principle of S. 14 of the Limitation Act. A party is seeking the relief that he was entitled to as much in the execution stage as during the pre-decree stage; and in a mortgage suit, the relief that he is entitled to is the sale of the property and till that has been carried out, all steps taken by him, provided they were taken with due diligence and in a Court which he *bona fide* believed to be the Court competent to grant him that relief, may legitimately be held to be steps

Plaintiff cannot claim the benefit of S. 14 as he deliberately under-valued his relief in the first instance.)

(95) 5 Mad L Jour 58 (59) (DB), *Nayinakamen v. Madureswara Bhattar*.

7. ('33) 20 AIR 1933 Mad 454 (455) : 143 Ind Cas 596, *Municipal Council, Calicut v. Kunhipathumma*. (The suit as originally instituted against a dead person being void.)

('68-69) 4 Mad H C R 1 (2), *Karuppan Chetti v. Veeriyal*. (Suit against a defendant who is supposed to be dead — Frame of suit to save time against the legal representatives under Section 14 explained.)

8. ('06) 10 Cal W N 959 (961, 962) (DB), *Brij Nath Ramgoenka v. Hem Chunder Bose*. (The Judge in administration suit himself ordering a separate suit to be filed.)

9. ('19) 6 AIR 1919 Low Bur 132 (133) : 52 Ind Cas 934, *N. K. M. M. Chetty v. Lutchman Chetty*.

9a. ('43) 30 AIR 1943 Cal 460 (464) : 209 Ind Cas 71 (DB), *Abhoy Kanta v. Gopinath Deb*.

('42) 29 AIR 1942 Sind 37 (40) : I L R (1941) Kyr 495 : 199 Ind Cas 438 (DB), *Madhavdas Parmanand v. Jai Mahomed Ghulam Hyder*. (S. 14 does not require that the earlier proceeding must have been a suit.)

('41) 28 AIR 1941 Cal 493 (495) : 195 Ind Cas 534, *Methraj Golab Chand v. Chandra Kamal Bhuiyan*. (Assumed.)

[See ('49) 36 AIR 1949 Mad 849 (849): 1949-1 Mad L Jour 432, *Akkal Naicker v. Kumarasami Reddiar*. (Successive execution applications in wrong Court S. 14 can be invoked—Each application dismissed for default—Each is distinct and separate application and not one in continuation of the previous Time actually taken in prosecution of each application should be deducted and not the period from first infructuous application to date of proper application—Held that even though S. 14 could be invoked, execution was out of time.)]

10. ('37) 24 AIR 1937 Mad 357 (359) : I L R (1937) Mad 161 : 170 I. C. 524 (DB).

taken in 'another civil proceeding' within the meaning of S. 14. That is the reason why in the earlier part of clause 1, S. 14, the Legislature has advisedly used the expression 'civil proceeding' and does not use the word 'suit.' The section specifically refers to the possibility of proceedings being taken in the Court of first instance or in the Court of appeal; this obviously rests on the theory that an appeal is merely a continuation of the proceedings in the first Court. No express reference has been made to proceedings in execution, apparently because under the law proceedings in execution have to be taken in the Court of first instance."

6. *Application to sue as a pauper.* — Where a *bona fide* application for leave to sue as a pauper is refused and the plaintiff thereafter institutes a suit on payment of full court fee, it has been held that he will be entitled to deduction of the time taken up by the pauper application.¹¹

13. "Civil proceeding" in a "Court." — It is necessary in each case to examine the precise nature of the proceedings and the constitution of the authority, before whom such proceedings are taken, in order to decide whether they are *civil proceedings* in a *Court*.¹

A Land Registration Deputy Collector, acting in a matter for decision under Ss. 28, 29 or 42 of the Land Registration Act of Bihar, is not a Court² and the proceedings are not civil proceedings.³

A Settlement Officer or Commissioner of a Board of Revenue, in preparing or revising a record of rights, is not a Court dealing with a civil proceeding.⁴ Proceedings before officers acting in an administrative⁵

11. ('38) 25 AIR 1938 Cal 730 (734) : I L R (1939) 1 Cal 112 : 179 Ind Cas 271 (DB), *Kali Dasi Dasi v. Santosh Kumar Pal*. (The Court must be held to be unable to entertain it on account of a cause of a "like nature" with want of jurisdiction.)

[See however ('43) 30 AIR 1943 Bom 292 (297): 208 Ind Cas 543 (DB), *Mahadev Gopal v. Bhikaji Vishram*. (Application for leave to sue as pauper refused — Time spent in pauper proceedings cannot be availed of to save bar of limitation.) ('39) 26 AIR 1939 Cal 394 (398, 399) : I L R (1939) 2 Cal 68 : 184 Ind Cas 345, *Biswanath v. Khejerali Molla*. (Defect not one of "like nature.")]

Section 14 — Note 13

1. ('24) 11 AIR 1924 Nag 309 (310) : 78 Ind Cas 580, *Bandappa v. Sankar Rao*. (Collector in Central Provinces held not to be empowered to investigate claims under Order 21 Rule 100, C. P. C., in execution of decrees.)
2. ('26) 13 AIR 1926 Pat 194 (195, 196) : 90 Ind Cas 244 (DB), *Ramjee Prasad v. Bishun Dutt*.
3. ('26) 13 AIR 1926 Pat 194 (195, 196) : 90 Ind Cas 244 (DB), *Ramjee Prasad v. Bishun Dutt*. (Question of title not within his jurisdiction.)
4. ('04) 26 All 382 (384, 385) : 1904 All W N 54 (DB), *Muhammad Subban-ullah v. Secretary of State*.
5. ('18) 5 AIR 1918 Bom 82 (82, 83) : 43 Bom 201 : 48 Ind Cas 467 (DB), *Laxman v. Keshav*. (Collector acting under S. 11A, Bombay Hereditary Offices Act, 1874 — Definition of 'Court' discussed.)
- ('27) 14 AIR 1927 Lah 185 (185) : 101 Ind Cas 254 (DB), *Abbas Ali Khan v. Yusuf Ali Khan*. (Notices of ejectment issued under S. 45, Punjab Tenancy Act, by a Revenue Officer — ('25) A I R 1925 Lah 264 *Yusuf Ali v. Abbas Ali*, reversed.)
- ('78) 1878 Pun Re No. 52, *Khana v. Hossein Khan*. (Revenue Officer — Proceedings before him in regard to a matter expressly excluded from cognizance of civil Courts.)
- [See ('29) 16 AIR 1929 Pat 694 (697): 9 Pat 385: 123 Ind Cas 817 (FB), *Mahabir Prasad v. Bhupal Ram*. (Manager under Chota Nagpur Encumbered Estates Act, VI of 1876, whether a Court.)]

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or an executive⁶ capacity are not covered by the section. But revenue Courts are Courts under this section.⁷ So also, it has been held that according to the scheme of the Jaipur Court of Wards Act, the Court of Wards constitutes a "Court" within the meaning of this section.^{7a}

As regards proceedings before arbitrators, the Privy Council has held that they are tribunals, whom the parties have substituted for a Court of law to be the judges of the disputes between them and that proceedings before them are civil proceedings in a Court.⁸ The observations to the contrary, in the undermentioned case,⁹ cannot be considered as good law. The tendency has been not to restrict the

[See also ('44) 31 AIR 1944 Nag 313 (314): I L R (1945) Nag 427, *Radhakisan v. Uttamchand*. (Under S. 14 time spent in a proceeding before the Collector to whom a decree is transferred for execution cannot be excluded, as the Collector is not a Court.)]

6. ('39) 26 AIR 1939 Nag 141 (144): 185 Ind Cas 241, *Meghji Hirjee & Co. v. B. N. Rly. Co. Ltd.* (The Governor-General in Council is no doubt the supreme executive authority in India but there is no statute constituting him a Court.)

('04) 26 All 382 (384, 385): 1904 All W N 54, *Muhammad Subban-ul-lah v. Secretary of State*.

('82) 6 Bom 31 (32, 33) (DB), *Manohar v. Gebiapa*. (A conciliator under the Dekkhan Agriculturists' Relief Act before whom a conciliation petition is pending in regard to an execution was held not a Court.)

('08) 31 Mad 495 (498): 18 Mad L Jour 581: 4 Mad L Tim 321 (DB), *Regulation Collector of Uthumali Estate v. Subbier*. (Regulation Collector under the Madras Court of Wards Act, I of 1902.)

7. ('30) 17 AIR 1930 All 193 (200, 205): 52 All 501: 124 Ind Cas 540 (F B), *Ananti v. Chhannu*.

('20) 7 AIR 1920 Pat 504 (506): 58 Ind Cas 434: 5 Pat L Jour 697 (DB), *Jagdeswar Dayal v. Bhagdi Mahton*. (Suit under S. 87 before Settlement Officer under the Chota Nagpur Tenancy Act, VI of 1908.)

('75) 23 Suth W R 152 (154): 15 Beng L R 56 (DB), *Gobind Coomar Choudhry v. W. B. Manson*. (Suit in revenue Court for arrears of rent.)

('70) 13 Suth W R 390 (391): 11 Beng L R App 31n (DB), *Prosunno Coomar Paul Choudhry v. Muddun Mohun Paul Choudhry*. (Do.)

('71) 16 Suth W R 61 (62): 8 Beng L R 190n (DB), *Haris Chandra Dutt v. Sm. Jagadamba Dasi*.

('93) 20 Cal 264 (268, 269) (DB), *Girjanath Roy Chowdhury v. Ram Narain Das*. [See also ('87) 14 Cal 9 (12) (DB), *Ram Logan Ojha v. Bhavani Ojha*.]

[See however ('11) 11 Ind Cas 34 (35) (Lah), *Katara v. Arjan Singh*. (Period prescribed by S. 21 (a), Land Alienation Act, is not subject to provisions of Ss. 4 to 25 of Limitation Act)]

[But see ('14) 1 AIR 1914 Lah 337 (338): 26 Ind Cas 441: 1914 Pun Re No. 83 (DB), *Gebinda Mal v. Santa*. (Decided on counsel's admission on the law — No discussion.)]

7a. ('46) 1946 J L R 257 (267) (DB), *Kaluram v. Thakur Phulsingh*.

8. (29) 16 AIR 1929 P C 103 (107, 108): 115 Ind Cas 713: 56 Ind App 128: 56 Cal 1048 (P C), *Ramdutt Ramkissen v. E. D. Sassoon & Co.*

[See also ('48) 35 AIR 1948 Nag 334 (337): I L R (1947) Nag 477 (DB), *Fatechand Ganeshram v. Wasudeo Shrawan Dalal*.]

('43) 30 AIR 1943 All 162 (167, 168): I L R (1943) Mad 467: 207 Ind Cas 571 (DB), *Behari Lal v. Punjab Sugar Mills*. (Chitaley's Lim. Act approved.)

('30) 17 AIR 1230 Cal 5 (8): 56 Cal 639: 120 Ind Cas 710, *Abdul Rahim Oosman & Co. v. Ojamshee Purshottam Das & Co.*

(1864) 1864 Suth W R Gap 283 (284), *Ramdhone Sircar v. Seetanath Sircar*.]

9. ('33) 20 AIR 1933 Nag 130 (132): 144 Ind Cas 948: 29 Nag L R 272, *Maharaj Sai v. Kedar Nath*.

operation of this section but to follow its principle in suitable cases even in proceedings which cannot strictly be called proceedings in a Court of law.^{9a}

An application by an attorney under ch. 38 R. 48, Original Side Rules (Calcutta) for an order for payment of costs against his client, is a civil proceeding in a Court of first instance.¹⁰

The word "Court" in section 14 does not include a *foreign* Court. See Note 5.

14. "Court of appeal," if includes Court of revision. — Does the expression "*proceeding in a Court of appeal*" include revision proceedings in the High Court? In *Appa Raw v. Sriramulu*,¹ their Lordships of the Madras High Court observed as follows:

"The language of the Legislature is not that the time occupied in prosecuting *appeal* may be deducted, but the time occupied in prosecuting *any civil proceeding in a Court of appeal*. We see no reason why a revision petition in the High Court should not be regarded as a *civil proceeding in a Court of appeal*. We think that the expression *Court of appeal* should be taken as being used in the broad sense of any Court which has the power to bring under review the decision of an inferior Court, whatever may be the extent of jurisdiction that the superior Court may possess in reviewing the decision of the inferior Court."

The Patna High Court in a recent Full Bench case^{1aa} and the High Court of Travancore-Cochin^{1ab} have also expressed a similar view.

The other High Courts agree in considering that revision proceedings do not, as such, fall outside the intendment of the section, though they hold that, in each case, it should depend on its own merits whether the prosecution by way of civil revision in the High Court can be considered to be in good faith or not. The Allahabad High Court in the undermentioned case^{1a} held that the time during which revision proceedings were going on must be excluded. This ruling was followed in a recent case of that Court^{1b} in which it was held that only the time from the date of application for revision to the date of the order thereon should be excluded. The Court therefore refused to exclude the period between the appellate decision returning the plaint and the date of application for revision therefrom and also the period from the date of order in revision to the filing of the plaint in the competent Court. The same High Court assumed in the under-

9a. ('45) 32 AIR 1945 All 377 (383) : I L R (1945) All 394 (DB), *Maqsood Ali v. Hoshiair Singh*. (Time taken under U. P. Agriculturists' Relief Act excluded on the principle of this section.)

10. ('49) 36 AIR 1949 Cal 24 (43), *Sarojendra Kumar Dutt v. Purnachandra Sinha*.

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1. ('12) 17 Ind Cas 593 (593, 594) (DB) (Mad). (Reversing the decision of Ayling, J., in 14 Ind Cas 259.)

[See also ('43) 30 AIR 1943 Mad 633 (636) : 213 Ind Cas 236, *Venkataswami v. Sara Bai*. (Word "appeal" in S. 14 (1) includes revision.)]

1aa. ('49) 36 AIR 1949 Pat 293 (296) : 28 Pat 102 (FB), *Bihari Lall v. Bani Madhava*.

1ab. ('51) 38 AIR 1951 T.-C. 26 (Pr 17) (DB), *Perumal v. Pandaram*.

1a. ('82) 1882 All W N 59 (59) (DB), *Mul Chand v. Samir Mal*.

1b. ('38) 25 AIR 1938 All 78 (79) : I L R (1938) All 192 : 173 I C 461, *Chhuttan Lall v. Dwarka Prasad*.

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mentioned case² that the duration of the civil revision proceedings, as such, is deductible but refused to exclude the period of delay that elapsed after the disposal of the civil revision petition. The Bombay High Court³ also assumed the former position but declined to exclude the time taken by the revision proceedings on the ground that those proceedings being contrary to the clearly expressed provision of law, there was no good faith on the part of the plaintiff. The Madras⁴ and Rangoon⁵ High Courts hold that where another remedy is open, the time spent in revision cannot be considered to be spent in good faith. Mukherjea, J., of the Calcutta High Court remarked in the under-mentioned case^{5a} that he was not prepared to go to the length as the Rangoon High Court had done and that he did not think that the application for revision where another remedy was open was a *mala fide* one; but his Lordship expressed his doubt whether "Court of appeal" could include a Court of revision. According to the late Nagpur Judicial Commissioner's Court,⁶ each case depends on its own circumstances and, under proper circumstances, the time spent in revision may be excluded.

See also Note 20.

15. "Court of appeal"—Second or further appeal.—The plaintiff is entitled to deduct the period occupied by the litigation

2. ('18) 5 AIR 1918 All 180 (180 181) : 45 Ind Cas 991 (DB), *Hamida Bibi v. Fatima Bibi*.
3. ('30) 17 AIR 1930 Bom 505 (506) : 128 Ind Cas 621, *Narayan Ambaji v. Hari Ganesh*. (Filing revision instead of a suit after an adverse order under Order 21 Rule 103, C. P. C.)
4. ('15) 2 AIR 1915 Mad 405 (407) : 26 Ind Cas 219 : 39 Mad 62 (DB), *Baiznath Lala v. Ramadoss*. (Adverse order under S. 73, C. P. C., in the matter of rateable distribution — Revision without filing a suit.)
[See however ('43) 30 AIR 1943 Mad 633 (636) : 213 Ind Cas 236, *Venkataswami v. Sara Bai*. (Claim under O. 21, R. 58, Civil P. C., allowed — Revision by decree-holder against claim order dismissed — Suit by decree-holder under O. 21, R. 63 filed more than one year after claim order Held, S. 14 (1) applied as it was practice of Madras High Court to admit revisions against claim orders. A I R 1915 Low Bur 145 (DB) : 8 L B R 146, *Maung Tun U v. Palaniappa*. Diss. from; AIR 1915 Mad 405 : 39 Mad 62, Expl.)]
5. ('29) 16 AIR 1929 Rang 297 (297, 298) : 7 Rang 466 : 120 Ind Cas 236 (DB), *S. R. M. M. A. Firm v. Maung Po Saung*. (Revision from order under O. 21 R. 63, C. P. C. — The law in Rangoon being that, that High Court does not interfere in revision in such matters.)
('15) 2 AIR 1915 Low Pur 145 (146) : 8 Low Bur Rul 146 : 27 Ind Cas 829 (DB), *Maung Tun U v. Palaniappa Chetty*. (Remedy under O. 21 R. 63, C. P. C., open — Time spent in revision or appeal should not be excluded.)
- 5a. ('38) 25 AIR 1938 Cal 577 (578) : 179 Ind Cas 40, *Meghmala Debi v. Saday Parhya*. (Even assuming that a "Court of appeal" would include a Court of revision it was held that in this case the time taken by the application for revision could not be excluded as it could not be said that the High Court had been unable to entertain it for want of jurisdiction or other cause of like nature.)
[See (49) 53 Cal W N (1 D R) 75 (76) (DB), *Md Chand Mia v. Md. Ali Mia*. (In this case time taken in revision in the prior proceeding was excluded.)]
6. ('31) 18 AIR 1931 Nag 17 (19) : 130 Ind Cas 145: 27 Nag L R 251, *Laxmandas v. Chunnilal*. (*Bona fide* belief that revision would succeed.)

till its termination in a *final* Court of appeal.¹ The fact that one appellate Court held against the plaintiff on the ground of want of jurisdiction, will not disentitle him to claim the deduction of the time occupied by a further appeal therefrom which was infructuous.²

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16. Parties must be the same. — Both the proceedings must be between the same parties,¹ or (in view of the definitions of plaintiff, defendant and applicant in S. 2) their representatives.² A firm is not the same party as the individual members thereof.^{2a} But a prior suit against a firm and a subsequent suit against the surviving partners of that firm, and the persons in possession of the assets of a deceased partner, are both against the same parties.³ A prior suit, wrongly filed against the Traffic Manager of a Railway Company, instead of the Secretary of State according to law, is not against the same party as the Secretary of State, against whom a subsequent suit is instituted.⁴ So also, where A sues B and C, whom he supposes to be the legal representatives of the deceased debtor, and after discovery of his mistake, he seeks to bring in D, the proper legal representative, as defendant, the latter proceeding is not against the same party as the former.⁵ In a suit against the defendant who had become surety under

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1. ('73) 20 Suth W R 380 (382) : 13 Beng L R 146 : 24 Suth W R 407n : 3 Sar 273 (P C), *Luckhinarain Mitter v. Khettro Pal Singh Roy*.
[See also ('43) 30 AIR 1943 Oudh 52 (53) : 18 Luck 480 : 204 Ind Cas 215 (DB), *Pratap Narain v. Sitla Bux*. (Case of a memorandum of appeal presented to wrong Court - S. 14 held to apply — Appellant held entitled to deduct time occupied by litigation till its termination in appeal in High Court by decision under S. 12 (2), Oudh Courts Act.)]
2. ('73) 20 Suth W R 380 (382) : 13 Beng L R 146 : 24 Suth W R 407n : 3 Sar 273 (P C), *Luckhinarain Mitter v. Khettro Pal Singh Roy*.

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1. ('21) 8 AIR 1921 Cal 596 (596) : 64 Ind Cas 315, *Janki Nath Sinha Roy v. Bejoy Chand Mahatab Bahadur*.
('25) 12 AIR 1925 Oudh 369 (369) : 87 Ind Cas 17, *Ram Pher v. Ajudhia Singh*. (Defendant must be same in both proceedings.)
('90) 1890 Pun Re No. 154, *Mihr Jang Khan v. Faizulla Khan*.
(1864) 1 Suth W R 121 (122, 123) (DB), *Mt. Munna Jhunna Koonwar v. Laljee Roy*. (Prior litigation against a different party.)
(1864) 1 Suth W R 29 (30, 31) (DB), *Rajah Barodakant Roy v. Sookmoy Mookerjee*. (Previous suit neither by plaintiff nor by any one under whom he claims.)
('72-'73) 6 Mad H C R 122 (123, 125) (DB), *Lee Morris v. Sambamurthi Kayar*.
('76) 1876 Bom P J 52 (DB), *Pandharinath v. Prahlad*. (A different defendant.)
(1864-65) 2 Mad H C R 1 (2, 5) (DB), *Venkatraswamy Nayakkan v. Subba Rau*. (In a communal matter the Court held that some only of the parties in the later suit being parties in the prior suit did not matter.)
2. ('22) 9 AIR 1922 Pat 450 (457, 458) : 66 Ind Cas 945 : 1 Pat 506 (DB), *Hari Prasad Singha v. Sourendra Mohan Sinha*. (Son of Mitakshara defendant.)
- 2a. ('27) 14 AIR 1927 All 181 (181, 182) : 98 Ind Cas 1050, *Firm Ram Lochan Ram Lachmi Prasad v. Jagat Narain Dube*.
3. ('28) 112 Ind Cas 715 (717) (DB) (All), *Firm of Baldeo Prasad Babu Ram v. Firm of Haji Ali Muhammad Usman*.
4. ('26) 13 AIR 1926 Lah 572 (572) : 96 Ind Cas 144 (DB), *Chanda Singh v. Secretary of State*.
5. ('73) 10 Bom H C R 224 (226, 227) (DB), *Kavasji Sorabji v. Barjorji Sorabji*.

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a bond for payment by the judgment-debtor of the plaintiff, the time, during which the plaintiff was taking out execution against the said judgment-debtor under the decree, was held not deductible.⁶

The same person suing in *different capacities* is not the same plaintiff, as for example, the same person suing as the administratrix of the estate of one person in one suit, and of the estate of a different person, in another suit.⁷ So also, two suits against the same defendant but in different capacities are not covered by the section.⁸

A prior suit was instituted by two plaintiffs alone. A third party, on his application, was impleaded as a co-plaintiff. The plaint was returned for presentation to the proper Court, and in presenting it to the proper Court, the two original plaintiffs alone sued and sought to exclude the time taken up by the prior suit. It was held that the parties to the second suit were the same notwithstanding the omission of the third person co-plaintiff.⁹

An application by a decree-holder to enter satisfaction of a decree was struck off on account of the absence of the decree-holder and his pleader. The judgment-debtor then applied for the recording of satisfaction. It was held that the time during which the application by the decree-holder was pending could not be excluded under this section but that the application by the judgment-debtor must be treated as being in continuation of the application by the decree-holder.¹⁰

An Official Receiver filed an application under Ss. 53 and 54, Provincial Insolvency Act (V of 1920), for setting aside alienations by an insolvent. The Court dismissed the application and indicated that the creditors should institute a suit for setting aside the conveyances under S. 53 of the Transfer of Property Act. Subsequently, the creditors instituted a suit for a declaration that the conveyances were void under S. 53, T. P. Act. It was held that although the Official Receiver represented the creditors in the proceedings before the insolvency Court, yet it could not be said that the present plaintiff prosecuted those proceedings within the meaning of this section. The creditor plaintiff was, therefore, not entitled to the exclusion of the period taken by the Official Receiver in prosecuting application under Ss. 53 and 54, Provincial Insolvency Act.¹¹

See also the undermentioned case.¹²

6. ('74) 1874 Pun Re No. 58, *Bhai Sawaya Singh v. Hira Nand*.

7. ('24) 11 AIR 1924 Rang 123 (123) : 1 Rang 402 : 76 Ind Cas 639, *H. C. Hoosein v. Asha Bibi*.

8. ('27) 14 AIR 1927 All 628 (629) : 102 Ind Cas 870 (DB), *Devi Chand v. Pirbhu Lal (Obiter)*.

9. ('04) 14 Mad L Jour 287 (288, 289) (DB), *Venkatasubbiah v. Pichamma*.

10. ('39) 26 AIR 1939 Mad 163 (164) : 180 Ind Cas 437, *Kailasa Padayachi v. Duraiappa Kachirayar*.

11. ('42) 29 AIR 1942 Mad 483 (484) : I L R (1942) Mad 862 : 202 Ind Cas 490 (DB), *Rama Naidu v. Gangi Reddi*.

12. ('46) 33 AIR 1946 Sind 14 (17) : I L R (1945) Kar 293 : 223 Ind Cas 291 (DB), *Rochaldas v. Uttamchand*. (A suit by an unregistered firm against D and a subsequent suit against D by some of the partners as partners in personam impleading the other partners in the firm, as defendants they being absent from the station, are suits between the same parties within S. 14.)

17. Suit must be based on the same cause of action — Application must be for the same relief. — In order to save time under this section for a suit, the prior suit must have been based on the same cause of action.¹ The section employs the expression “cause of action” in relation to suits in sub-section (1) and the word “relief” in the case of applications in sub-s. (2). The former expression is of larger import and several reliefs may be asked for in respect of the same cause of action. In the matter of “applications,” the prior proceedings must relate to the same ‘relief.’ Where the prior proceeding was a *suit* for mesne profits on dispossession for a period of two years and the subsequent proceeding was an application under S. 144, Civil Procedure Code, for mesne profits on the same dispossession for a period of four years, inclusive of the former period of two years, the exclusion of time under this section would apply only in respect of the relief for mesne profits for two years in common between the two proceedings though the cause of action of dispossession was the same.²

Though, in the case of suits, the expression used is “founded upon the same cause of action” and nothing is said about the relief being the same, it has been held by the Madras High Court that it would be an extraordinary proposition to hold that where the same cause of action entitles a party to several reliefs and he chooses to sue only for one of them, he can subsequently bring a suit for another relief, and so far as limitation is concerned, claim the benefit of S. 14. The relief also must be the same even under sub-s. (1).³ A recent decision of the Allahabad High Court has, however, taken the contrary view and held that the relief need not be identical in both suits.⁴ See also the undermentioned case expressing a similar view.⁵

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1. ('28) 15 AIR 1928 Nag 178 (179) : 108 Ind Cas 785, *Ganesh Parsad v. Bhawani Pershad*.
2. ('34) 21 AIR 1934 All 824 (824, 825) : 152 I C 800, *Balkaran Pandey v. Ram Badan Pandey*. (The conclusion in the ruling is correct though the reasoning is involved and contradictory—The Court ought to have considered the case with reference to the language of sub-section (2) and not of sub-section (1).)
3. ('33) 20 AIR 1933 Mad 778 (779) : 146 Ind Cas 361, *Ramakrishna Chettiar v. Jayaramier*.
[See also ('33) 20 AIR 1933 Mad 197 (198) : 140 Ind Cas 270, *Narasimmachariyulu v. Appa Rao*. (Material factors constituting cause of action in present suit also alleged in prior proceedings—Held prior proceedings must be deemed to have been founded upon same cause of action.)]
[See however ('43) 30 AIR 1943 Mad 498 (499, 500) : ILR (1944) Mad 104 : 213 Ind Cas 270 (DB), *Vengannam Chettiar & Sons v. Ramaswami*. (('20) AIR 1933 Mad 778, not referred.)]
4. ('40) 27 A I R 1940 All 145 (146):187 Ind Cas 336, *Dal Singar Koeri v. Chandi Singh*. (Suit on simple mortgage—One for recovery of the loan and the other for additional relief of enforcing the charge — Held, that the common cause of action was failure to discharge loan and hence S. 14 applied though the relief was not identical.)
5. ('46) 1946 JLR 257 (269) (DB). *Kaluram v. Thakur Phulsingh*. (Where in an earlier proceeding or suit, total amount of money of a bond is claimed, while in the subsequent some instalments only out of that bond are claimed, the two claims though not identical arise from the same cause of action. Relief are

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18. "Same cause of action" — Sub-section (1). — In *Dugarajulum Garu v. Aryan Bank, Vizagapatam*,¹ it was observed as follows :

The concluding words of cl. (1), S. 14 no doubt provide that the previous proceeding should be founded upon the same cause of action as the later. And it is also true that so far as proceedings in execution following upon a decree are concerned, there is no question of their being founded upon a particular "cause of action"; it is the suit in which the decree was passed that must be looked to for determining the identity of the causes of action between the two suits. It seems to us that if the two suits are founded on the same cause of action, the fact that no "cause of action" can be predicated in respect of proceedings in execution is no reason for holding that the time *bona fide* but infructuously taken in executing the prior decree should not be deducted under section 14."

A obtained a decree for money against one brother as a member of a firm. On attachment of certain property in execution of the decree, the other brothers raised objections to the attachment under O. 21 R. 58 of the Civil Procedure Code, and the objections were upheld. The plaintiff then applied under O. 21 R. 50 of the said Code for a declaration that the brothers were liable as partners and his application was successful in the first Court but was dismissed on appeal and also on further appeal under the Letters Patent on the ground that the application was barred by the order made against the decree-holder under O. 21 R. 58. Thereupon, the decree holder filed a suit for declaration of his rights against the objecting brothers. It was held that the time occupied by the decree-holder's application under O. 21, R. 50 and the appellate proceedings thereafter should be excluded in computing the period of limitation for the suit, the cause of action being the same for the suit as well as the infructuous application.²

But, time spent in carrying on a wholly independent litigation founded on a different cause of action cannot be excluded.³ The following are some instances of different causes of action :

different but the cause of action is the same in both cases and plaintiff is entitled to claim benefit of S. 14.)

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1. ('37) 24 AIR 1937 Mad 357 (358) : I L R (1937) Mad 161 : 170 I C 524 (DB).
2. ('28) 15 AIR 1928 All 10 (10, 11) : 108 Ind Cas 134 (DB), *Kanhaiya Lal v. Suraj Karan*.
3. ('29) 16 AIR 1929 All 101 (101) : 112 Ind Cas 246, *Gaya Prasad v. Ram Sarup*.
- ('33) 20 AIR 1933 Bom 450 (452, 454) : 145 Ind Cas 630 : 58 Bom 200 (DB), *Karsondas v. Surajbhan*.
- ('26) 13 AIR 1926 Cal 693 (694, 695) : 92 Ind Cas 37 (DB), *Port Canning and Land Improvement Co. Ltd. v. Acchiruddi Mollah*. (Suit for the recovery of rent against a non-occupancy raiyat—Period cannot be extended owing to pendency of proceedings under S. 46, Bengal Tenancy Act.)
- ('25) 12 AIR 1925 Mad 675 (680, 681) : 91 Ind Cas 833, *Alayil Kalathil Kambil Achuthan v. Kunambrath Abdu*.
- ('24) 11 AIR 1924 Rang 123 (123) : 1 Rang 402 : 76 Ind Cas 639 (D B), *Hossein v. Asha Bibi*.
- ('13) 20 IC 513 (514) (DB) (Cal), *Dand Bahadur Singh v. Deo Nandan Prasad*.
- ('81) 1881 All W N 3 (3) (DB), *Girdhar Prasad v. Gaya Prasad*. (Different reliefs.)
- ('32) 138 Ind Cas 621 (622) (Lah), *Tola Ram Singh v. Shehinchi Khan*.

- (1) Mutation proceedings before revenue authorities and an application to a Civil Court under Sch. II of the Civil Procedure Code, (now repealed by Arbitration Act X of 1940) to have an award as to the family rights in the property filed and decreed upon.⁴
- (2) Suit for rent and a suit for possession⁵ or for mesne profits arising out of unlawful use or occupation.^{5a}
- (3) Suit in revenue Courts for ejectment of defendants as tenants and a suit in a civil Court for ejecting them as trespassers.⁶
- (4) A suit in Malabar founded on *kanom* right and a suit based on *jenmi* right.⁷
- (5) Suit for rent against all defendants on a *muchilika* jointly executed by them and suits for rents against each defendant under a separate contract by each.⁸

(16) 3 AIR 1916 Mad 57 (59) : 38 Mad 260 : 28 Ind Cas 290 (DB), *Mohomed Usain Kadir v. Saran Bivi Saila Ammal*.

(16) 3 AIR 1916 Mad 1010 (1010, 1011) : 31 Ind Cas 917 (DB), *Sambasiva Iyer v. Mohamed Hussain*. (Two separate proceedings in execution with different objects in view.)

(28) 15 A I R 1928 Bom 252 (256, 257) : 52 Bom 477 : 110 I C 33 (DB), *Maneklal Mansuhbhai v. Suryapur Mills Co. Ltd.*

(21) 8 A I R 1921 Cal 525 (525) : 42 Cal 65 : 57 Ind Cas 992 (DB), *Nagendra Nath Sen v. Sudhu Ram Mandal*.

(1864) 1864 Suth W R Gap 130 (130) (DB), *Wooma Churn Mitter v. Ranee Mohamaya*. (A summary proceeding for title and a subsequent suit for possession.)

(68) 9 Suth W R 570 (570) (DB), *Prodhan Gopal Singh v. Bhoop Roy*. (Suit for rent on account of lands as *mal* from defendants—Time spent in suits for rent and for small portions of land against defendants cannot be deducted.)

[See (66) 5 Suth W R 32 (33), *Kishen Mohun Koond v. Muddun Mohun Tewaree*]

4. (15) 2 AIR 1915 All 369 (371) : 38 All 85 : 31 Ind Cas 899 (DB), *Ram Ugrah v. Achraj Nath*.

5. (18) 5 A I R 1918 Cal 819 (819, 820) : 39 Ind Cas 865 (DB), *Aswani Kumar Nag v. Madhu Sudan Pal Kundu*.

(14) 1 A I R 1914 Mad 656 (656) : 23 Ind Cas 942 (D B), *Bahavaraju Venkata Subba Rao v. Yenumul Mallu Dora*.

(86) 12 Cal 258 (260, 261) (DB), *W. Sheriff v. Dino Nath Mookerjee*.

(83) 9 Cal 255 (258, 259) : 9 Ind App 82 : 12 Cal L R 129 : 4 Sar 363 : 6 Ind Jur 546 (P C), *Hurro Proshad Roy v. Gopal Das Dutt*.

(78) 3 Cal 817 (820, 823) : 2 Cal L R 450 (DB), *Hurro Pershad Roy v. Gopal Das Dutt*.

(1865) 3 Suth W R 13 (13) (DB), *Baboo Issureenud Dutt Jha v. Parbutty Churn Jha*. (Subsequent suit for mesne profits.)

[See (1864) 1 Suth W R 35 (36) (DB), *Hossien Khan v. Dinnobundhoo Pundahi*. (Subsequent suit for proprietary title and prior suit for rent.)]

5a. (39) 26 A I R 1939 Mad 724 (726) : 189 Ind Cas 204, *Satyanarayanamurthy v. Surya Rao*. (Claim for rent based on the ground of subsisting relationship between landlord and tenant cannot be held to be founded on the same cause of action as a claim for mesne profits which is based essentially on trespass.)

6. (16) 3 A I R 1916 Oudh 155 (156) : 36 Ind Cas 770, *Dondoo Singh v. Sheo Narain Singh*.

7. (1864-'65) 2 Mad H C R 266 (267) (D B), *Parakut Assen Cutty v. Edapally Chennen*.

8. (72-73) 7 Mad H C R 242 (244, 245) (DB), *G. Lee Morris v. Chinnasamy Ayyan*.

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- (6) Separate suits for the recovery of specific portions of property in the hands of co-sharers and a suit for general partition as against all the co-sharers.⁹
- (7) A proceeding before arbitrators based on an agreement to refer to arbitration, and a regular suit based on the rights of parties after setting aside the award.¹⁰
- (8) A suit to set aside an award and a suit on a promissory note executed in pursuance of the award.¹¹
- (9) A suit was instituted for the second instalment on a bond under the impression that the first instalment was beyond limitation. The plaint was returned for presentation to the proper Court. The plaintiff in presenting the suit to the proper Court included the first instalment also. It was held that the second suit was not saved by the first suit so far as the first instalment was concerned.¹²
- (10) Where a decree-holder attached a book-debt due to a judgment-debtor and purchases it himself in court-auction, a subsequent suit by him to recover the book-debt is not on the same cause of action as the attachment.¹³
- (10a) Suit by mortgagee to recover mortgage money on the ground of deprivation of security by the wrongful act or default of the mortgagor and a suit by him, after the principal has become payable, for foreclosure or sale.^{13a}
- (11) An application under O. 9 R. 2 of the Civil Procedure Code for restoration of a suit dismissed for the default of the plaintiff and a fresh suit under Order 9 Rule 4.¹⁴
- (12) A suit for accounts against the defendant as a broker in respect of cotton transactions alone and a subsequent suit against him as a commission agent in respect of cotton and also of other commodities and for certain dividends received by him on behalf of the plaintiff.¹⁵
- (13) Suit for money under an agreement and a subsequent suit for the same sum as on a settlement of accounts.¹⁶

9. ('71) 8 Bom H C R A C 228 (232, 233) (DB), *Joitaram Beehar v. Bai Ganga*.
(88) 1888 Bom P J 285, *Tukaram v. Naro*.

10. ('33) 20 A I R 1933 Nag 130 (132) : 144 I C 948 : 29 Nag L R 272, *Maharaj Sai v. Kedar Nath*.

11. ('12) 17 Ind Cas 513 (514, 515) (Mad), *Krishnaswamy v. Sitaram Chetty*.

12. ('88) 1888 Bom P J 349 (DB), *Govind v. Balakrishna*.

13. ('19) 6 A I R 1919 Mad 317 (318, 319) : 42 Mad 637 : 50 Ind Cas 380 (D B), *Rangasamy Chetty v. Thengavelu Chetty*.

13a. ('01) 4 Oudh Cas 293 (294, 295) (DB), *Sarju Prasad Singh v. Sripat Prasad Singh*.

14. ('29) 16 A I R 1929 Nag 219 (220, 221) : 25 Nag L R 99 : 116 Ind Cas 509, *Chintaman v. Kisan*.

15. ('33) 20 A I R 1933 Bom 450 (452, 454) : 145 Ind Cas 630 : 58 Bom 200 (DB), *Karsondas Dhunjibhoy v. Surajbhan Ramrijpal*.

16. ('86) 8 All 475 (478) : 1886 All W N 233 (DB), *Mangu Lal v. Kandhai Lal*.
(Per Straight, Offg. C. J.)

- (14) A suit in a British Indian Court on a foreign judgment concerning a promissory note and a suit on the promissory note itself.¹⁷
- (15) An application by an Official Receiver under ss. 53 and 54, Provincial Insolvency Act, for setting aside transfers by an insolvent and a suit by a creditor under s. 53, Transfer of Property Act, for avoiding the said alienations.^{17a} See also the undermentioned cases.^{17b}

In a suit for partition of joint family property the dispute was referred to arbitration. The question of the actual division of the properties was not referred to arbitration. But the arbitrator attempted to bring about a compromise between the parties as to this, and succeeded in doing so with reference to a large portion of the joint family property. One of the parties attempted to enforce this arrangement in the proceedings that followed the award but it was held that as the matter was outside the scope of the reference, he was not entitled to do so. Thereupon, he brought a suit for the purpose and it was held that in the previous proceeding he was founding himself on the same cause of action as that upon which the present suit was founded and that he was entitled to the benefit of this section in computing the period of limitation.¹⁸

Mere addition of a new relief in the subsequent proceeding flowing from the same cause of action would not make the subsequent proceeding one based on a different cause of action.¹⁹

19. "For the same relief" — Sub-section (2). — The words "same relief" in the section ought not to be liberally construed so as to look not to the precise relief sought in the proceedings, but to the ultimate object with which the relief is sought.^{1a} Thus, it was held that the relief sought in an abortive application to scale down the decree debt under s. 19, Madras Agriculturists' Relief Act (IV of 1938), when the trial Court's decree had been superseded by the appellate decree is not the same as the relief sought in an application to rehear the appeal, though the object with which the petitioners sought to get the appeal re-heard was to obtain an opportunity to raise the same contentions

17. ('28) 15 A I R 1928 Mad 1088 (1088) : 112 Ind Cas 139 (DB), *Rathina Thevan v. Pakrisamy Thevan*.

17a. ('42) 29 A I R 1942 Mad 483 (484) : I L R (1942) Mad 862 : 202 Ind Cas 490 (DB), *Rama Naidu v. Gangi Reddi*.

17b. ('51) 38 AIR 1951 Nag 255 (Pr 28) : I L R (1950) Nag 562 (DB), *Kashinath v. New Akot Ginning & Pressing, Co., Ltd.* (The cause of action in proceedings for winding up and the cause of action in proceedings for recovery of debts are not the same.)

('48) 35 A I R 1948 Nag 189 (194) : I L R (1947) Nag 497, *Prayagdas v. Indira-bai*. (An application for transfer of a decree sought to be executed, and an application for execution, are not founded on the same cause of action.)

18. ('39) 26 AIR 1939 P C 128 (132) : ILR (1939) Kar (P C) 211 : 181 Ind Cas 471 (P C), *Nitya Nand v. Karam Chand*.

19. ('49) 36 AIR 1949 Cal 24 (43), *Sarojendrakumar v. Purnachandra*.

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1a. ('45) 32 AIR 1945 Mad 86 (87) : (1944) 2 Mad L Jour 338, *Bacha Rowther v. Chidambaram Pillai*.

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as those which they had unsuccessfully raised in the abortive proceedings under S. 19.^{1b} The following are instances of cases in which the relief claimed in the application was held not to be the same as was claimed in the prior civil proceeding :

- (1) The relief claimed in an application for execution of a decree is the realisation of the decretal amount and is different from the relief in an application for the preparation of a final decree, viz., to pass a decree which is capable of execution.¹
- (2) A suit for injunction restraining the defendant from entering a piece of property on the ground that it belongs to the plaintiff under a court-auction purchase and a subsequent application for the execution of the balance of the decretal amount against the same property as belonging to the same defendant are for two different reliefs.²
- (3) The right to enforce a sale is not suspended on account of a suit to set aside the sale, the reliefs being different.³
- (4) The relief for possession under a sale-deed is different from a relief for damages or for a return of the purchase money in default of possession.⁴
- (5) The relief of possession is different from a relief of declaration.⁵
- (6) An application to obtain execution under a preliminary decree is not for the same relief as a subsequent application for a final decree in the suit.⁶
- (7) A suit under O. 9 R. 4, Civil Procedure Code, and an application to restore a suit dismissed for default are not for the same relief.⁷

1b. ('45) 32 A I R 1945 Mad 86 (87) : (1944) 2 Mad L Jour 338 (DB), *Bacha Rowther v. Chidambaran Pillai*.

1. ('48) 35 A I R 1948 Bom 185 (187) : 49 Bom L R 864 (DB), *Awappa v. Datto*.

('38) 25 A I R 1938 Lah 117 (119) : I L R (1937) Lah 671 : 175 Ind Cas 846 (DB), *Jodh Singh v. Firm Bhagwan Das Nanak Chand*.

('29) 16 A I R 1929 All 677 (678, 679) : 118 Ind Cas 670 (DB), *Maqbul Ahmed v. Pateshri Partap Narain Singh*.

('26) 92 Ind 299 (300) (Lah), *Mohan Singh v. Nathu Mal*.

2. ('28) 15 AIR 1928 All 368 (368, 369, 371) : 50 All 670 : 115 Ind Cas 869 (DB), *Mohsin Faiza Khan v. Haider Baksh*. (The suit was dismissed on the ground that the property did not form part of auction purchase.)

3. ('66) 6 Suth W R 57 (57) (DB), *Munno Beebee v. Nund Kishore Lall*. (Decided under S. 14, Regulation III of 1793.)

4. ('27) 14 A I R 1927 Mad 273 (277) : 100 Ind Cas 40, *Pattarachariar v. Alamelumangaiammal*.

5. See ('11) 11 Ind Cas 76 (77) : 1912 Pun Re No. 15, *Saif-ud-din v. Hansraj*.

6. ('35) 22 AIR 1935 P C 85 (86, 87) : 155 Ind Cas 205 : 62 Ind App 80 : 57 All 242 (PC), *Maqbul Ahmad v. Onkar Pratap Narain Singh*.

('35) 22 AIR 1935 All 323 (324, 325, 327) : 153 I C 1058 (DB), *Muhammad Yunis v. Tilok Chand*. (Compromise decree on a mortgage—Execution application dismissed for want of a final decree Subsequent application for final decree.)

7. ('29) 16 AIR 1929 Nag 219 (221) : 25 N L R 99 : 116 I C 509, *Chintaman v. Kisan*.

('86) 1886 Pun Re No. 63, *Sheoji Ram v. Sheo Chand Rai*.

- (8) An application by the judgment-debtor to have an *ex parte* decree set aside is not for the same relief as an application for execution of the same decree.⁸
- (9) An application under O. 21 R. 89 of the Civil Procedure Code is for a different relief from one claimable under O. 21 R. 90.⁹
- (10) A revision from a judgment of a Small Cause Court is for a different relief from a revision from an infructuous prior appeal from a previous decree of the Small Cause Court in the same matter.¹⁰
- (11) A suit by decree-holder for a declaration under O. 21 R. 63, Civil Procedure Code, with respect to one set of properties and an application for execution in respect of other set of properties of the judgment-debtor are for different reliefs.¹¹
- (12) An application to have the judgment-debtor adjudged an insolvent is not for the same relief as a subsequent application for execution against the judgment-debtor.¹² See also the undermentioned case.¹³

20. "In good faith." — Section 2, sub-s. (7), provides that "nothing shall be deemed to be done in good faith which is not done with due care and attention." The General Clauses Act (X of 1897) in S. 3 defines 'good faith' as follows: "A thing shall be deemed to be done in 'good faith' where in fact it is done honestly, whether it is done negligently or not." Looking at these two definitions, the one given by the Limitation Act is stricter than the other. And, inasmuch as the definition found in the General Clauses Act is not applicable

8. ('32) 19 AIR 1932 All 601 (602) : 132 Ind Cas 692 (DB), *Sukhnandan Singh v. Mt. Ramdevi Kunwar*.

9. ('34) 21 AIR 1934 Mad 593 (593, 594, 596) : 152 Ind Cas 519 (DB), *Chidambaram Chettiar v. Annamalai Chettiar*.

10. ('10) 8 Ind Cas 318 (318) : 1910 Pun Re No. 92, *Behari Lal v. Kalu*.

11. ('38) 25 AIR 1938 Nag 534 (537) : ILR (1940) Nag 334 : 180 Ind Cas 903 (DB), *Rajaram Daduji v. Paiku*.

12. ('51) 38 A I R 1951 S C 16 (Pr 5) : 1950 S C R 852 (S C), *Yeshwant v. Walchand*. (There can be no exclusion under S. 14, Limitation Act, of time occupied by the insolvency proceedings against the judgment-debtor in computing the period of limitation for executing a decree against him as the proceedings are not for obtaining the same relief.)

(49) 36 AIR 1949 Bom 379 (382) : I L R (1949) Bom 634 (DB), *Walchand v. Yeshwant*. (A I R 1943 Mad 457, dissent.; A I R 1944 Lah 136 : ILR (1944) Lah 451 (FB), followed.)

(44) 31 AIR 1944 Lah 136 (141) : ILR (1944) Lah 451 : 217 Ind Cas 65 (FB), *Jai-kishen v. Peoples Bank*. (('35) AIR 1935 Lah 736 (DB), *Lorind Chand v. Bahadurkhan*, Overruled.)

[See however ('43) 30 AIR 1943 Mad 457 (458) : 213 Ind Cas 27, *Vaithlinga v. Narayanaswami*. (The relief asked for in each should be deemed to be the same so as to attract the application of S. 14.)]

13. ('44) 31 AIR 1944 Mad 67 (69) : ILR (1944) Mad 410 : 215 Ind Cas 318 (D B), *Chidambaram Chettiar v. Meyyappa Chettiar*. (Administration suit by creditor—Decree-holders of debtor made defendants—Objection by latter to maintainability of suit—Dismissal of suit—Execution of decrees—Limitation—Period of pendency of administration suit cannot be excluded under S. 14 (2), as reliefs are not same.)

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where there is anything repugnant in the subject or context, the definition given in the Limitation Act alone is applicable in construing S. 14 of the Act.¹ This section cannot, therefore, help a party who is guilty of *negligence*, *laches* or *inaction*.²

There can be no hard and fast rule as to what amounts to good faith. It is a matter to be decided on the facts of each case.³ It will, in almost every case, be more or less a question of degree, and the same course of action, which on the part of a person within reach of skilled advice would indicate bad faith or want of diligence might be consistent with good faith in a mofussil community unfamiliar with the refinements of law.⁴ It would be a fair working rule, however, to lay down that indulgence should be granted only where the error is one which might be committed by a reasonable and prudent man exercising due diligence and caution.⁵ An error of judgment is quite a

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1. ('12) 13 Ind Cas 260 (260) : 5 Sind L R 181, *Manghanmal Lalchand v. Fernandez*.
[See ('38) 25 AIR 1938 Nag 300 (303) : ILR (1939) Nag 422 : 179 Ind Cas 837, *Dinkarrao Dharrao v. Ratansi Asaram*. ('Good faith' as used in S. 14 means exercise of due care and attention.)]
2. ('48) 35 AIR 1948 Nag 189 (194) : ILR (1947) Nag 497, *Prayagdas Shankarlal v. Indirabai*. (Omission to set out mode of execution and property to be attached and sold in execution application.)
(46) 33 AIR 1946 Pat 301 (303) : 25 Pat 50 : 226 Ind Cas 195 (DB), *Inderdeo v. Deonarayan*. (Decree-holder allowing his application to be dismissed for default thrice - Decree-holder held had not shown due diligence.)
(41) 28 AIR 1941 Lah 256 (257) : 199 Ind Cas 866, *Amar Nath v. Basant Ram*. (Where the plaintiff had not only failed to give notice but also failed to implead an obviously necessary party, it would be impossible to hold that there has not been gross negligence.)
(38) 25 AIR 1938 Cal 377 (380) : 62 Cal 510 : 164 Ind Cas 111 (DB), *Ghisulal Goneehilal v. Gumbhirmull*. (Plaintiff and his attorney knowing that leave of Court under Cl. 12, Letters Patent, would be necessary but not making application for it—Nor, if application had been made, ascertaining whether leave has been granted or not—Besides this, in spite of defendant's plea in written statement that Court had no jurisdiction, plaintiff and attorney not taking trouble to ascertain meaning of that plea—Plaintiff and attorney held could not be said to be prosecuting case in good faith.)
(32) 19 AIR 1932 Oudh 220 (222) : 138 Ind Cas 149 (DB), *Jagmohan Tewari v. Mahdeo Prasad*. (Filing an execution application in a wrong Court.)
(23) 10 AIR 1923 Nag 241 (242, 243) : 74 Ind Cas 317, *Sheonarayan v. Rampasad*. (Deliberate refusal to amend plaint, thus protracting prior proceedings.)
(30) 17 AIR 1930 Pat 54 (58) : 8 Pat 851 : 122 Ind Cas 241 (DB), *Narpat Singh v. Mahidhar Jha*.
(11) 11 Ind Cas 338 (339) (DB) (Mad), *Kakamani Rayappa v. Kotta Venkanna*. (Omission take steps in pending execution petitions.)
(75) 7 N W P H C R 284 (285, 287) (DB), *Bahal Singh v. Gauri*. (Gross negligence in framing suit, without ascertaining whether defendant was a major or minor and then impleading a person as guardian without ascertaining if the latter was legally constituted guardian.)
(90) 3 C P L R 134 (134), *Krishna Lodhi v. Sheoram Patel*.
3. ('16) 3 AIR 1916 Sind 82 (83) : 9 Sind L R 167 : 32 Ind Cas 616 (DB), *Gehimal v. Manager, Encumbered Estates, Sind*.
4. ('78) 3 Bom 182 (184) (DB), *Sheth Kahandas Narandas v. Dahiabhai*.
5. ('38) 25 AIR 1938 Lah 704 (706) : 181 Ind Cas 290 (SB), *Maya Singh v. Udham Singh*. (Plaintiff filing a suit in Court A alleging that the defendant resided

different thing from bad faith.⁶ There must be no pretended mistake intentionally made with a view to delay proceedings or harass the opposite party.⁷

Burden of proof of good faith.—The person claiming the benefit of this section must prove that he acted in good faith in instituting the earlier proceedings.^{7a}

Honest doubt.—An honest doubt as to whether a suit lies in one Court or another is covered by the expression 'good faith,' the test being one of honesty with due care and caution.⁸ The mere fact that the question of jurisdiction is an arguable one does not negative good faith provided the party *believed bona fide* that the Court in which he instituted the proceedings had jurisdiction in the matter.⁹ If in addition to this, the Court in which the prior proceedings were pending also thought that they were in the proper Court, there can be no question of bad faith.¹⁰

Wrong valuation of suit. — If the plaintiff gave *bona fide*, a particular value to the suit property but the Court, on trial, found the value to be different and returned the plaint for want of jurisdiction,

within its jurisdiction — Defendant not residing but only having land within the jurisdiction—*Held* that the suit was filed in good faith.)

('16) 3 AIR 1916 Oudh 139 (140) : 19 Oudh Cas 367 : 36 Ind Cas 702, *Ram jag v. Bhagwan Dat.* (Filing prior plaint on last day of limitation in a patently wrong Court.)

6. ('28) 112 Ind Cas 715 (717) (DB) (All), *Firm Baldeo Prasad Babu Ram v. Firm Haji Ali Mahomed Usman.*

7. ('93) 6 C P L R 85 (86), *Jagannath Kewalram v. Mt. Chandbi.*

7a. ('41) 28 AIR 1941 Mad 319 (320) : ILR (1941) Mad 347 : 194 Ind Cas 328 (FB), *Gnanacharaya Swamigal v. Saravana Perumal Pillai.* (('37) 1937 M W N 465 (DB), *Alagappa v. Somasundaram*, overruled ; ('74) 21 Suth W R 97 (PC), *Benodram v. Brojendro Narain*, distinguished.)

[See also ('47) 51 Cal W N 907 (908), *Bibhuti Bhusan v. Tarakeswar.* (No material from which it can be inferred that the previous suit was prosecuted by the plaintiff in good faith — S. 14 cannot be invoked.)]

8. ('32) 19 AIR 1932 All 377 (378) : 138 Ind Cas 108 (DB), *Mt. Ram Pati v. Phool Singh.* (Subsequent admission of want of jurisdiction and return of plaint by Court does not affect good faith.)

('33) 20 AIR 1933 Sind 317 (319, 320) : 27 Sind L R 101 : 150 Ind Cas 279 (DB), *Mt. Shamul v. Dost Mahomed Khan.*

('09) 3 Ind Cas 79 (80) (DB) (All), *Jadu Rai v. Ganesh Prasad.*

[See ('18) 5 AIR 1918 Cal 986 (986, 987) : 46 Ind Cas 116 (DB), *Rupa Thakurani v. Kumudnath.* (*Bona fide* construction of a notification as to Courts in which to present an appeal.)

('96) 23 Cal 526 (531) (DB), *Balaram Bhramaratar Roy v. Sham Sunder Narendra.*]

9. ('33) 20 AIR 1933 Lah 264 (264, 265) : 144 Ind Cas 184, *Bhagwan Das v. Tikaya Ram.*

10. (78) 3 Bom 182 (183, 184, 185) (DB), *Sheth Kahandas Narain Das v. Dahiabhai.*

('17) 4 AIR 1917 All 122 (123) : 40 Ind Cas 447, *Ford & Macdonald Ltd. v. A. D. Meyer.*

('96) 19 Mad 67 (69) (DB), *Barrow v. Javerchund Sett.* (Prior execution petition.)

('96) 19 Mad 90 (93, 94 95) (DB), *Subbarau Nayadu v. Yangana Pantulu.* (Enabling rule subsequently declared *ultra vires.*)

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it is a case of good faith.¹¹ But knowingly to undervalue the subject-matter of the suit so as to bring it in a wrong forum,¹² or to present a plaint to a wrong Court when the plaint valuation patently took the suit out of its cognizance,¹³ is not consistent with good faith. Where the circumstances are such as would justify either of the two views as regards the value of the suit property, the plaintiff will not be regarded as having acted dishonestly and without due care and attention because he follows the view which is more advantageous to him.^{13a}

Wrong choosing of forum. — If a plaintiff, having a right to institute a suit in different Courts, elects to sue in the Court in which the defendant was an officer in the hope of getting his money paid easily, there is nothing *mala fide* in his conduct.¹⁴ Nor is the plaintiff bound to look to the convenience of the other party in choosing the Court.^{14a} But where the plaintiff, with a view to have an advantage over the defendant of another province, makes a false allegation of fact in the plaint in order to enable himself to sue in a place most convenient to himself, there is no good faith.¹⁵ The prosecution of a proceeding in a wrong forum owing to the *bona fide* mistake of the

11. ('32) 19 AIR 1932 Cal 504 (506) : 138 Ind Cas 349 (DB), *Mohendra Nath Baychi v. Tarak Chandra*.
- ('33) 20 AIR 1933 Lah 652 (653) : 146 Ind Cas 125, *Mulchand v. Allah Yar Khan*. (Opposite party and Court taking no objection at first; in course of trial, Judge taking point of valuation *suo motu* and returning plaint.)
- ('14) 1 AIR 1914 Oudh 282 (282, 283) : 17 Oudh Cas 210 : 25 Ind Cas 403, *Ram Dayal v. Sarju Prasad*. (Under-valuation not deliberate, reckless or *mala fide*, though plaintiff later admits value to be higher.)
- ('81) 7 Cal 284 (286, 287) (DB), *Obhoy Churn Nundi v. Kritarthamoyi Dossee*. (Court holding that there was over-valuation.)
- ('98) 1 Oudh Cas 272 (276), *Mt. Tulsha v. Mahadeo Perhal*.
- ('68) 1 Beng L R (S N) 12 (C) (DB), *Chandi Dasi v. Jankiram*.
12. ('45) 32 AIR 1945 Pat 369 (371) : 24 Pat 462 (DB), *Ramchandra Singh v. Khodaijatul*.
- ('40) 27 AIR 1940 Mad 689 (691) (DB), *Chandrayya v. Seethanna*. (AIR 1939 Mad 397 reversed.)
- ('19) 6 AIR 1919 Pat 345 (348, 349) : 53 Ind Cas 892 (DB), *Sairah Bibi v. Gulab*.
- ('12) 14 Ind Cas 86 (87, 90) (DB) (Oudh), *Rukaiya Bibi v. Mubarak Ali*. (Pre-emption suit—Price in sale deed alleged to be fraudulent and market value given in plaint deliberately understated.)
13. ('19) 6 AIR 1919 Oudh 378 (379) : 51 I C 590 : 22 Oudh Cas 39, *Ram Sahu v. Imdad Husain*.
- ('16) 3 AIR 1916 Oudh 139 (140) : 19 Oudh Cas 367 : 36 Ind Cas 702, *Ram Jag v. Bhagwan Dat*.
- 13a. ('38) 25 AIR 1938 Nag 300 (303) : 1 L R (1939) Nag 422 : 179 Ind Cas 837, *Dinkarrao Dharrao v. Ratansi Asaram*.
14. ('19) 6 AIR 1919 Lad 845 (845) : 47 Ind Cas 624 (D B), *Ramlingam Ayyar v. S. Subbier*.
- 14a. ('39) 26 AIR 1939 Pat 86 (89) : 182 Ind Cas 632 (DB), *Kaluram v. Janistha Lal*. (Plaintiff's choosing Court inconvenient to defendant does not constitute lack of good faith.)
15. ('12) 14 Ind Cas 19 (23) (DB) (Lah), *Sham Lal v. Baink Mal*.
[See however ('12) 14 Ind Cas 86 (88) (DB) (Oudh), *Rukaiya v. Mubarak Ali*. (Motive immaterial in considering good faith.)]

counsel is protected by the section.¹⁶ But a legal adviser's mistake, by itself, is no test of *bona fides*. The mistake must be *bona fide*, i. e., the legal adviser should have acted with due care and attention.¹⁷ *Bona fide* ignorance of facts determining correct jurisdiction is covered by the section.^{17a} Where the plaintiff institutes a suit in the proper Court but, due to the mistake of the Court, he is driven from Court to Court and ultimately required to file the suit again in the same Court, the time occupied by these proceedings must be excluded under this section.^{17b}

16. ('27) 14 AIR 1927 All 719 (719) : 101 Ind Cas 750 : 49 All 555 (DB), *Kishan Lal v. Tika*.

('33) 20 AIR 1933 Lah 541 (541, 542) : 14 Lah 206 : 149 I C 968 (DB), *Ghulam Muhammad v. Usman*. (A leading pleader's advice on the authority of certain rulings.)

('33) 20 AIR 1933 Oudh 231 (233) : 8 Luck 646 : 150 Ind Cas 533 (D B), *Mahabir Singh v. Mt. Radha*.

[See also ('21) 8 AIR 1921 Bom 302 (302, 303) : 45 Bom 607 : 60 I C 744 (DB), *Dattatraya Sitaram v. Secretary of State*.

('18) 5 AIR 1918 Bom 228 (229) : 46 I C 14 : 42 Bom 295 (DB), *Bai Nemathu v. Bai Nemathullabai*. (First review application to wrong Court—Second application to right Court—Applicant Muhammadan female.)]

17. ('44) 31 AIR 1944 Mad 47 (49) : 211 Ind Cas 480, *Rajharayya v. Vasudevayya Chetty*.

('38) 25 AIR 1938 Oudh 112 (114) : 173 I. C. 956 (DB), *Ram Dutta v. Mahpal Singh*. (Where a decree in the nature of a foreclosure decree was passed by an Additional Subordinate Judge, but the application for making it final was made to another of co-ordinate jurisdiction, on the advice of counsel, it was held that it was a case of gross negligence and hence the applicant was not entitled to the benefit of Section 14.)

('33) 20 AIR 1933 Lah 568 (569) : 144 Ind Cas 627 (DB), *Uttam Chand v. Vishan Das Bhagwan Das*. (The question of jurisdiction beyond all doubt — Held no *bona fide* mistake.)

('15) 2 AIR 1915 Low Bur 145 (146) : 8 Low Bur Rul 146 : 27 Ind Cas 829 (DB), *Maung Tun U v. Palaniappa Chetty*.

('33) 20 AIR 1933 Lah 541 (541, 542) : 14 Lah 206 : 149 Ind Cas 968 (DB), *Ghulam Muhammad v. Usman*. (A leading practitioner acting on the strength of certain decided cases of the High Court.)

('38) 25 AIR 1938 Cal 377 (379) : 164 I. C. 111 (114) : 62 Cal 510 (DB), *Ghishulal Goneshilal v. Gumbhirmull Pandya*. (Negligence of pleader and attorney in not obtaining leave required in law.)

('19) 6 AIR 1919 Oudh 378 (379) : 22 Oudh Cas 39 : 51 Ind Cas 590, *Ram Sahu v. Imdad Husain*.

[See ('26) 93 Ind Cas 876 (876, 877) (Lah), *Lathu Ram v. Muhammad Din*.]

17a. ('10) 6 Ind Cas 154 (155, 157) (DB) (Cal), *Basiruddin Mondal v. Sonaulah Mondal*. (Petition to set aside *ex parte* decree — Later discovery that decree was made on Small Cause side — Security required by law furnished subsequently — Time excluded.)

17b. ('35) 22 AIR 1935 Oudh 501 (503) : 158 I. C. 267 (DB), *Gappoo Singh v. Haracharan*. (Suit filed in Court of Subordinate Judge Court directing plaintiff to file it in the Court of Additional Sub-Judge who subsequently found that he had no jurisdiction and hence the suit was again filed in the original Court — S. 14 applied.)

('25) 12 AIR 1925 Oudh 493 (494) : 89 I. C. 443, *Raghubar Dayal v. Kanhaiya Bux*.

[See also ('41) 28 AIR 1941 Cal 493 (495) : 196 Ind Cas 534, *Meghraj Golab Chand v. Chandra Kamal*. (Execution petitions filed in competent Court —

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Error of law. — Whether an *error or mistake of law* entitles a person to the benefit of this section has been the subject of some difference of opinion. Some rulings incline to the view that as ignorance of law is no excuse it cannot be a ground of claim under the section.¹⁸ On the other hand, it has been observed that though every one is supposed to know the law and the law is always certain, if that principle is to be strictly applied, then section 14 of the Act would be useless.¹⁹ A *bona fide* mistake of law has, therefore, been held to be a sufficient ground for treating the proceedings to be in good faith.²⁰

Last petition dismissed by Court on erroneous ground that it had no jurisdiction — No question of bad faith can arise and all petitions could be availed of to save limitation under S. 14]

18. ('24) 11 AIR 1924 Pat 716 (717): 78 I. C. 482, *Sheo Dhari Ram v. Guptheswar*. (Ignorance of law is *per se* want of good faith, i. e., due care and attention.)
- ('88) 10 All 587 (597, 598): 1888 All W N 258 (DB), *Ramjiwan Mal v. Chand Mal*. (Mahmood, J. — Section 14 refers only to *bona fide* mistakes of fact and not of law — But this was *obiter*, the case dealing only with S. 5 — This was disapproved in 19 All 348 (FB).)
- ('88) 11 All 408 (414): 1888 All W N 111 (DB), *Chajmal Das v. Jagadamba Prasad* (*Obiter*.)
- ('90) 12 All 461 (482): 1890 All W N 149 (FB), *Bechi v. Ahsanullah Khan*. (Per Mahmood, J. — *Obiter*.)
19. ('89) 12 Mad 467 (471) (DB), *Kullayappa v. Lakshmipathi*.
20. ('41) 28 AIR 1941 Pesh 3 (5): 192 I. C. 758 (DB), *Peoples Bank of Northern India Ltd. v. Firm Lekhu Ram & Sons*. (Award between Bank and private individual — Bank in good faith carrying on proceedings for execution of award in Sub-Judge's Court — Subsequent ruling declaring that awards such as one in question were cognizable by District Judge — Bank held entitled to benefit of S. 14.)
- ('40) 27 AIR 1940 Oudh 412 (413): 190 Ind Cas 93, *Ram Shankar v. Bechan Chaudhari*. (AIR 1937 All 333 followed — Suit instituted in wrong Court due to ignorance of S. 7 of U. P. Agriculturists' Relief Act held *bona fide*.)
- ('37) 24 AIR 1937 All 333 (334): 168 Ind Cas 936, *Ahmed v. Ram Chander*. (19 All 348 (FB) followed — Suit instituted in wrong Court due to ignorance of S. 7A of the U. P. Agriculturists' Relief Act passed only a short time before the institution of the suit — Proceedings held carried on in good faith.)
- ('97) 19 All 348 (349, 351, 352): 1897 All W N 86 (FB), *Brij Mohan v. Mannu Bibi*. (Suit under O. 21 R. 63, C. P. C. — Mistake of law in supposing that jurisdiction was determined by value of property attached and not the value of the decree.)
- ('99) 26 Cal 414 (416, 417): 3 Cal W N 233 (FB), *Bishambhur Haldar v. Bonomali Haldar*. (*Bona fide* mistake of law upon a doubtful point of jurisdiction or procedure is as much entitled to benefit of S. 14 as a *bona fide* mistake of fact.)
- ('21) 8 AIR 1921 Oudh 100 (100, 101): 61 Ind Cas 203: 24 Oudh Cas 137, *Bahadur Khan v. Abbu Saheb*.
- ('16) 3 AIR 1916 Sind 82 (83, 84): 9 Sind L R 167: 32 I. C. 616 (DB), *Gehimal v. Manager Encumbered Estates, Sind*. (Omission to give notice under S. 80, C. P. C., before suit, relying upon a ruling of the High Court that it is not necessary in injunction suits.)
- ('12) 13 Ind Cas 260 (260, 261): 5 Sind L R 181, *Manghammal Lal Chand v. Fernandez*. (But a deliberate omission to give notice required under S. 80, C. P. C., to secure an advantage over the defendant is not in good faith.)
- ('36) 23 AIR 1936 Rang 184 (185, 186): 162 Ind Cas 865, *M. P. L. Chettiyar Firm v. Vanappa Chettiar*. (Especially where there is no clear indication in the law as to the proper procedure. There is no clear indication in the C. P. C.,

But, as a general rule, proceedings contrary to a *clearly expressed* provision of law cannot be said to be prosecuted in good faith.^{20a} Thus, an application in reckless disregard of the provisions of O. 21, R. 16 of the Civil Procedure Code will not be deemed to be in good faith.^{20b} Where the circumstances are such, that the party ought to have known the law, there can be no *bona fide* mistake,²¹ as for example, where the party is a Deputy Commissioner who has a Government Pleader for his legal adviser.²² So also, when the law clearly requires an application to be made to a *Court* but the party presents it to the Collector or a revenue officer, he cannot be credited with good faith.²³

as to the proper procedure to be followed in respect of an order by an executing Court to which a decree has been transferred staying the execution of decree under O. 21 R. 29. Hence time spent in appeal should be excluded from time for revision application.)

('28) 15 AIR 1928 Nag 227 (228): 107 Ind Cas 910, *Sadashiv Rao v. Laxman Sao*. (Suit wrongly filed in civil Court for apportionment of land revenue—The civil Courts had jurisdiction before the then new Land Revenue Act)

('09) 3 Ind Cas 79 (80) (DB) (All), *Jadu Rai v. Ganesh Parshad*. (Circumstances leading both parties to entertain doubts as to proper forum for institution of suit present.)

('96) 20 Bom 133 (143, 144) (DB), *Ram Ravji Jambhekar v. Prahaladdas Subkarn*. (Error of law does not by itself negative *bona fides*.)

('01) 28 Cal 238 (241): 5 Cal W N 150 (DB), *Sheik Jafar v. Kamalini Debi*. (Execution application made *bona fide* to wrong Court—Time excluded.)

('89) 13 Mad 394 (395) (DB), *Hall v. Venkatakrishna*.

('82) 1882 All W N 59 (59) (DB), *Seth Mul Chand v. Seth Samir Mal*. (Preferring an appeal from an adverse order under S. 73, C. P. C., instead of a suit.)

[See ('88) 10 All 524 (529, 530): 1888 All W N 218 (DB), *Jaglal v. Har Narain Singh*. (Prior proceedings in Court without jurisdiction in point of value of subject-matter—No *bona fides*.)]

20a. ('43) 30 AIR 1943 Oudh 453 (455): 19 Luck 279: 209 Ind Cas 129 (DB), *Durga Prasad v. Kunj Behari*. (Section 14 (2) is not meant to cover cases in which the holder of a mortgage decree attempts to proceed against other property without exhausting the property held under the mortgage.)

('40) 27 AIR 1940 Bom 5 (9): 187 I. C. 85, *Brij Mohandas Damodardas v. Sadashiv Laxman*. (AIR 1929 Rang 297 relied on.)

('29) 16 AIR 1929 Rang 297 (298): 7 Rang 466: 120 Ind Cas 236 (DB), *Firm S. R. M. M. A. v. Maung Po Saung*. (Person not filing a suit as provided in C. P. C., O. 21 R. 63 but preferring revision—*Hell* that time could not be excluded under Section 14.)

20b. ('40) 27 AIR 1940 Bom 5 (9): 187 Ind Cas 85, *Brijmohandas Damodardas v. Sadashiv Laxman*.

21. ('11) 11 Ind Cas 880 (881): 1912 Pun Re No. 22, *Moti Singh v. Maghar*. (Sufficient publication of a ruling that no appeal at all lay.)

22. ('33) 20 AIR 1933 Lah 58 (58): 145 Ind Cas 245, *Deputy Commissioner, Jhang v. Devi Ditta*.

('86) 23 AIR 1936 Lah 857 (858): 167 Ind Cas 501, *Jhanda Ram Wadhava Ram v. Allah Yar*.

('33) 20 AIR 1933 Lah 589 (589): 144 Ind Cas 690, *Deputy Commissioner, Jhang v. Shankar Das Lachman Das*.

23. ('20) 7 AIR 1920 Bom 130 (130, 131): 44 Bom 50: 54 I. C. 670 (DB), *Tipan-gavda v. Ramangavda* (Application to set aside sale on deposit under O. 21, R. 89, Civil Procedure Code.)

('99) 23 Bom 531 (532, 533, 535): 1 Bom L R 33 (DB), *Narayan v. Rasulkhan*. (Government rules and decided cases (in Bombay) being clear that Collector has

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Similarly, the prosecution of an execution petition wrongly in the Court of a Munsif by negligence, while previous petitions were presented in the Court of a Subordinate Judge whose decree it was, cannot be deemed to be in good faith.²⁴

The prosecution of a wrong proceeding induced by a *bona fide* mistake is covered by the section. An assignee of a mortgage decree passed in terms of a compromise applied, in execution, for the sale of properties, other than the property mortgaged which had been already sold under the decree in satisfaction of a portion of the decree amount. The judgment-debtor objected that no personal decree under O. 34 R. 6 of the Civil Procedure Code had been obtained and that, as such, the execution was not sustainable. The first Court held in favour of the assignee decree-holder on the ground that the decree being a compromise decree, no personal decree was necessary. On appeal, the High Court, however, upheld the judgment-debtor's objection and dismissed the execution. The assignee then made an application for a decree under Order 34 Rule 6 and when the records were looked into in that connexion, it was discovered that the *assignor* himself had obtained a decree under O. 34 R. 6. The assignee then filed a second application for execution and the period between the date of the prior application for execution and the date of the discovery of the existence of the decree under O. 34 Rule 6 was deducted as being spent in good faith under a mistake of fact.²⁵ A claim petition against an attachment of property was wrongly described by the claimant as falling under O. 21, R. 58 of the Civil Procedure Code instead of section 47. Misled by this mistake, the opposite party, the decree-holder, filed a claim suit in which it was held finally by the High Court that an appeal, and not a suit, lay from the original claim order. In the appeal subsequently filed, it was held that the prosecution of the claim suit and the appeals therefrom was in good faith.²⁶

Suppose a person does not file a suit within one year from an adverse order made against him as provided in O. 21 R. 63 or R. 103 of the Civil Procedure Code, but prefers an appeal or a revision petition from the adverse order, not doing so under any mistake; can it be said that he is prosecuting the latter proceeding in good faith? It has been held in some cases²⁷ that the prosecution of such a proceeding

no power to entertain an application to set aside a sale by him in execution of decree under Civil Procedure Code.)

[See ('78) 1878 Pun Re No. 52, *Khana v. Hossein Khan*.]

24. (27) 14 AIR 1927 Pat 256 (256, 257) : 101 Ind Cas 674 (DB), *Fazul Jamil v. Helaluddin*.

25. ('20) 7 AIR 1920 Pat 462 (462, 463) : 58 Ind Cas 40 (DB), *Karimulla Shah v. Mirza Mohamed Raza*.

26. ('30) 17 AIR 1930 Pat 307 (307, 308) : 129 Ind Cas 660 (DB), *Jiwan Ram Ram Chander v. Hazari Lal Bhagat*. (Section 14 though not applicable to appeals was applied in this case to appeal.)

27. ('30) 17 AIR 1930 Bom 505 (505, 506) : 128 Ind Cas 621, *Narayan Ambaji v. Hari Ganesh*.

('29) 16 AIR 1929 Rang 297 (297, 298) : 7 Rang 466 : 120 Ind Cas 236 (DB), *S. R. M. M. A. Firm v. Maung Po Saung*.

is not in good faith because it is contrary to the clearly expressed provision of law and because also the High Court, in revision, is known not to interfere when another remedy is open. But this rule is not to be rigidly enforced, as good faith should be ascertained with reference to particular facts and circumstances of each case.²⁸ But the period during which the party was contemplating revision cannot be deducted.²⁹ See also Note 14 above.

Where there is no clear indication in the law as to the proper procedure, a party taking a proceeding, believed to be open to him, cannot be said to be wanting in good faith.³⁰

The fact that the Court considered the prior proceeding as misconceived cannot, by itself, negative good faith where the party, acting on legal advice, *bona fide* believed that the action was sustainable.³¹

(15) 2 AIR 1915 Low Bur 145 (146) : 8 Low Bur Rul 146 : 27 Ind Cas 829 (DB), *Mg. Tun U v. Palaniappa Chetty*.

(1864) 1864 Suth W R (Gap) 371 (372, 373) (DB), *Ramdas Baboo v. R. Watson & Co.* (Appeal)

(68) 3 Agra 39 (39) (DB), *Futteh Ram v. Manohur Lall*. (Do.)

(15) 2 AIR 1915 Mad 405 (407) : 26 Ind Cas 219: 39 Mad 62 (DB), *Baiznath Lala v. Ramadass Doss* (Adverse order under S. 73, Civil Procedure Code, for rateable distribution—Revision instead of filing suit.)

28. ('43) 30 AIR 1943 Mad 633 (636): 213 IndCas 236, *Venkataswami v. Sara Bai*. (Claim order under O. 21 R. 58, Civil P. C.—Revision application Dismissal—Subsequent suit under O. 21 R. 63, Civil P.C.—In view of practice of Madras High Court to interfere in revision with orders on claim petition, filing of revision does not amount to negligence — Time spent in revision proceedings can therefore be excluded under S. 14 (1) : ('37) 1937 M W N 465 (1) (DB), *Alagappa v. Somasundaram*, Applied ; ('15) A I R 1915 Low Bur 145: 8 L B R 146 (DB), *Mg. Tun U v. Palaniappa*, Dissent.; ('15) A I R 1915 Mad 40 (DB), *Baiznath v. Ramadass*, Expl.)

('31) 18 AIR 1931 Nag 17 (19) : 27 Nag L R 251 : 130 Ind Cas 145, *Laxman Das v. Chunnilal*. (The party may have reasonable grounds for believing that he would succeed in revision.)

29. ('31) 18 AIR 1931 Nag 17 (19) : 27 Nag L R 251 : 130 Ind Cas 145, *Laxman Das v. Chunnilal*.

30. ('41) 28 AIR 1941 Pesh 85 (86) : 197 Ind Cas 183, *Mohd. Azim v. Bhagat Ram*. (Order under N. W. F. P. Agriculturists Debtors Relief Act, 4 of 1939 — Whether appeal or revision competent difficult to ascertain from N.-W. F. P. Act, 4 of 1939 — Trend of decisions on aforesaid point not known — Appeal by judgment-debtor — Judicial Commissioner's judgment holding appeal incompetent — Appellate Court in pursuance of aforesaid judgment dismissing appeal — Revision by judgment-debtor — Judgment-debtor held entitled to deduct time spent in prosecuting appeal under S. 14, Limitation Act.)

('36) 23 A I R 1936 Rang 184 (185, 186) : 162 I. C. 865, *M. P. L. Chettiar Firm v. Vanappa Chettiar* (An order under O. 21 R. 29, C. P. C., by transferee Court staying execution of the decree — Whether an appeal lies in respect of such an order is not clearly indicated in the Civil Procedure Code.)

31. ('33) 20 AIR 1933 Mad 197 (199, 200) : 140 Ind Cas 270 (DB), *Narasimha-charyulu v. Appa Rao*. (Application in the executing Court under S. 47, C.P.C., by a judgment-debtor that the decree is not binding on him by reason of fraud of guardian *ad litem* and resisting attachment in execution of that decree.)

('13) 20 Ind Cas 3 (6, 7) (DB) (Lah), *Mt. Husaina v. Mt. Sahib Nur*. (Prior proceedings prosecuted on advice of one of the leading counsel of the province)

[See ('07) 29 All 628 (639, 640) : 1907 All W N 219 : 4 All L Jour 515, *Anjora Kunwar v. Babu*. (Case of an appeal.)

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Where two Courts concur in decreeing a plaintiff's claim, it is difficult to hold that the claim is not *bona fide*, although the final Court of appeal dismissed it.³² But a clearly unnecessary and unsustainable action is not taken into account.³³ The plaintiffs sued for possession alone and obtained a decree. They, subsequently, sued for mesne profits and claimed to deduct the period occupied by a proceeding carried on by them for mesne profits by way of restitution under the former decree. The application for restitution was held not to be in good faith the former suit and decree being only for possession.³⁴

The prosecution of an application to sue in *forma pauperis* made *mala fide* as to pauperism cannot entitle the party to the benefit of this section.³⁵

21. "Good faith," whether a question of fact — It has been held in some cases¹ that whether a person has acted in good faith

(1865) 3 Suth W R 101 (101, 102)(DB), *Shah Karamut Hossein v. Golab Koonwur*. (Form of suit erroneous—Time excluded.)]

32. ('25) 12 AIR 1925 Cal 456 (460): 86 I. C. 130 (DB), *Dina Nath v. Jadu Nath*. ('21) 8 AIR 1921 Sind 13 (15): 15 Sind L R 11: 62 Ind Cas 507 (DB), *Ibrahim v. Ghulam Hussain*.

[See ('40) 1940 Oudh W N 818 (819), *Birendra Kant Singh v. Jageshar Singh*. (First Court holding that the proceedings were legal while the second Court holding otherwise—Held that the proceedings were *bona fide*.)]

[See also ('35) 22 AIR 1935 Pat 82 (83):153 I.C. 155 (DB), *Brijlal v. Jnanendra*.]

33. ('38) 25 AIR 1938 Rang 318 (318, 319): 177 Ind Cas 923 (DB), *Hasanar v. Kandan Chettyar*. (An unnecessary application prosecuted under the belief that there existed an order which, in fact, was non-existing.)

('87) 1887 All W N 198 (198), *Madho Rai v. Raj Kali Kuar*. (Instead of executing a decree already obtained, the plaintiff filed a fresh suit on the same cause of action and after its dismissal applied for execution of the former decree—Held, the second suit was not in good faith.)

('22) 9 AIR 1922 Mad 417 (418, 420): 70 Ind Cas 743 (DB), *Ganapathi Mudaliar v. Krishnamachari*. (The time taken up in prosecuting a wholly misconceived proceeding by way of a suit cannot be deducted.)

('32) 19 AIR 1932 Cal 171 (174): 144 Ind Cas 561 (DB), *Secretary of State v. Hindustan Co-operative Insurance Society Ltd.* (Application, for review, by the Secretary of State after the termination of a clearly unsustainable appeal to the Privy Council.)

34. ('35) 22 AIR 1935 Mad 731 (732, 733): 156 Ind Cas 640 (DB), *Siddalingana Gowd v. Bhimana Gowd*.

35. ('39) 26 AIR 1939 Cal 394 (398): I L R (1939) 2 Cal 68: 184 Ind Cas 345, *Biswanath v. Khejerali Molla*.

('29) 16 AIR 1929 Nag 268 (269): 118 Ind Cas 687, *Jagannath Puni v. Nathoo*. (Payment of court-fee after limitation.)

('28) 15 AIR 1928 Nag 296 (296, 297): 112 Ind Cas 875, *Model Mills Ltd., Nagpur v. Kurban Hussain*. (Do.)

('07) 9 Bom L R 204 (207) (DB), *Keshavlal v. Mayabhai*.

Section 14 — Note 21

1. ('45) 32 AIR 1945 All 377 (383): I L R (1945) All 394 (DB), *Maqsood Ali v. Hoshier Singh*.

('44) 31 AIR 1944 Mad 47 (49): 211 Ind Cas 480, *Raghavayya v. Vasudevayya*. (Whether an advocate has shown due care and attention is a question of fact to be decided on the evidence adduced in any particular case.)

('38) 25 AIR 1938 Nag 300 (302): I L R (1939) Nag 422: 179 Ind Cas 837, *Dinkarrao Dharrao v. Ratansi Asaram*.

is a question of fact while the undermentioned cases² have adopted the view that it is a mixed question of law and fact.

**Section 14
Notes 21-22**

22. "Which, from defect of jurisdiction, is unable to entertain it." — In order that this section may apply, it is essential that the Court in which the prior civil proceeding was prosecuted, must have been unable to entertain it *for the reasons specified*, namely, *defect of jurisdiction or other cause of a like nature*.^{1a} It is not sufficient to show merely that there were prior proceedings and that they went against the plaintiff.^{1b} The words "defect of jurisdiction or other cause of a like nature" indicate that the ground of dismissal of the prior proceedings must be one in the nature of a *preliminary* ground. The benefit of the section cannot,

('38) 25 A I R 1938 Oudh 100 (101) : 14 Luck 4 : 173 Ind Cas 648 (DB), *Jagdeo Prasad v. Pearey Lal*. (In this case the Oudh Chief Court expressed its inclination to this view without deciding the point definitely. The Chief Court further held that it would not interfere where the lower Court's conclusion was not improper.)

('32) 19 AIR 1932 Lah 531 (532) : 138 Ind Cas 646 : 14 Lah 136, *Kala v. Gehna*.

('27) 14 AIR 1927 Lah 909 (910) : 102 Ind Cas 628, *Gangaram Bishen Das v. Hari Ram Ram Lal*.

('21) 8 AIR 1921 Sind 13 (15) : 62 Ind Cas 507 : 15 Sind L R 11 (DB), *Ibrahim v. Ghulam Hussain*.

('26) 13 AIR 1926 Mad 178 (179) : 92 Ind Cas 373, *Sinna Karuppan v. Muthiah Chettiar*. (Due diligence is a question of fact.)

2. ('38) 25 A I R 1938 Lah 704 (706) : 181 Ind Cas 290, *Maya Singh v. Udham Singh*. (AIR 1916 Oudh 139 followed.)

('27) 14 AIR 1927 Pat 256 (256) : 101 Ind Cas 674 (DB), *Fazlul Jamil v. Helal-uddin*.

('16) 3 AIR 1916 Oudh 139 (140) : 36 Ind Cas 702 : 19 Oudh Cas 367, *Ram Jag v. Bhagwan Dat*.

Section 14 — Note 22

1a. ('48) 35 AIR 1948 Nag 189 (194) : ILR (1947) Nag 497, *Prayagdas v. Indira-bai*. (Where the Court had jurisdiction to entertain prior proceedings the question of applicability of S. 14 does not arise.)

('44) 31 AIR 1944 Lah 136 (141) : I L R (1944) Lah 451 : 217 Ind Cas 65 (FB), *Jaikishen v. Peoples Bank, Northern India*. (The defect must be of such a character as to make it impossible for a Court to entertain the suit or application either in its inception or at all events as to prevent it from deciding it on its merits. It is not possible to give an exhaustive list of defects that these words may be taken to cover. (Scope of the expression discussed, *Firm Lorind Chand v. Bahadur Khan*.) Overruling AIR 1935 Lah 736.)

('31) 18 AIR 1931 Nag 47 (48) : 130 Ind Cas 157, *Krisna v. Sitaram*.

('30) 17 AIR 1930 Bom 505 (506) : 128 Ind Cas 621, *Narayan Ambaji v. Hari Ganesh*. (Application under O. 21 R 97, C. P. C., dismissed under O. 21, R. 99, — Party, instead of filing suit under O. 21, R. 103, C. P. C., within one year, applying for revision of order — High Court refusing to interfere on the ground that another remedy was available — *Held*, S. 14 did not apply.)

('28) 15 AIR 1928 Bom 252 (256, 257, 259) : 52 Bom 477 : 110 Ind Cas 33 (DB), *Maneklal Mansukhbhai v. Suryapur Mills Co. Ltd.*

('25) 12 AIR 1925 Mad 464 (465) : 86 Ind Cas 13, *Mallayya v. Narayana-gajapathiraju*.

[See ('16) 3 AIR 1916 Lah 234 (236) : 32 Ind Cas 497 : 1916 Pun Re No. 41 (DB), *Kalu v. Mehru Mal*.]

1b. ('30) 17 AIR 1930 Bom 505 (506) : 128 Ind Cas 621, *Narayana Ambaji v. Hari Ganesh*.

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therefore, be had in cases where the prior proceedings were dismissed on merits,^{1c} or on the ground that the action was misconceived.¹

- 1c. ('48) 35 AIR 1948 East Punj 68 (70) : ILR (1948) East Punj 89 (DB), *Shanti Lal v. Daulat Ram*. (Dismissal of prior proceedings as barred by limitation—Dismissal is on merits.)
- ('45) 32 AIR 1945 Cal 381 (382) : 221 Ind Cas 429 (DB), *Nakul Chandra v. Shyamapada*. (Inability to entertain a suit means not inability to grant relief but inability to give him a trial at all.)
- ('44) 31 AIR 1944 Lah 136 (141) : ILR (1944) Lah 451 : 271 Ind Cas 65 (FB), *Jaikishen v. Peoples Bank, Northern India*.
- ('44) 31 AIR 1944 Mad 67 (69) : ILR (1944) Mad 410 : 215 Ind Cas 318 (DB), *Chidambaram Chettiar v. Meyappa Chettiar*. (Section 14 (1) has no application where the prior suit was dismissed as not maintainable.)
- ('42) 29 AIR 1942 Mad 713 (713):205 I. C. 326 (DB), *Rajabapayya v. Basavayya*.
- ('42) 29 AIR 1942 Pat 378 (379) : 200 Ind Cas 309 (DB), *Sheorajdhari v. Kameshwar*. (Competent tribunal refusing relief—No absence of jurisdiction.)
- ('38) 25 AIR 1938 Nag 534 (537) : I L R (1940) Nag 334 : 180 Ind Cas 903 (DB), *Rajaram Dadaji v. Paiku*.
- ('32) 19 AIR 1932 Cal 558 (559) : 59 Cal 1057 : 138 Ind Cas 748 (DB), *Rajendra Nath v. Kamal Krishna*.
- ('28) 15 AIR 1928 Bom 323 (325, 326, 328):113 Ind Cas 515(DB), *Hari v. Krishnaji*.
- ('24) 11 AIR 1924 Bom 39 (40) : 76 Ind Cas 557 (DB), *Somshikharswami v. Shivappa*. (Plaintiff defending another suit concerning same subject-matter.)
- ('24) 11 AIR 1924 Cal 419 (420) : 74 Ind Cas 279 (DB), *Rajani Bandhu v. Kali Prasanna*.
- ('27) 14 AIR 1927 Lah 186 (186) : 101 Ind Cas 254 (DB), *Abbas Ali v. Yusuf Ali*.
- ('27) 14 AIR 1927 Lah 785 (786) : 104 Ind Cas 726 (DB), *Mt. Sat Bhirai Khurd v. Ahmad*. (Proceedings by defendants.)
- ('16) 3 AIR 1916 Mad 57 (59) : 28 Ind Cas 290 : 38 Mad 260 : 28 Mad L Jour 347 (DB), *Kaliba Mavulija v. Saran Bivi Saila*. (Claim disallowed as a matter of law)
- ('05) 32 Cal 118 (121) (DB), *G. S. Hays v. Padmanand Singh*. (Relief not granted in prior suit by inadvertence or by not being pressed.)
- (1900) 23 Mad 583 (590) (DB), *Commercial Bank of India v. Allavooddeen Sahib*. (Suit dismissed because no cause of action established.)
- ('05) 28 Mad 338 (341, 342) (DB), *Narayanan Chetty v. Kannammai Achi*.
- ('78-80) 2 Mad 407 (413) : 5 Ind Jur 188 (DB), *Parry & Co. v. Appasamy Pillai*.
- (1900) 4 Cal W N 75n (75n), *Sm. Matungini v. Surja Kumar Pal*.
- (1865) 2 Suth W R 9 (10) (DB), *Nund Doolal Sirkar v. Dwarkanath Biswas*.
- (1865) 3 Suth W R 13 (13) (DB), *Issureenund Dutt Jha v. Parbutty Churn Jha*.
- ('68) 9 Suth W R 455 (455) (DB), *Oodoy Monee Dabee v. Bishonath Dutt*.
- ('74) 22 Suth W R 162 (163) (DB), *Rughoonath Pershad v. Surjo Pershad Singh*.
- ('98) 1898 Pun Re No. 34, *Rajah of Faridkote v. Sardar Gurdayal Singh*. (Suit on a foreign judgment which is a mere nullity.)
- ('33) 20 AIR 1933 Nag 130 (132, 133) : 144 Ind Cas 948 : 29 Nag L R 272, *Maharaj Sai v. Kedar Nath*. (Adjudication on merits by arbitrators.)
- (1865) 2 Suth W R Misc 1 (1) (DB), *Kalee Chunder Chowdhury v. Ruttun Gopal Bhadooree*.
- ('83) 13 Cal L R 214 (216) (DB), *Hafizunnessa Khatun v. Bhyrub Chunder Das*. (Set-off claimed in a prior suit dismissed as unsustainable in law.)
- ('67) 7 Suth W R 160 (160) (DB), *Dhun Monee Chowdrain v. Brindabun Chunder Sircar Chowdhry*. (Though the dismissal may be erroneous.)
- [See ('29) 16 AIR 1929 Pat 694 (697) : 9 Pat 385 : 122 Ind Cas 817 (FB), *Mahabir Prasad v. Bhupal Ram*.
- ('20) 7 AIR 1940 Pat 504 (506) : 58 Ind Cas 434:5 Pat L Jour 697 (DB), *Thakur Jagdishwar Dayal Singh v. Bhagdi Mahton*.
- ('70-71) 5 Mad H C R 93 (97)(DB), *Kristnayya v. Rajahlakshmi Venkamma Rao*.]
1. ('49) 36 AIR 1949 Pat 362 (362, 363) : 27 Pat 137 (DB), *Ramanand Prasad v. Gaya Prasad*. (The words "other cause of a like nature" cannot be construed as

Grounds of dismissal, such as the following, are not covered by the section :

- (1) That the *darkhast* is not sustainable on a construction of a decree.²
- (2) That the alleged fraud is not proved.³
- (3) A suit was filed for money in the Union Court of Bahar which passed the following order: "It being desirable that there should be a proper trial conducted by persons versed in law of the question regarding the document filed by the plaintiffs and regarding the question of the rate of interest, this Court orders that the suit be conducted in the proper Court." It was held that this was not a case contemplated by the section.⁴
- (4) That the claim in the prior proceedings was premature.⁵
- (5) That the plaintiffs, not being the nearest reversioners, were not entitled to sue.⁶
- (6) In an application for transfer of a decree, that it was barred by limitation and that it was not shown that the judgment-debtor had no property within the local limits of the Court which passed the decree.⁷
- (7) In an application for execution, that it was not in accordance with law,⁸ or that there was no decree in existence.^{8a}
- (8) That the plaintiff was negligent.⁹

being wide enough to include instances in which the failure of the plaintiff's suit is due to the fact that the remedy he sought is misconceived : AIR 1922 Mad 417; AIR 1928 Bom 323, *Hari v. Krishnaji*, Rel. on; 22 All 248 *Mathura v. Bhawani*, (FB), Dissent.)

(30) 17 AIR 1930 Lah 211 (212) : 120 I. C. 70 (DB), *Amar Nath v. Mt. Ralli*.

(22) 9 AIR 1922 Mad 417 (420) : 70 Ind Cas 743 (DB), *Ganapathi Mudaliar v. Krishnamachari*. (Prior proceedings being by way of suit where remedy lay only in execution under S. 47, Civil Procedure Code.)

(1900) 23 Mad 621 (625) (DB), *Murugesu Mudaliar v. Jattaram Devy*. (Suit misconceived—Claim to recover specific property instead of for value of goods.)

(72) 17 Suth W R 266 (267, 269) (DB), *Luchman Parshad v. Nimhoo Pershad*. (Cause of action misconceived.)

2. ('28) 15 AIR 1928 Bom 323 (325, 326) : 113 Ind Cas 515 (DB), *Hari Janardhan v. Krishnaji Balkrishna*.

3. ('24) 11 AIR 1924 Bom 39 (39, 40) : 76 Ind Cas 557 (DB), *Somshikharaswami v. Shivappa Mallappa*.

4. ('28) 15 AIR 1928 Cal 46 (47) : 106 I. C. 324, *Bonomali Gope v. Fakir Chand*.

5 ('19) 6 AIR 1919 Cal 381 (382) : 46 Cal 870 : 51 Ind Cas 922 (DB), *Dwarka v. Atul Chandra*.

[But see ('39) 26 AIR 1939 Bom 26 (30) : ILR (1939) Bom 9 : 179 Ind Cas 441 (DB), *Maneklal Kalidas v. Shivalal Dayaram*.]

6. ('30) 17 AIR 1930 Lah 211 (212) : 121 I. C. 70 (DB), *Amar Nath v. Mt. Ralli*.

7. ('18) 5 AIR 1918 Mad 23 (23, 24) : 45 I. C. 460 (DB), *Vidhya Thirtha Swamigal v. Venkatarama Iyer*.

8. ('08) 1908 Pun L R No. 125, p. 378 (381), *Ganga Ram v. Mt. Durgi*.

(37) 24 AIR 1937 Mad 760 (761, 762) : 174 I. C. 28, *Appaji Chetty v. Govindasamy Reddi*. (Execution petition filed neither by party nor by duly authorized vakil—Application not being in accordance with law under Article 182 (5) held did not save limitation.)

8a. ('49) 36 AIR 1949 Pat 117 (119) (DB), *Anis Imam v. Doughter of Jamunabai*.

9. ('31) 18 AIR 1931 Nag 109 (110) : 121 Ind Cas 55, *Baliram v. Supadasa*.

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- (9) That the suit disclosed no cause of action.¹⁰
- (10) That the final decree having been already passed an application for a final decree could not be sustained.¹¹
- (11) In an application for adjudication as insolvent, that the act of insolvency alleged to have been committed by the debtor was not an act of insolvency within the meaning of S. 6, Provincial Insolvency Act.^{11a}
- (12) That the suit or an application is barred by limitation.^{11b}

It is clear that the section does not apply where the prior suit has ended in a decree in favour of the plaintiff. In such cases, however, there *may* be a revival of the cause of action and the plaintiff may be entitled to a fresh period of limitation on the principles discussed in section 9 Note 11.¹²

To get the benefit of this section it is sufficient if the plaintiff or applicant shows that the Court before which the abortive proceedings were had, had no jurisdiction. It is not necessary to show that the Court had actually refused to grant relief on the ground of want of jurisdiction.¹³ This section does not require any order of the Court which had no jurisdiction recognizing the fact.¹⁴

23. "Jurisdiction."—A defect of jurisdiction may be territorial,¹ or in relation to the subject-matter.²

10. ('88) 1888 Pun Re No. 19, *Ram Chand v. Shadi Ram* (Suit on dishonoured hundi—No allegation in the plaint of presentment and dishonour.)

11. ('38) 25 AIR 1938 Lah 117 (119) : ILR (1937) Lah 671 : 175 I. C. 846 (DB), *Jodh Singh v. Firm Bhagwan Das Nanak Chand*. (('37) A I R 1937 Lah 404, *Jodh Singh v. Bhagwan Das*, Reversed.)

11a ('44) 31 AIR 1944 Lah 136 (140) : ILR (1944) Lah 451 : 217 Ind Cas 65 (FB), *Jai Kishen v. Peoples Bank, Northern India*.

11b. ('48) 35 AIR 1948 East Punj 68 (70) : ILR (1948) East Punj 89 (DB), *Shanti Lal v. Daulat Ram*.

12. See however ('38) 25 AIR 1938 Pat 321 (322) : 174 I. C. 630 (DB), *Gajanand Marwari v. Nonidh Lal*. (In this case prior suit was one for possession and it was decreed and the plaintiff also obtained possession in execution but was subsequently dispossessed by the same defendant—In deciding that the subsequent suit was not barred by limitation the Patna High Court held that the period of the prior suit should be excluded in computing limitation—This decision purported to follow ('16) A I R 1916 P C. 96, *Nrityamoni Dassi v. Lakkan Chandra*—But it is submitted that the true principle in such cases is that of satisfaction and revival of cause of action above referred to and not that of exclusion of time under this section.)

13. ('44) 48 Cal W N 821 (825)(DB), *Prasanna Narayan v. Kamrup Co-operative Land Mortgage Bank, Ltd.*

14. ('43) 30 AIR 1943 Mad 457 (458); 213 I. C. 27, *Vaithilinga v. Narayanaswami*.

Section 14 — Note 23

1. ('26) 13 AIR 1926 Mad 813 (813, 815) : 95 Ind Cas 587, *Panchapakesa Iyer v. Natesa Pattar*.

('80) 5 Bom 48 (57, 60) : 7 Ind App 181 : 4 Sar 173 : 3 Suther 778 : 3 Shome L R 217 : 4 Ind Jur 472; 7 Cal L R 320 (PC), *Lukshman Dada Naik v. Ramchandra Dada Naik*. (No jurisdiction over the place in which the land in suit was situated.)

('71) 15 Suth W R 69 (69) (DB), *Banee Madhub Lahoree v. Bipro Dass Dey*.

2. ('78-79) 3 Bom 223 (226, 227) (DB), *Putali Mehali v. Tulja*. (Non-production of certificate of Collector under Section 6, Pensions Act, which gave jurisdiction to Court.)

The want of jurisdiction may arise after the institution of the proceeding,^{2a} as for instance, where by a later *ruling* of a competent Court, the jurisdiction is taken away.³ Similarly, where after the institution of a suit on a mortgage, the plaintiff amends the plaint by the deletion of the relief as to sale and thereupon the plaint is returned from the regular side for presentation to the Small Cause Court, the plaintiff is entitled to the benefit of this section.^{3a}

The expression "defect of jurisdiction" means a defect of jurisdiction peculiar to the Court in which the proceedings were taken, and does not cover such mistakes as the presentation and prosecution of an appeal which does not lie at all to any Court.⁴ A defect of jurisdiction is due to the provisions of the law itself and not due to the laches of parties.⁵

The word "jurisdiction" occurring in this section has been interpreted liberally.⁶ In a case where an execution application for sale of

- (84) 1884 Pun Re No. 59, *Dharam Das v. Eshri Pershad*. (Summary proceedings to enforce an award – Award being indefinite was incapable of being dealt with in summary proceedings.)
- (89) 1889 Pun Re No. 67, *Niadar Mal v. Shankar Das*. (Do.)
- (11) 9 Ind Cas 642 (642) (Mad), *Gopisetty Narainsawmi Naidu v. Tallanraju Vencatasubrayudu*. (Revenue Court having no jurisdiction to entertain a suit for kattubadi against an inamdar in Madras.)
- (70) 12 Suth W R 45 (46) : 3 Beng L R A C 233 (DB), *Mohun Chunder v. Azeem Gazea*. (Suit against a dead person – No jurisdiction.)
- [See (07) 34 Cal 619 (626, 627) : 11 Cal W N 649:5 Cal L Jour 405:2 Mad L Tim 406 (DB), *Laliteswar Singh v. Rameswar Singh*. (Leave granted by Registrar of High Court – Leave invalid as being not of the proper authority as required by Clause 12, Letters Patent (Calcutta).)]
- 2a. (43) 30 AIR 1943 All 162 (168) : 1LR (1943) All 467 : 207 Ind Cas 571 (DB), *Firm Behari Lal v. Punjab Sugar Mills*.
- [See however (48) 35 AIR 1948 Cal 226 (229) : 1 L R (1948) 2 Cal 334 (DB), *Hariprosad Roy v. Babulal Chaukhani*. (Section 14 (2) is only available where there is initial want of jurisdiction.)]
3. (41) 28 AIR 4941 Pesh 3 (5) : 192 Ind Cas 758 (DB), *Peoples Bank of Northern India Ltd. v. Lekhu Ram*. (Award between Bank and private individual – Bank in good faith carrying on proceedings for execution of award in Sub-Judge's Court – Subsequent ruling declaring that such awards were cognizable by District Judge – Held, Section 14 applies.)
- (22) 9 AIR 1922 All 74 (76) : 44 All 296 : 66 Ind Cas 214 (DB), *Parbati v. Rajah Shyam Rikh*. (Rent decree-holder under Agra Tenancy Act suing in civil Court to set aside alienation by insolvent tenant – Later decision negating right of civil suit.)
- (96) 19 Mad 90 (93, 94, 95) (DB), *Subbarau Naidu v. Yagana Pantulu*. (Suit in Madras Presidency Small Cause Court – Defendant outside jurisdiction – Leave of Registrar obtained under Rules for filing suit – Subsequently the rule declared *ultra vires* and leave of Court made necessary.)
- 3a. (40) 27 AIR 1940 All 145 (147) : 187 I. C. 336, *Dal Singar Koeri v. Chand Singh*.
4. (11) 11 Ind Cas 880 (881) : 1912 Pun Re No. 22, *Moti Singh v. Maghar*.
- (93) 1893 Pun Re No. 45, *Sultan v. Ala Bukhsh*.
5. (86) 10 Bom 604 (609) (DB), *Bai Jamna v. Bai Ichha*. (Prior suit dismissed owing to plaintiff not having registered sale certificate at date of institution of suit.)
6. (33) 20 AIR 1933 Mad 197 (199) : 140 Ind Cas 270, *Narasimhacharyulu v. Sabhnadri Appa Rao*.

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properties, not included in the mortgage, was dismissed on the ground that no decree under O. 34 R. 6 of the Civil Procedure Code had been obtained; the Patna High Court⁷ held that as the executing Court would be acting without jurisdiction if execution were ordered in the absence of such a decree, the dismissal was on account of defect of jurisdiction.

Where a Court has no *power* to make an order, it does not mean that it has no jurisdiction in the matter.⁸

24. "Other cause of a like nature." — In construing these words, it has been observed in some cases¹ that, if there was an inability in the Court to entertain the former suit, produced by any cause not connected in any way with want of good faith or due diligence in the plaintiff, that cause is of a like nature to defect of jurisdiction. Adopting this view, the following were held not to be causes of a like nature :

(1) A wrong party suing.²

(2) Plaintiff's inability to produce a registered certificate of sale with the suit.³

7. ('20) 7 AIR 1920 Pat 462 (462, 463) : 58 Ind Cas 40 (DB), *Karimullah Shah v. Muhammad Raza*.

8. ('68) 9 Suth W R 402 (408, 412, 413) : Beng L R Supp Vol 985 (FB). *Hurro Chunder Roy Chowdhury v. Sooradhonne Debia*. (Dismissal of an application for mesne profits on the ground that the decree does not grant it is not for want of jurisdiction — Per Macpherson and Kemp, JJ. — Loch, J., concurring; Peacock, C. J., dissenting.)

('76) 25 Suth W R 540 (541) (DB), *Perhlad Sein v. Gunness Lall Tewary*.

[See however ('25) 12 AIR 1925 Cal 1258 (1260) : 89 Ind Cas 744 (DB), *Kayem Biswas v. Bahadur Khan*. (The word 'jurisdiction' may be used in the sense of power to make an order.)]

Section 14 — Note 24

1. ('49) 86 AIR 1949 Cal 24 (45), *Sarojendra Kumar v. Purnachandra*. (Attorney's application in Chambers under Chap. 33, R. 48, Calcutta High Court Original Side Rules, for order for payment of taxed costs — Parties referred to suit as Court unable to make order for payment due to defect of jurisdiction — Defect not brought about by plaintiff or any absence of diligence or want of good faith — Principle of S. 14 applies — Time taken for presenting application can be excluded for subsequent suit.)

('46) 33 AIR 1946 Sind 14 (17) : I L R (1945) Kar 293 : 223 Ind Cas 291 (DB), *Rochaldas v. Uttamchand*. (Failure of the suit for want of registration of the plaintiff firm under S. 69, Partnership Act, held, was a cause akin to defect of jurisdiction.)

('43) 30 AIR 1943 All 162 (170) : ILR (1943) All 467 : 207 Ind Cas 571 (DB), *Firm Beharilal v. Punjab Sugar Mills*. (One of arbitrators withdrawing — Other arbitrators not proceeding with arbitration — Inability in remaining arbitrators held due to cause of a like nature to defect of jurisdiction within meaning of S. 14.]

(1900) 22 All 248 (257, 258) : 1900 All W N 64 (FB), *Mathura Singh v. Bhawani Singh*. (Strachey, C. J.)

('12) 14 Ind Cas 437 (438) : 6 Low Bur Rul 43 (DB), *Po Nyun v. Mathu Karappan Chetty*.

('75) 7 N W P H C R 284 (287) (DB), *Bahal Singh v. Mt. Gauri*.

('72) 17 Suth W R 266 (267, 269) (DB), *Luchmun Pershad v. Nimhoo Pershad*.

2. ('81) 7 Cal 367 (368, 369) (DB), *Rajendro Kishore Singh v. Bulaky Mahlon*. (Manager of plaintiff suing instead of plaintiff himself.)

3. ('86) 10 Bom 604 (609) (DB), *Bai Jamna v. Bai Ichha*.

- (3) "Non-suit" of plaintiff for neglect to state the boundaries of property.⁴
- (4) Neglect or laches of plaintiff in stating or prosecuting his case.⁵
- (5) Want of notice required by S. 80 of the Civil Procedure Code.⁶
- (6) Dismissal of prior suit for default.⁷
- (7) Dismissal of an application for want of a necessary affidavit.⁸
- (8) Prior application for execution not being presented by the decree-holder or by a vakil duly authorized on his behalf.⁹

But, a liberal construction of these words has been also favoured¹⁰ and it has been observed that a cause of a like nature need not be always one, which the plaintiff could have avoided, because it is equally in the plaintiff's own power to avoid suing in a Court without jurisdiction.¹¹ In other words, given good faith and due diligence, a cause is not prevented from being of a like nature to defect of jurisdiction merely because it was in the plaintiff's own power to avoid, or the dismissal resulted from his own act or from a *bona fide* mistake of law or procedure.¹² The test, accordingly, appears to be whether, like jurisdiction, the cause in question led to the inability of the Court to entertain the suit, good faith and diligence being granted. Accordingly, it has been held by the Patna High Court in a recent Full Bench case^{12a} that in a suit under O. 21 R. 63, Civil P. C., the plaintiff is entitled, under this section, to the deduction of time spent in prosecuting with due diligence an abortive civil revision filed under

4. ('66) 6 Suth W R 184 (185, 186) : Beng L R Sup Vol 553 (FB), *Chunder Madhub Chukerbatty v. Ram Coomar Choudhry*. (Loch and Pundit, JJ., dissenting)
5. ('98) 1898 Pun Re No. 34, *Raja of Faridkote v. Sardar Gurdajal Singh*.
6. ('12) 13 Ind Cas 260 (261) : 5 Sind L R 181, *Manghammal v. V. Fernandez*. (Want of notice due to plaintiff's laches and disregard of law — *Obiter*.)
7. ('29) 16 AIR 1929 Nag 219 (231) : 25 Nag L R 99 : 116 I. C. 509, *Chintaman v. Kisan*.
8. ('24) 11 AIR 1924 Pat 40 (41) : 79 Ind Cas 696 (DB), *Akhaj Khalifa v. Ramlal Marwari*. (It is not defect of jurisdiction.)
9. ('37) 24 AIR 1937 Mad 760 (762) : 174 Ind Cas 28, *Appaji Chetti v. Govindasami Reddi*.
10. ('39) 26 AIR 1939 Bom 26 (30) : I L R (1939) Bom 9 : 179 Ind Cas 441 (DB), *Manek Lal Kalidas v. Shirlal Dayaram*. (Former suit dismissed because the cause of action had not accrued though it was the same — *Held* S. 14 applied.)
- (19) 6 AIR 1919 Mad 1071 (1074) : 41 Mad 701 : 46 Ind Cas 265 (DB), *Kannusamy Pillai v. Jagathambal*.
11. ('86) 10 Cal 86 (88) : 13 Cal L R 218 (DB), *Deo Prasad Singh v. Pertab Koeree*. (A case of misjoinder of causes of action under the Act of 1871.)
12. ('49) 36 AIR 1949 Pat 293 (295) (FB), *Bihar Lall v. Bani Madhav*. (('44) AIR 1944 Pat 225 : 23 Pat 14, *Radha Kishun v. Sri Niwas* Overruled.)
- (1900) 22 All 248 (255) : 1900 All W N 64 (FB), *Mathura Singh v. Bhawani Singh*. (Per Strachey, C. J.)
- ('12) 14 Ind Cas 437 (438) : 6 Low Bur Rul 43 (DB), *Po Nyun v. Muthukaruppan Chetty*. (One partner of a firm suing on a promissory note executed in favour of all the partners without an endorsement in his favour by the other partners who were alleged to have sold their interests to plaintiff — *Held*, this was too obscure and legal a point for the party.)
- 12a. ('49) 36 AIR 1949 Pat 293 (297) : 28 Pat 102 (FB), *Bihari Lall v. Bani Madhav*. AIR 1944 Pat 225 : 23 Pat 14, Overruled.)

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Note 24

a *bona fide* mistake of law or procedure against the order passed under O. 21 R. 58, Civil P. C.

In the following instances, the causes were held to be of a like nature to defect of jurisdiction :

- (1) The present plaintiff having claimed the relief in the prior suit in a wrong capacity.¹³
- (2) Prior proceedings being barred by the existence of an unvacated previous order on the matter.¹⁴
- (3) When the plaintiffs had applied to continue a suit begun by another but their application was dismissed on the ground that it was one which the Court was not competent to entertain, they instituted an independent suit by themselves.¹⁵
- (4) Failure to obtain sanction necessary to try a suit relating partly to property outside jurisdiction.¹⁶
- (5) Decree in a suit being vacated on the ground of non-service of summons.¹⁷
- (6) Want of power-of-attorney in favour of a mother who sued on behalf of her sons.¹⁸
- (7) Where jurisdiction of the Court to entertain the suit depends on leave being granted by the Court, and the Court grants such leave but subsequently recalls it and rejects the plaint.^{18a}

This divergence of view on the construction of the words 'a cause of a like nature' has led to divergent decisions in almost identical circumstances. Where in a suit for a mere declaration, the consequential relief of possession was not asked for, and the suit was dismissed under S. 42 of the Specific Relief Act, the Madras High Court¹⁹ has held that the Court being deprived of its discretion of granting a declaratory decree in such a case, the cause was in the nature of a defect of jurisdiction. The same Court has also held that the inability of a

13. ('16) 8 AIR 1916 P C 96 (101, 102) : 43 Cal 660 : 33 Ind Cas 452 (PC), *Sm. Nrityamoni Dass v. Lakhan Chandra Sen.* (Defendants claiming a relief without getting themselves transferred as plaintiff and claim being therefore disallowed.)

14. ('28) 15 AIR 1928 All 10 (11) : 108 Ind Cas 134 (DB), *Kanhaiya Lal v. Suraj Karan.*

15. ('19) 6 AIR 1919 Mad 572 (573) : 52 Ind Cas 465 (DB), *Arunachallam Pillai v. Vellaya Pillai.*

16. ('74) 6 N W P H C R 225 (230, 231) (DB), *Stewart Skinner v. William Orde.*

17. ('72) 17 Suth W R 518 (518, 520) (DB), *Nobo Coomar Chuckerbutty v. Koylashchunder Baroore.*

[See however ('73) 1873 Pun Re No. 17, *Lallu Mull v. Shahzada Mahomed.*]

18. ('75) 1875 Pun Re No. 69, *Sirdar Bakshish Singh v. Futteh Singh.* (Court's inability to try the suit on merits in the absence of power of attorney is a cause of a like nature.)

18a. ('39) 26 AIR 1939 Pat 86 (88) : 182 Ind Cas 632 (DB), *Kaluram v. Janistha Lal.* (Master on the Original Side of the Calcutta High Court granting leave and subsequently recalling it.)

19. ('26) 13 AIR 1926 Mad 1081 (1081, 1082) : 98 Ind Cas 14, *Venkamma v. P. Parthasarathy & Brothers.*

Court to decide on the lawfulness of the plaintiff's claim, owing to his wrongly framing his action, involves a cause of a like nature.²⁰ The Patna High Court²¹ similarly, held that where a decree-holder joined in his execution petition a relief, which was not in conformity with the decree, the case was analogous to misjoinder of causes of action and the cause in question was in the nature of a defect of jurisdiction. The Rangoon High Court has, on the other hand, held that the mistake of a party with regard to the relief he seeks arises out of the incompetence of his advisers and that, as such, it is not a cause of a like nature.²² Again, where a person proceeded by way of a suit instead of making an application for his remedy, the Bombay High Court²³ held that such an error of law was a cause of a like nature. But the Madras High Court²⁴ has held that the failure of the plaintiff in the prosecution of his claim by a suit cannot be attributed to anything connected with the jurisdiction of the Court. In a Nagpur case, an application under S. 144, Civil Procedure Code, was made instead of a suit being instituted for money wrongly paid. It was held that the time of the proceeding of the application ought to be excluded.^{24a} In a recent case,^{24b} where an appeal was filed (in a case under S. 47, Civil Procedure Code) as being the proper remedy under the decisions then prevailing, but it was subsequently held that a suit under O. 21 R. 63 was the proper remedy, and thereupon a suit was filed, it was held by the Madras High Court that the failure of the appeal was due to a "cause of a like nature."

Defect of jurisdiction or a cause of a like nature must be such that it has prevented the Court from *entertaining* the suit. It has no application where the suit is entertained and decided, even if it be on grounds, such as the following :

- (1) Res judicata.²⁵
- (2) Limitation.²⁶

20. ('23) 10 AIR 1923 Mad 347 (348, 349) : 73 Ind Cas 139 (DB), *Kunhi Kuttiali v. Kunhammad*.

21. ('24) 11 AIR 1924 Pat 471 (473) : 3 Pat 42 : 75 Ind Cas 312 (DB), *Kishore Mal v. Jagdish Narain Singh*.

22. ('34) 21 AIR 1934 Rang 158 (158) : 152 Ind Cas 415, *Maung Pu v. U Paing*.

23. ('20) 7 AIR 1920 Bom 208 (209) : 44 Bom 97 : 55 Ind Cas 967 (DB), *Ganpat Rao v. Anand Rao*. (Suit for refund of excess amount recovered by defendant in prior execution against plaintiff dismissed as not being maintainable. A subsequent execution petition filed on the execution side.)

[See ('20) 7 AIR 1920 Bom 351 (352) : 57 Ind Cas 551 (DB), *Ibrahim Harun Jaffer v. Jusaf Hussain Jaffer*. (Prior suit to set aside *ex parte* decree not lying—Subsequent application under O. 9 R. 13—*Obiter*.)]

24. ('22) 9 AIR 1922 Mad 417 (418, 420) : 70 Ind Cas 743 (DB), *Ganapathy Mudaliar v. Krishnamachari*.

24a. ('23) 10 AIR 1923 Nag 94 (94, 95) : 71 Ind Cas 42, *Lakshman v. Bishram*.

24b. ('38) 25 AIR 1938 Mad 41 (42) : 175 Ind Cas 767, *Kesavan Nambudri v. Theva Amma*

25. ('21) 8 AIR 1921 Pat 225 (226) : 63 Ind Cas 593 : 6 Pat L Jour 593 (DB). *Braja Gopal Mukherji v. Tara Chand Marwari*.

26. ('85) 11 Cal 264 (265, 266) (DB), *Nobin Chunder Kurr v. Rojomoye Dossee*. (Though the suit would have been within time if certain payments made had been alleged in the plaint.)

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Notes 24-25

(3) That the award in question was void and not binding.²⁷
See also Note 25.

25. "Unable to entertain." — The Act of 1859 used the words "unable to decide upon it." The Act of 1871 used the words "unable to try it." In *India Publishers, Ltd. v. Aldridge*,¹ a case of misjoinder of parties arising before the Act of 1908, i.e., before explanation III was added to the section, Maclean, C. J., observed as follows :

"There is a marked difference between the language of the Act of 1859 and that of the existing Limitation Act. In the present Act the words are 'unable to entertain;' in the previous Act the words are 'unable to decide upon it.' A Court may be able to entertain a suit in its inception, but be unable to decide it on the merits, owing to some defect, not in jurisdiction, but in procedure. There must have been some reason for this change of language, and a possible reason is that the Legislature intended to limit the benefit of the section to cases, where the Court had no power to *embark upon the case at all*."

The section would seem to apply not only where the Court in which the prior proceedings were pending *rightly* thought it had no jurisdiction in the matter, but also where it thought so *erroneously*.² There was a decree against several defendants in the trial Court fixing each defendant with distinct and several liability. The decree against R, one of the defendants, was *ex parte*. The other defendants appealed against the decree making R a respondent. No notice of appeal was, however, served on R and the appeal was dismissed. R filed an application to the trial Court to have the *ex parte* decree against him set

('99) 26 Cal 414 (416, 417, 422) : 3 Cal W N 233 (235) (FB), *Bishambhar Haldar v. Bonomali Haldar*.

27. ('33) 20 AIR 1933 Nag 130 (133) : 144 Ind Cas 948 : 29 Nag L R 272, *Maharaj Sai v. Kedar Nath*. (Cancellation of the award is not a cause of a like nature.)

Section 14 — Note 25

1. ('08) 35 Cal 728 (733) : 12 Cal W N 473 (DB). ("Entertain — Receive and take into consideration" — From Webster's International Dictionary.)

2. ('43) 30 AIR 1943 Cal 460 (464) : 209 Ind Cas 71 (DB), *Abhoy Kanta v. Gopinath*. ('41) 28 AIR 1941 Cal 493 (495) : 196 Ind Cas 534, *Mehraj v. Chandrakamal*. (Execution petitions filed in competent Court — Last petition dismissed by Court on erroneous ground that it had no jurisdiction — Petitions could be availed of to save limitation under S. 14.)

('35) 22 AIR 1935 Oudh 501 (503) : 158 Ind Cas 267 (DB), *Gappoo Singh v. Harcharan*.

('32) 19 AIR 1932 All 340 (342) : 54 All 423 : 140 Ind Cas 178, *Raghunandan Chauhe v. Bhuwal Tewari*.

('37) 24 AIR 1937 Nag 69 (69, 70) : 170 Ind Cas 115 : ILR (1937) Nag 311, *Motilal Madanlal v. Musa Muhammad*.

('25) 12 AIR 1925 Oudh 493 (494) : 89 Ind Cas 443, *Raghubar Dayal Singh v. Kanhaya Bux*.

('73) 20 Suth W R 433 (437) (DB), *Bibee Khodajamnissa v. R. F. Stevens*.

[See ('16) 3 AIR 1916 Lah 202 (203) : 33 Ind Cas 808, *Azam Ali v. Akhtar*.]

[But see ('18) 5 AIR 1918 Mad 94 (95, 96) : 43 Ind Cas 6 (DB), *Abdulla Koya v. Kallumpurath Kanaran*. (Execution application for compensation under Ss. 5 and 6. Malabar Compensation for Tenants' Improvements Act, 1900. First Court dismissed execution petition for want of proof of allegations. Sub-Court in appeal also added that plaintiff's remedy was not in execution but was by suit. No appeal from latter. In the subsequent suit for same relief held that S. 14 did not apply to exclude the time of the pendency of execution proceedings as on a correct view of the law, the remedy was on the execution side.)]

aside but the Court dismissed the application on the ground that the application should have been made to the appellate Court. Subsequently, R applied to the appellate Court to have the appeal re-opened on the ground that he had no notice of the appeal, and his application was dismissed as barred by limitation. The High Court^{2a} reversed the decisions of the Courts below and held that in the particular case, the Court of the first instance was wrong in holding that it had no jurisdiction to entertain an application to have the *ex parte* decree set aside and that the lower appellate Court was also wrong in not applying S. 14 to the application made by R to re-hear the appeal. The High Court held that R was right in having applied to the trial Court to have the *ex parte* decree set aside and that the lower appellate Court ought to have excluded the time occupied in the prior proceedings in computing the period of limitation for the application by R to have the appeal re-opened. Similarly, where a prior execution application was presented in the proper Court but the Judge presiding over the Court sat for some time in a Court at another place and taking up the application in the latter Court, ordered execution to proceed, and on appeal, the order was set aside for want of jurisdiction in the Judge at the latter place, the time taken in these proceedings was excluded.³

The section is also applicable where the prior proceeding was pending in a wrong Court on account of a *mistake on the part of the Court* and not of any fault of the party.⁴

A held a decree against B with a charge on his property. C, who also obtained a decree against B, brought the property to sale. In more applications than one, A applied for and obtained amounts from out of the sale proceeds towards the discharge of his decree-debt. Subsequently, the sale being set aside A was ordered to refund the amounts he had obtained. A, after making the refund filed an application to execute his decree. The Punjab Chief Court⁵ held that the Court was *ultimately* "unable to grant" the remedy as the auction sale was set aside and excluded the period of the prior application under S. 14. It is submitted that this view of the inability of the Court is wrong as it did not originate in any defect of jurisdiction or a cause of a like nature.

Where the prior suit was decreed in the first Court but was dismissed in appeal on the grounds mentioned in the section, it is not as if the period of the appellate proceedings alone is to be excluded.

2a. ('32) AIR 1932 All 340 (341, 342): 54 All 423: 140 Ind Cas 178, *Raghunandan Chaube v. Bhuwal Tewari*. (The two applications by R were for the same relief.)

3. ('25) 12 AIR 1925 Bom 113 (114, 115): 85 Ind Cas 778 (DB), *Pandu Dagadu v. Jamnadas Chotumal*. (Affirming ('23) AIR 1923 Bom 218 (DB), *Pandey v. Jamnadas*.)

4. ('35) 22 AIR 1935 Oudh 501 (503): 158 Ind Cas 267 (DB), *Gappoo Singh v. Harcharan*. (A Subordinate Judge sent a suit pending before him to an Additional Subordinate Judge who was found subsequently to have no jurisdiction.)

5. ('09) 2 Ind Cas 102 (103, 105): 1909 Pun Re No. 52 (DB), *Peachey v. Punjab Banking Co. Ltd., Lahore*.

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Notes 25-26

The period from the institution of the suit is to be deducted provided it was spent in good faith.⁶

The section only says that the Court was unable to entertain the prior proceeding. It does not mean that the prior proceeding ought to have been *dismissed* by the Court. The section applies even where the plaint or an application in the prior proceeding is returned for presentation to the proper Court.⁷ It has been held to apply even where the prior proceeding has not terminated at the date of the second suit, but is pending before the Court not having jurisdiction. A filed a suit against B in the Small Cause Court of Kumbakonam for rent within limitation. While it was pending trial, he filed another suit against the same defendant for rent for the same period in the Small Cause Court of Tiruvadi after the period of limitation had expired. The former Court *subsequently* returned the plaint on the ground that it had no jurisdiction. In computing the period of limitation for the latter suit, the Madras High Court⁸ held that the period between the date of the institution of the former suit and the date of the institution of the latter should be excluded notwithstanding the pendency of the former suit on the date of the institution of the latter.

26. Misjoinder — Explanation III. — Before explanation III was enacted, there was a conflict of opinions among the High Courts on the question whether misjoinder was a defect coming under the section.¹ It had also been decided in some cases that nonjoinder was not a cause of a like nature to defect of jurisdiction.^{1a} It was to set

6. ('29) 16 AIR 1929 Rang 55 (57):6 Rang 691:117 Ind Cas 52 (DB), *G. Bhandari v. R. Nihalchand*. (The technical point taken and decided against the plaintiff in the appeal was not in issue in the first Court stage.)

7. ('32) 19 AIR 1932 All 377 (378) : 138 Ind Cas 108 (DB), *Mt. Ram Pati v. Phool Singh*.

[See however ('71) 1871 Pun Re No. 64, *Heera Lal v. Sheo Buksh*.]
See also Section 14 Note 12.

8. ('72-73) 6 Mad H C R 45 (46, 50) (DB), *Lee Morris v. Sapamhteetha Pillay*.

Section 14—Note 26

1. *Misjoinder is not such a defect :*

('11) 9 Ind Cas 680 (681) : 1911 Pun Re No. 8, *Allan Khan v. Dost Muhammad*.

('05) 29 Bom 219 (225, 226) : 7 Bom L R 90 (DB), *Varajilal v. Someshwar*.

('08) 35 Cal 728 (735, 736) (DB), *India Publishers Ltd v Aldridge*.

('36) 17 Mad 299 (302) (DB), *Thirtha Sami v. Seshagiri Pai*. (Misjoinder of parties and causes of action.)

('78-80) 2 All 622 (625), *Ram Subhag Das v. Gobind Prasad*. (Overruled in 22 All 248.)

Misjoinder is a cause of a like nature :

(1900) 22 All 248 (258, 259, 260, 261) : 1900 All W N 64 (FB), *Mathura Singh v. Bhawani Singh*. (Overruling 2 All 622.)

('84) 10 Cal 86 (88) : 13 Cal L R 218 (DB), *Deo Prosad v. Pertab Kairee*.

('01) 24 Mad 361 (363) (DB), *Venktaratnam Naidu v. Ramaraju*.

('99) 22 Mad 494 (500, 501, 506) (DB), *Assan v. Pathumma*.

('96) 23 Cal 821 (825, 826) (DB), *Mullick Ketait Hossein v. Sheo Prasad*.

('97) 20 Mad 48 (50, 51) (FB), *Venkiti Nayak v. Murugappa Chetty*. (Misjoinder of causes of action without leave under O. 2 R. 4, C. P. C.)

1a. ('90) 12 All 207 (208, 209): 1890 All W N 76 (DB), *Jema v. Ahmad Ali Khan*. (Non-joinder of a plaintiff not a cause of a like nature.)

at rest this conflict that explanation III was added to the section,² under which, misjoinder of parties or causes of action is deemed to be a cause of a like nature to defect of jurisdiction.³

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Notes 26-27

Explanation III speaks only of misjoinder. Is *nonjoinder* covered by the principle of the section?⁴ In a case of nonjoinder of a person as *plaintiff*, the Madras High Court decided that it is a cause of a like nature to defect of jurisdiction.⁵ There was, however, no discussion of the distinction between nonjoinder and misjoinder. In a Sind case,⁶ also of nonjoinder of a plaintiff, it was observed that misjoinder and nonjoinder are only variations of the same defect, viz., the omission to have the proper parties or causes of action included in a suit or application.

27. Explanation I.— When a plaint is ordered to be returned for presentation to the proper Court, the proceedings cannot be said to be “*ended*” until the plaint is made ready for return. Hence, the period between the date of the order and the date on which the plaint is *made ready* for return as per O. 7, R. 10 of the Civil Procedure Code is to be deducted.¹ That is, if after an order of the plaint

(‘66) 5 Suth W R 281 (281) (DB), *Nilamdhub Surnokar v. Kristo Doss Surnokar*. (Non-joinder of *defendant*.)

2. (‘34) 21 AIR 1934 All 688 (692):57 All 145:150 Ind Cas 135 (FB), *Sadayatan Pande v. Ramchandra Gopal*.

(‘12) 14 Ind Cas 437 (437):6 Low Bur Rul 43 (DB), *Po Nyun v. Muthukarappan*.

3. (‘15) 2 AIR 1915 Lah 474 (475) : 27 Ind Cas 927, *Ahmad v. Sultan*.

(‘24) 11 AIR 1924 Pat 471 (473) : 3 Pat 42 : 75 Ind Cas 312 (DB). *Kishori Mal v. Jagdish Narain Singh*.

4. (‘16) 3 AIR 1916 Lah 234 (236) : 32 Ind Cas 497 : 1916 Pun Re No. 41 (DB), *Kalu v Mehru Mal*. (Question raised but not considered.)

5. (‘23) 10 AIR 1923 Mad 347 (348, 349):73 Ind Cas 139 (DB), *Kunhikuttiali v. Kunhammad*. (Non-joinder of *co-trustees* in a suit to remove manager of a mosque and for appointment of a receiver for the mosque properties.)

[See also (‘90) 13 Mad 451 (452, 453) (DB), *Narasimma v. Muttayyan*. (Some of the mortgagees suing for their share of the mortgage money—Suit dismissed as not maintainable—All the mortgagees then suing—*Held*, S. 14 applied—This case was before Act of 1908.)]

6. (‘21) 8 AIR 1921 Sind 13 (14, 15) : 62 Ind Cas 507 : 15 Sind L R 11 (DB), *Ibrahim v. Firm of Gulam Hussain*. (Non-joinder of *plaintiff*.)

Section 14—Note 27

1. (‘51) 38 AIR 1951 Hyd 57 (Pr 7) (DB), *Muslim Bank v. Hasan Shiraza*. (Where a plaint is returned the endorsement of the dates of presentation and return are imperative under the law. This endorsement is a part of the Court’s duty; therefore, until the endorsement is made the proceedings cannot be said to have come to an end.)

(‘48) 35 AIR 1948 Mad 26 (30) : ILR (1947) Mad 694 (DB), *Subbu Naidu v. Varadarajulu Naidu*.

(‘39) 26 AIR 1939 Lah 47 (48) : 182 Ind Cas 732, *Gurdit Singh v. Mota Singh*.

(‘33) 20 AIR 1933 Cal 914 (915, 916, 917, 918) : 60 Cal 1122:149 Ind Cas 79 (DB), *Neerendrabhooshan Lahari v. Berhampur Oil Mills Ltd.* (Authorities of all Courts reviewed.)

(‘33) 20 AIR 1933 Lah 611 (611):144 Ind Cas 5 (DB), *Muhammad Din v. Gurbaksh Sing*. (Party should not suffer by laches of Court.)

(‘26) 13 AIR 1926 Mad 178 (178, 179) : 92 Ind Cas 373, *Sinna Karuppan v. Muthuiah Chettiar*.

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Note 27

is made by the Court, the plaint is actually returned to the party by the Court sometime afterwards, the period of delay so caused must also be deducted.² The exclusion is allowable however subject to this overriding qualification that during that period the plaintiff must be prosecuting his suit or proceeding with due diligence.^{2a} But no period after the actual return can be deducted. Thus, the time taken after return of the plaint, for getting back the promissory note sued on, cannot be excluded: the absence of an endorsement of return is only an irregularity and cannot extend the period of exclusion where the plaint has been actually returned.³

The Court, which returns the plaint, has no power to fix a period within which it should be presented to the proper Court and no such

[See ('13) 20 Ind Cas 183 (183, 184) (DB) (Cal), *Mohendra Prasad Singh v. Nanda Prosad Singh*. (Where the order of return was promulgated on a day subsequent to its signing, held limitation would not run till the date of promulgation.)]

[See also ('38) 25 AIR 1938 Pat 203 (203, 204) : 175 Ind Cas 89, *Iswar Dayal v. Badri Lal*. (Plaint ordered to be returned—Costs awarded to defendant—Plaint required for preparing decree — Proceedings terminate only when the decree is prepared and signed.)]

[But see ('75) 24 Suth W R 26 (27, 28) (DB), *Abhaya Churn Chuckerbuty v. Gour Mohun Dutt*. (This was based on the then Code of Civil Procedure.)]

2. ('49) 53 Cal W N (1 DR) 75 (76) (DB), *Md. Chand Mia v. Md. Ali Mia*. (A suit for setting aside a revenue sale was filed on 6-10-1939 i.e. 25 days before the expiry of limitation. The plaint was however ordered to be returned on 11-8-1941 for want of pecuniary jurisdiction. An appeal against the order was dismissed on 19-11-1941 and a revision filed against the order was dismissed on 3-3-1942 and the plaint was actually returned to the plaintiff on 20-3-1942. The plaintiff on the same date presented the plaint to the proper Court with a proper valuation: Held that the plaintiff having prosecuted the suit and other proceedings in due diligence was entitled to exemption of that period under S. 14.)

('39) 26 AIR 1939 All 590 (591) : ILR (1939) All 709 : 184 Ind Cas 860, *Jafar Uddin v. Debi Prasad*.

('22) 9 AIR 1922 Bom 160 (160) : 64 Ind Cas 160 : 46 Bom 211 (DB), *Nagindas Kapurchand v. Maganlal Panachand*.

('21) 8 AIR 1921 Bom 379 (379) : 45 Bom 443:50 Ind Cas 743 (DB), *Basavanappa v. Krishnadass*.

('17) 4 AIR 1917 Cal 794 (795) : 35 Ind Cas 595 (DB), *Ganga Charan v. Akhil Chandra*.

('97) 7 Mad L Jour 261 (262) (DB), *Bapu Ammal v. Govinda Padayachi*.

(87) 1887 All W N 302 (303), *Bisheshar Singh v. Ram Daur Singh*.

[See ('48) 35 AIR 1948 Mad 26 (30, 31):ILR (1947) Mad 694 (DB), *Subbu Naidu v. Varadarajulu Naidu*, (The plaintiff is not entitled to any deduction of time after an endorsement required under O. 7, R. 10 (2) except where he can show that the Court delayed the return of the plaints in spite of his endeavours to take it back. Observations in some decisions to the effect that the period to be excluded under S. 14 extends up to the date of actual return of the plaint can only be regarded as loosely worded.)]

2a. ('47) 34 AIR 1947 Bom 140 (141, 142) : 231 Ind Cas 282 (DB), *Babanna v. Channappa*. (The omission of the pleader for the plaintiff to make an application, after the pronouncement of the Court, to have the bill of costs dealt with expeditiously and to rely on the normal machinery of the Court is not acting without due diligence.)

('44) 31 AIR 1944 Bom 37 (38) : 215 Ind Cas 12 (DB), *Harkubai v. Sankarbai*.

3. ('37) 24 AIR 1937 Lah 464 (465) : 173 Ind Cas 740, *Bhuja Mal Gaiinda Mal v. Mukta Parsad*.

period can be deducted.⁴ See also Authors' Commentary on the Civil Procedure Code, 3rd Edition, O. 7 R. 10 Note 9.

Where the order returning the plaint undergoes first and second appeals, the proceedings started by the presentation of the plaint do not come to an end till *final* orders are passed in appeal and in case of a remand by any appellate Court, till the proceedings after remand are also concluded.⁵ (See also Note 11.)

See also the case noted below.⁶

28. Time for obtaining copy of the order in prior proceedings — Explanation I. — The party is not entitled, under this section, to exclude the time required to obtain a copy of the order which ended the prior proceedings when the subsequent suit can be instituted without such copy.¹ But when a plaintiff has applied for a copy of the judgment and decree in order to enable him *to prefer an appeal* therefrom, he may be deemed to have been prosecuting the proceeding, at least during the period occupied in the preparation of the copies.² This will only be giving effect to the intention of the Legislature upon a reasonable construction of the section, though the period may not strictly fall within the term "in a Court of appeal." See also Article 163 Note 11.

29. Exclusion of a portion of the time. — The section says that the time *during which* the party was prosecuting with due diligence shall be excluded. It would, therefore, seem to follow that, in any particular case, though the whole period of the pendency of the prior proceedings may not be excluded, such portion of it during which

4. ('19) 6 AIR 1919 Cal 4 (5) : 53 Ind Cas 955 (DB), *Ramgopal Mandal v. Kumar Kamala Ranjan Roy*.

('17) 4 AIR 1917 Cal 794 (795):35 I. C. 595 (DB), *Ganga Charan v. Akhil Chandra*
(13) 18 Ind Cas 121 (121, 122) (DB) (Cal), *Haridas Roy v. Sarat Chandra Dey*.

(70-71) 5 Mad H C R 407 (410) (DB), *Cheigu Nangiah Gauri Nangiah v. Pidatala Venkatuppah*.

('37) 24 AIR 1937 Pat 495 (496) : 167 Ind Cas 941 (DB), *Jiwan Ram Ramchandra v. Jagernath Sahu*.

[But see ('10)-6 Ind Cas 637 (637) (DB) (Cal), *Nibaran Chandra v. S. C. Mukherjee*. (Reasonable time may be granted.)]

5. ('89) 12 Mad 434 (438, 439) (DB), *Sankaran v. Parvathi*. (Munsif returns plaint for presentation to proper Court—District Judge on appeal reverses the order — On appeal to High Court, District Judge directed to enquire into valuation and decide — District Judge on enquiry confirms Munsif's order.)

6. ('49) 36 AIR 1949 Cal 24 (46), *Sarojendra Kumar Dutt v. Purnachandra Sinha*. (Where the plaintiff took out a summons under Chap. 38, R. 48, Original Side Rules, on 15th August 1944 returnable on 22nd August 1944 and on the same day had obtained an interim order of attachment on his petition, time taken for prosecution of the application, for purposes of S. 14, begins from 15th August 1944 and not 22nd August 1944 : ('43) AIR 1943 Cal 257 : ILR (1943) 2 Cal 227 (DB), *Shree Chand v. Sohanlal*, Ref.)

Section 14—Note 28

1. ('28) 15 AIR 1928 Cal 46 (47) : 106 I. C. 324, *Bonomali Gope v. Fakir Chand Pal*. (Order returning plaint.)

2. ('10) 7 Ind Cas 775 (776, 777) (DB) (Cal), *Lakshiram Mandal v. Sonatum Basar*. (Time requisite for obtaining copies for filing the appeal was held to be deductible as part of time taken in due prosecution.)

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Notes 29-30

he acted with due diligence and in good faith may be deducted.¹ The plaintiff who had purchased the assets of an insolvent firm filed a suit for Rs. 500 in a Munsif's Courts in the *bona fide* belief that that was the amount due to him. After some time, he learnt that the amount due to the insolvent firm from the defendant was something less which would make the suit cognizable by a Court of Small Causes. He asked for the return of the plaint for amendment and instead of presenting it in the Court of Small Causes, he again re-presented it do the same Court. As the plaintiff ought to have known that the same Court had no jurisdiction to entertain the amended suit, the plaintiff was held to be guilty of want of due diligence and the time after he came to know that he was entitled to a smaller amount was not excluded.²

It also follows that want of good faith or due diligence during a portion of the period will not deprive the party of the whole period.³

A was prosecuting in good faith and with due diligence the execution of a decree obtained by him, by filing successive applications for execution, until it was finally discovered that his remedy was by suit and not by execution. A, thereupon, filed a suit and claimed to exclude the whole period from the date of the decree to the date of the discovery of the error. It was contended that, if anything, the periods only, during which the execution applications were actually pending, should be excluded and not the intervals between the dismissal of one execution application and the filing of another. It was held by the High Court of Madras that even those intervals should be excluded on the ground that the suit must be deemed to be a *lis* pending until realization.⁴

30. Failure to plead the exemption under this section.—

The non-mention of a claim to exclusion of time under this section is not fatal to the suit.¹

Section 14—Note 29

1. ('15) 2 AIR 1915 Lah 459 (460) : 28 Ind Cas 347, *Radha Kishen v. Firm of Ladha Mal Ram Chand.*
- ('11) 11 Ind Cas 338 (339) (DB) (Mad), *Kakamani Rayappa v. Kotta Venkanna of Rhjahmundry.*
- ('72) 17 Suth W R 518 (519, 520) (DB), *Nobo Coomar-Chuckerbuty v. Koylash Chunder Baroore.*
- [See ('28) 15 AIR 1928 Rang 21 (22, 23) : 5 Rang 600 : 105 Ind Cas 701 (DB), *Nadesan Chettiar v. Shankaran Chettiar.*
- ('76) 1876 Pun Re No. 35, *Jymal Singh v. Bhagwan Das.*]
2. ('15) 2 AIR 1915 Lah 459 (460) : 28 Ind Cas 347, *Radha Kishen v. Firm of Ladha Mal-Ram Chand.*
- See also Note 11.
3. ('34) 21 AIR 1934 Nag 145 (146) : 30 Nag L R 294 : 149 Ind Cas 956, *Model Mills Nagpur, Ltd v. Hiralal-Ram Gopal.* (It is no concern of Court how plaintiff spends his time till expiry of ordinary period of limitation, excluding time allowed under Section 14.)
4. ('37) 24 AIR 1937 Mad 357 (358, 359) : ILR (1937) Mad 161 : 170 Ind Cas 524 (DB), *Dugarajulum Garu v. Aryan Bank, Vizagapatam.*

Section 14—Note 30

1. ('08) 7 Cal L Jour 560 (562) : 12 Cal W N 617 (DB), *Raghu Nath Bhagat v. Syed Samad Shah.*

15.* (1) In computing the period of limitation prescribed

Exclusion of time for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

(2) In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded.

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope. 3. "Prescribed." 4. "Suit." See Notes to S. 2 cl. (10). 5. "Application for the execution of a decree." 6. "Stayed by injunction or order." 7. Stay by agreement of parties. 8. Insolvency, whether operates as a stay or injunction. 9. Partial stay of execution. 10. Order granting time to judgment-debtor to pay, if amounts to stay order. 11. Institution of collateral suit or proceeding, if will operate as stay. 12. Attachment, if amounts to an injunction or a stay order. 13. Order allowing execution only on condition. | <ol style="list-style-type: none"> 14. Adjournment of case is not stay. 15. Appeal does not operate as a stay. 16. "The day on which it was issued or made, and the day on which it was withdrawn." 17. Duration of stay in case of an appeal. 18. "Revival" of execution application and Section 15. 19. Notice of "suit" — Sub-section (2). 20. Notice required in case of only one or some only of the defendants. 21. Adverse possession (Section 23) and extension of limitation under sub-section (2). 22. Sub-section (2) : "Enactment for the time being in force." 23. Section 15 sub-section (2) and Sections 6 and 8. See Note 41 to S. 6. 24. Section 15 and res judicata. |
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* Act of 1877 : S. 15.

Exclusion of time during which commencement of suit is stayed by injunction or order.

In computing the period of limitation prescribed for any suit, the institution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

Act of 1871 : S. 16.

Exclusion of time during which commencement of suit is stayed by injunction.

In computing the period of limitation prescribed for any suit, the commencement of which has been stayed by injunction, the time of the continuance of the injunction shall be excluded.

Act of 1859.

No corresponding provision.

Section 15
Note 1

TOPIC INDICATOR

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| Absolute stay contemplated by section. See Note 9. | Order for taxation of solicitor's costs. See Note 6. |
| Application for delivery of possession by auction purchaser — Not application for execution. See Note 5. | Proceedings consigned to record room — No stay. See Note 10. |
| Application for final decree in mortgage suit. See Notes 5 and 11. | Refusal of leave to proceed against insolvent — Whether amounts to injunction or stay. See Note 8. |
| Attachment of decree — Whether operates as stay or injunction. See Note 12. | Stay against one judgment-debtor is not stay against other judgment-debtors. See Note 9. |
| Civil Procedure Code, S. 48 — Not controlled by this section. See Note 3. | Unnecessary notice to Secretary of State or public officer — No deduction against private individual. See Note 20. |
| Disability to sue or apply from other circumstances. See Notes 6, 7 and 8. | |

1. Legislative changes.

- (1) The corresponding S. 16 of the Act of 1871 applied only to a stay by *injunction*.
- (2) Section 15 of the Act of 1877 introduced the words or "order" after the word "injunction" and also the words "the day on which it was issued or made and the day on which it was withdrawn."
- (3) Neither of the above two sections applied to *applications for execution of decrees*¹ and this resulted in hardship in many cases under the Act of 1877 where the decree-holder could not execute his decree owing to an injunction or a stay order, but found himself barred by limitation when the bar was removed. In order to meet this difficulty the Courts adopted various methods of relieving the parties of this hardship. In some cases² where

Section 15 — Note 1

1. ('10) 7 Ind Cas 886 (888, 889) (DB) (Cal), *Amulya Ratan v. Preo Nath*.
('03) 26 Mad 780 (782) : 13 Mad L Jour 412 (DB), *Rungiah Goundan & Co. v. Nanjappa Rao*.
('88) 11 Mad 103 (105) (DB), *Rajarathnam v. Skevalayammal*.
('82) 8 Cal 248 (250) : 10 Cal L R 143 : 6 Ind Jur 357 (DB), *Lutful Huq v. Sumbhudin Pattuck*. (Per Prinsep, J.)
2. ('03) 26 All 156 (161) : 1903 All W N 221 (DB), *Rudder Singh v. Dhanpal Singh*.
('95) 17 All 425 (427) : 1895 All W N 82, *Lakhmi Chand v. Ballam Das*.
('83) 6 All 23 (24) : 1883 All W N 181 (DB), *Basant Lal v. Batul Bibi*. (Article 178 of Act of 1877 also applied.)
('77) 1 All 355 (358, 360) (FB), *Paras Ram v. Gardner*.
(1900) 24 Bom 345 (349) : 1 Bom L R 846 (DB), *Narayan Govind Manik v. Sono Sadashv*.
('92) 16 Bom 294 (302, 303) (DB), *Chintaman Damodar Agashe v. Balshastri*.
('80) 5 Bom 29 (35) (DB), *Kalyan Bhai Dipchand v. Ghanashamlal Jadu Nathji*. (Article 178 of Act of 1877 applied.)
('03) 30 Cal 407 (411) (DB), *Ashrafuddin Ahmed v. Bepin Behari Mullick*.
('95) 23 Cal 397 (402) (DB), *Raghunath Sahay Singh v. Lalji Singh*.
('06) 33 Cal 689 (692) (DB), *Gurudeo Narayan Sinha v. Amrit Narayan Sinha*. (A case where injunction affected only a portion of the property proceeded against in execution.)
('05) 28 Mad 50 (53) : 14 Mad L Jour 401 (FB), *Suppa Reddiar v. Avudi Ammal*. (Previous application was wrongly dismissed.)
('98) 21 Mad 261 (263) : 8 Mad L Jour 18 (DB), *Sasivarna Tevar v. Arulanandun*.

a stay or an injunction had been obtained after an application had been filed, the subsequent application filed after the removal of the bar was regarded as one for *revival* of the prior proceeding which was regarded as suspended during the injunction or stay. In some cases³ the subsequent application was held not to fall within Art. 179 of the Act of 1877 (now Art. 182) but to fall under Art. 178 (now Art. 181) of the Limitation Act, and the right to apply was taken to arise on the removal of the bar. In the undermentioned case⁴ it was held that time did not run at all during the pendency of the bar and that S. 9 would not apply.

- (4) The difficulty has now been removed in the present S. 15 by inclusion in the section of applications for the execution of decrees.⁵ The second paragraph is new.

2. Scope.—This section is intended to prevent the accrual of any injury to the person who is interdicted by an *injunction or order* from exercising his right of suit or of execution of the decree obtained by him.¹ It is, however, only the period during which he is actually so interdicted that will be excluded. In the same matter there may be several interrupted periods of interdiction. In such cases the party cannot claim to exclude the time or the periods during which there is no stay or injunction in force.²

3. "Prescribed." — As to the applicability of this section to the twelve years' period prescribed by S. 48 of the Civil Procedure Code, see S. 29 Note 6a.

4. "Suit." — See Notes to Section 2 clause (10).

('10) 6 Ind Cas 537 (539) : 37 Cal 796 (DB), *Madhab Moni Dasi v. Pamela Lambert*.

('10) 7 Ind Cas 886 (888) (DB) (Cal), *Amulya Ratan v. Preo Nath*.

('73) 19 Suth W R 186 (187) (DB), *Gunesh Dutt v. Mungree Ram*.

See also Article 182 Note 143.

3. ('03) 26 Mad 780 (782, 783, 784) : 13 Mad L Jour 412 (DB), *Rungiah Goundar & Co. v. Nanjappa Rao*.

[See ('96) 19 All 71 (72, 73) : 1896 All W N 188 (DB), *Desraj Singh v. Karam Khan*.

('03) 26 All 156 (161) : 1903 All W N 221 (DB), *Rudder Singh v. Dhanpal Singh*.]

4. ('03) 26 All 140 (143) : 1903 All W N 211 (DB), *Beni Prasad v. Sarju Prasad*.

5. ('26) 13 AIR 1926 All 473 (474) : 94 Ind Cas 482 (DB), *Mt. Sahodra v. Bhagwan Das*. (('81) 4 All 60 (DB), *Sitla Din v. Sheo Prasad* and ('81) 4 All 155 (DB), *Bal Chand v. Raghunath*, distinguished.)

('27) 14 AIR 1927 All 16 (19) : 100 Ind Cas 692 : 49 All 276 (FB), *Chattar Singh v. Kamal Singh*. (Per Lindsay, J.)

('36) 23 AIR 1936 Cal 239 (241) : 63 Cal 57 : 162 I. C. 654 (DB), *Kristo Kamini Debi v. Girish Chandra Mondal*.

Section 15 — Note 2

1. ('85) 8 Mad 229 (234) (DB), *Shunmugan v. Moidin*.

2. ('15) 2 AIR 1915 Mad 756 (758) : 26 Ind Cas 267 (DB), *Doraisamy Reddy v. Venkatachallam Pillai*. (Order of remand by High Court is not tantamount to issue of injunction.)

('07) 31 Mad 71 (73) : 18 Mad L Jour 46 (DB), *Chalavadi Kotiah v. Poloori Alimelammah*. (Order removing bar to execution—Appeal against the order — But no stay by appellate Court.)

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Note 5

5. "Application for the execution of a decree." — The section applies only to applications *for* execution of a decree. The section assumes the existence of a decree which is capable of execution. Where there is no operative decree there is no scope for applying the provisions of this section.^{1a} An application for delivery of possession by the auction purchaser under O. 21 R. 97 of the Civil Procedure Code is not an "application for execution" within this section.¹ Also, an application for a final decree in a mortgage suit is not an application for execution and it would follow that S. 15 does not apply to such an application. It has, however, been held by the Calcutta and Patna High Courts² that where proceedings after a preliminary decree are stayed, the right to apply for a final decree arises under Art. 181 only when the stay is removed. According to the Bombay High Court and a recent decision of the Allahabad High Court, limitation is saved in such a case because the right to apply for a final decree is *suspended* during the continuance of the stay.³ It is submitted that none of the above views is correct under the Limitation Act as it stands. It is a case for amending the statute. It has been held in the undermentioned cases^{3a} that the principle of this section should be extended to an application for restitution.

In order that the section may apply to an application for the execution of a decree, it is not necessary that such application must have been *pending* at the date the injunction or stay order was passed.⁴

Section 15 — Note 5

1a. ('44) 31 A I R 1944 All 88 (89): ILR (1944) All 197 : 212 Ind Cas 621 (DB), *Chanda Devi v. Nathu Singh*.

1. ('35) 22 AIR 1935 Cal 333 (334) : 62 Cal 66 : 158 Ind Cas 191 (DB), *Jateendra Chandra v. Rebateemohan Das*.

See also Article 180 Note 5 and Article 182 Note 16.

2. ('33) 20 AIR 1933 Cal 508 (509) : 144 Ind Cas 768 (DB), *Pulin Chandra v. Amin Miah*. (Stay under C. P. C., O. 32, R. 10.)

('22) 9 AIR 1922 Pat 201 (203) : 66 Ind Cas 97: 1 Pat 435 (DB), *Chhotey Narain Singh v. Kedar Nath Singh*.

[See also ('47) 34 AIR 1947 Pat 225 (230) : 25 Pat 432 : 225 Ind Cas 256 (DB), *Sona Debi v. Bhola Prosad*. (Preliminary decree in mortgage suit—Fact that question as to priority with respect to certain prior mortgages was pending decision in appeal filed against preliminary decree in another connected suit held no ground for suspending limitation for application for final decree.)]

3. ('47) 34 AIR 1947 All 187 (188) : I L R (1946) All 709 : 226 Ind Cas 424 (DB), *Umrao v. Behari Lal*. (An application for a final decree in a suit on the basis of a mortgage is in effect an application to obtain execution of the decree for recovery of money by the sale of property, although in form it is a preliminary step before actual execution can be taken out. AIR 1941 Bom 203 : ILR (1941) Bom 435, Foll.)

('41) 28 AIR 1941 Bom 203 (204) : I L R (1941) Bom 435 : 197 Ind Cas 30 (DB), *Govindnaik Gurunath Naik v. Basawannawa Parulappa*. (Stay under O. 32, R. 10, C. P. C.)

3a. ('45) 32 AIR 1945 Lah 227 (228) (DB), *Managing Committee, S. S. M. S. Rajput High School v. S. S. M. S. S. D. Rajput High School Trust*.

('44) 31 AIR 1944 Lah 190 (196) : ILR (1945) Lah 8 : 213 Ind Cas 121 (FB), *Ram Singh v. Dhayan Singh*.

4. ('21) 8 AIR 1921 Mad 113 (114) : 62 Ind Cas 255 (DB), *Govindarajulu Naidu v. Ranga Rao*.

As to exclusion under other Acts of certain periods in computing the period of limitation for execution applications, see the undermentioned cases.⁵ See also Article 182 Note 6.

6. "Stayed by injunction or order."—Where the institution of a suit or the execution of a decree has been stayed by an injunction or order, the period during which such injunction or order is in force must be excluded in computing the period of limitation for such suit or application.¹

The words "stayed by injunction or order" have reference to orders of Courts and not to a disability to sue or to apply arising from other circumstances such as the declaration of war.² Similarly, the section applies only to injunctions and orders judicially made by Court and will not apply to administrative instructions issued to Courts to keep execution cases pending against certain classes of persons until further orders.^{2a} See also Notes 7 and 8 below. Further, the order of the Court must be such that it clearly operates as an injunction or a stay of execution.³ The section applies to cases in which

[But see ('01) 6 Cal W N 735 (736) (DB), *Sarup Ganjan Singh Bhuyan v. Robert Watson & Co., Ltd.* (Observations to the contrary are not good law though the actual decision in the case as to limitation is otherwise correct on facts.)]

5. ('45) 32 AIR 1945 Pat 398 (400) : 24 Pat 222 : 227 Ind Cas 605 (DB), *Kedar Nath v. Parsidh Singh*. (Section 15 applies to an application for execution covered by Art. 6 of Sch. 3 of Bihar Tenancy Act.)

('10) 7 Ind Cas 860 (860) (DB) (Mad), *Damara Kunar Thimmanayannu v. Ranga Bhupala*. (Schedule 3 Para. 11, C. P. C.)

('10) 8 Ind Cas 377 (378) : 13 Oudh Cas 303, *Mohamed Abdul Karim Khan v. Nawaz Singh*. (Do.)

Section 15 — Note 6

1. ('24) 11 AIR 1924 Cal 485 (487) : 51 Cal 150 : 81 I. C. 734 (DB), *Jyoti Prakash Nandi v. Mukti Prakash Nandi*. (Injunction staying execution proceedings.)

('28) 15 AIR 1928 Pat 86 (86) : 102 Ind Cas 327 : 6 Pat 635 (DB), *Ramgulam Singh v. Raj Kumar Rai*. (Do.)

('21) 8 AIR 1921 Cal 606 (608) : 64 Ind Cas 594 (DB), *Govinda Nath v. Basiruddin Mandal*. (Execution may be stayed by injunction in proceedings other than execution proceedings or by order of executing Court.)

('19) 6 AIR 1919 Oudh 375 (376) : 52 Ind Cas 116 : 22 Oudh Cas 75 (DB), *Gulzari Lal v. Ram Bhajan*. (Execution stayed by order of Court.)

('16) 3 AIR 1916 Pat 39 (40) : 2 Pat L Jour 24 : 38 Ind Cas 85 (DB), *Baluk Chand v. Nadhuni Singh*. (Injunction restraining execution.)

[See also ('48) 35 AIR 1948 All 375 (378) : 1 L R (1949) All 49 (DB), *Ganesh Prasad v. Mt. Makhna*. (Decree-holder attempting claim to be recognized under U. P. Encumbered Estates Act—Execution stayed at instance of party—Person at whose instance stay was granted cannot subsequently object to stay and say that period taken by proceedings under that Act cannot be excluded from limitation.)]

2. ('19) 6 AIR 1919 Cal 706 (708) : 46 Cal 526 : 47 Ind Cas 398 (DB), *Deutsche Asiatische Bank v. Hira Lall Burdhan & Sons*. (Per Woodroffe, J.)

2a. ('41) 28 AIR 1941 Oudh 93 (95) : 16 Luck 495 : 191 Ind Cas 757, *Gurdin Bhand v. Chhedi Bhand*. (In this case the Chief Court issued a letter to District Judges to stay all executions in civil Court decrees passed against agriculturists as defined in the Agriculturists' Relief Bill until the Bill became law — Held that it was only an administrative instruction to Courts.)

3. ('50) 1950 T. O. L. R. 81 (83) (DB), *Sivakalaperumal Nadar v. Arumughakkannu Nadar*. (The mere filing of an application by the defendant to set aside

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Note 6

either as a direct or as an indirect consequence of an order of a Court a party is debarred from instituting a suit or proceeding with an application.^{3a} Where there is no such order as to *prevent* the party from instituting the suit or from applying for execution, or the Court from *entertaining* the suit or *proceeding* with the application, no exclusion can be claimed under this section.⁴ But it is not necessary

an *ex parte* decree, does not operate as a bar against the decree-holder's right to execute the decree unless such application is followed by an order restraining such execution.)

('50) 1950 Ker. L. T. 312 (316) (DB), *Lekshmana Perumal v. Sundalamuthu*. (The mere pendency of an application under O. 9, R. 13, Civil P. C. will not suspend the period of limitation for the execution of the decree. Any appeal or revision against the order dismissing such an application will be only a continuation of the proceedings under O. 9, R. 13, and as such, the pendency of such appeal or revision cannot also suspend the period of limitation for the execution of the decree.)

('21) 8 AIR 1921 Bom 33 (33): 60 Ind Cas 916, *Visvanath Parashram v. Narsu-Tulsidas*. (Though perhaps a *written order* may not be necessary.)

3a. ('47) 34 AIR 1947 All 187 (188): I L R (1946) All 709 : 226 Ind Cas 424 (DB), *Umrao v. Behari Lal*. (The rule contained in S. 15 applies to suits and applications for execution stayed under the Encumbered Estates Act, because the stay is the indirect result of the order passed by the Collector under S. 6 of the Act. AIR 1943 All 291 : ILR (1943) All 569, followed.)

('43) 30 AIR 1943 All 291 (293): I L R (1943) All 569 : 209 Ind Cas 541 (DB), *Hulas Singh v. Data Ram*.

4. ('44) 31 AIR 1944 Mad 67 (68, 69): ILR (1944) Mad 410: 215 Ind Cas 318 (DB), *Chidambaram Chettiar v. Meyyappa Chettiar*. (Administration suits— Preliminary decree passed and receiver appointed — Preliminary decree and appointment of receiver held could not be regarded as amounting to an injunction or order within this section.)

('44) 31 AIR 1944 Pesh 17 (19): 212 Ind Cas 628 (DB), *Jawahar Singh v. Mohd. Rafiq*. (If no stay order is passed under S. 10 of that Act, S. 15 of the Limitation Act has no application.)

('40) 27 AIR 1940 Lah 75 (77): 190 Ind Cas 379, *Kundo Mal v. Doulat Ram Vaidya Parkash Firm*. (Sale of particular house attached in execution stayed— Decree-holder cannot claim benefit of section because he is not prevented from proceeding against other properties or against the person of the judgment-debtor.)

('39) 26 AIR 1939 Bom 1 (10, 21): ILR (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jivaji v. Gurunathgouda*. (Decree declaring plaintiff in possession of lands as sole owner and ordering defendant not to deprive plaintiff of his possession or to obstruct plaintiff in taking crops and ordering defendant not to receive rents does not operate as an injunction restraining the defendant from filing a suit for possession — S. 15 does not apply.)

('38) 25 AIR 1938 Nag 534 (537): ILR (1940) Nag 334 : 180 Ind Cas 903 (DB), *Rajaram Daduji v. Paiku*. (Attachment of property in execution of decree — Attachment raised on objection by third party — Claim suit by decree-holder does not operate as a bar to execution against other properties — Section does not apply when there is no injunction staying execution.)

('33) 20 AIR 1933 Mad 418 (424): 143 Ind Cas 1 : 56 Mad 490 (FB), *Tripura Sundaramma v. Abdul Khader*. (Per Mockett, J.)

('35) 22 AIR 1935 Mad 352 (352, 353): 164 Ind Cas 896 (DB), *Kadimcherja Raju v. Ayyappa Raju*. (It was within power of parties to remove the stay.)

('24) 11 AIR 1924 Bom 39 (40, 41): 76 Ind Cas 557 (DB), *Somshikharswami v. Shivappa Mallappa*. (Plaintiff defending suit concerning same subject-matter.)

('19) 6 AIR 1919 Oudh 85 (87): 54 I C 426, *Kalka Singh v. Gur Saran Lal*.

that the order should be a valid one or that it should be proper.^{4a} Whether in any particular case there is an order which operates as an injunction or a stay of the institution of a suit or of execution must be decided upon an examination of the circumstances under which the order was passed and on a consideration of the terms and effect of the order.^{4b} Thus, an order staying delivery of possession to the court auction purchaser of the property purchased by him does not amount to an injunction preventing the institution of a suit for mesne profits against the person in wrongful possession of the property.⁵ The acceptance of a decree by the Court as a security for costs does not amount to an order staying the execution of such decree.⁶ An order of a Court for taxation of a solicitor's costs against his client is no bar to the institution of a suit by the solicitor against the client for his costs.⁷ The order of collector under S. 6 of the U. P. Encumbered Estates Act attracts the provisions of this section since no creditor can during the pendency of proceedings under that Act institute a suit for the recovery of the debt due to him from the landlord.⁸

[See ('29) 16 AIR 1929 Pat 694 (695, 696) : 9 Pat 385 : 122 Ind Cas 817 (FB), *Mahabir Prasad v. Bhupal Ram*. (Per Das, J. — Case under S. 2, Chota Nagpur Encumbered Estates Act, 1876.)]

('28) 15 AIR 1928 Pat 179 (181, 182): 105 Ind Cas 643: 7 Pat 109 (DB), *Khairul-lah Khan v. Lachmi Ram*. (Do.)]

[See also ('26) 13 AIR 1926 Pat 260 (262) : 5 Pat 404 : 94 Ind Cas 624 (DB), *Mathura Prasad Singh v. Jageswar Prasad Singh*. (The word 'bar' in S. 3, Chota Nagpur Encumbered Estates Act held to mean 'stay' of all proceedings.)]

4a. ('44) 31 AIR 1944 Nag 155 (156, 157) : ILR (1944) Nag 250 : 217 Ind Cas 298 (DB), *Sitaram v. Chunnilalsa*.

4b. ('45) 32 AIR 1945 P C 5 (7) : ILR (1945) Kar (PC) 43 (PC), *Narayan Patil v. Puttabai*. (Suit for declaration and possession — Injunction restraining defendant from interfering with plaintiff's possession — Defendant held not prohibited from instituting suit for possession.)]

('41) 28 AIR 1941 Pat 499 (501) : 196 Ind Cas 609 : 41 Pat W N 183 (186), *Jagdeo v. Babulal*. (Compromise decree providing that it should not be executed till a certain other suit was decided — Provision operates as an order staying execution.)

('39) 26 AIR 1939 Bom 1 (10) : ILR (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jivaji v. Gurunath Gauda*. (Such an order may be express or implied.)

5. ('33) 20 AIR 1933 Lah 615 (618): 146 Ind Cas 939, *Basheshar Dass v. Diwan Chand*.

6. ('17) 4 AIR 1917 Pat 132 (133) : 3 Pat L Jour 132 : 44 Ind Cas 570 (DB), *Midnapore Zamindari Co. v. Deputy Commissioner of Manbhum*.

[See ('39) 26 AIR 1939 Nag 81 (82) : ILR (1940) Nag 627: 181 Ind Cas 516 (DB), *Shankarrao v. Hazarimal*. (Decree-holder obtaining stay of execution in previous suit against him by offering security of decree obtained by him against person whose estate was under management of Court of Wards — Court obtaining from decree-holder undertaking not to accept payment direct from Court of Wards — Order held did not amount to stay by injunction.)]

7. ('08) 35 Cal 171 (175) (DB), *Makham Lal Mukerjee v. Nalin Chandra Gupta*.

8. ('43) 30 AIR 1943 All 291 (293) : ILR (1943) All 569 : 209 Ind Cas 541, *Hulas Singh v. Data Ram*.

('47) 34 AIR 1947 All 187 (188): ILR (1946) All 709: 226 Ind Cas 424 (DB), *Umrao v. Behari Lal*. (AIR 1943 All 291: ILR (1943) All 569, followed.)

('47) 34 AIR 1947 Oudh 157 (158): 229 Ind Cas 62, *Radhey Shyam v. Ibne Hasan*.

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Notes 6-8

An order of a competent Court declaring a decree null and void is not an order staying execution of the decree.⁹ The question whether this section will apply to an instalment rent decree which does not provide that in case of default the entire decree would be executable was raised but not decided in the undermentioned case.¹⁰

See also Notes 7 to 15.

7. Stay by agreement of parties. — It has been seen in Note 6 that the words “stay by an injunction or order” have reference to *orders of Courts*. It follows that the words cannot apply to a disability to sue or to apply arising from the existence of an *agreement between the parties* that the suit or execution should not be instituted or proceeded with.¹ Limitation cannot be extended by agreement of parties.² But where the parties consent that a stay order or injunction should be granted and the Court passes an *order* on such consent granting injunction or stay, such order will, of course, be covered by the section.³

8. Insolvency, whether operates as a stay or injunction. — The words “stayed by injunction or order” have, as has been seen in Note 6, reference to an *order of a Court* and not to a disability to sue or to apply arising from the other causes. It follows that even assuming that the pendency of insolvency proceedings against a person will prevent any suit or application from being filed against him, such prevention will be not by reason of the order of the Court, but *under*

(‘46) 33 AIR 1946 Oudh 161 (162): 223 Ind Cas 225 (DB), *Azam Qadar v. Jagannath*. (Compromise decree passed on 16th October 1933 — Application by judgment-debtor under S. 4, U. P. Encumbered Estates Act [25 (XXV) of 1934] on 3rd January 1936 — Application dismissed for default on 19th April 1938 — Application for restoration dismissed — Appeal against dismissal dismissed on 2nd December 1938 — Application for execution of decree on 9th September 1939 — Period from 3rd January 1936, when order under S. 6 was passed, to 2nd December 1938 held should be excluded — Application held was within time.)

(‘46) 33 AIR 1946 Oudh 121 (122): 222 Ind Cas 446 (DB), *Yadavendra Dutt v. Ajodhia Bank, Fyzabad*. (AIR 1943 All 291: ILR (1943) All 569, followed.)

(‘45) 1945 Oudh App (H. C.-B) 38 (40), *Behari Lal v. Umrao*. (Application for final decree in mortgage suit.)

9. (‘44) 31 AIR 1944 All 88 (89): ILR (1944) All 197: 212 Ind Cas 621 (DB), *Chand Devi v. Natthu Singh*.

10. (‘45) 32 AIR 1945 Pat 398 (400): 24 Pat 222: 227 Ind Cas 605 (DB), *Kedar Nath v. Parsil Singh*.

Section 15 — Note 7

1. (‘27) 14 AIR 1927 Mad 347 (348): 100 Ind Cas 20, *Syamaldoss v. Subbayya*. (‘15) 2 AIR 1915 All 231 (232): 28 Ind Cas 381 (DB), *Ibrahimji v. Hasanuddin Khan*. (Decree-holder agreeing in judgment-debtor’s insolvency proceedings that if insolvency was withdrawn the decree-holder would not take out arrest for two years, but no stay in execution side though insolvency withdrawn.)

(‘17) 4 AIR 1917 Mad 892 (894): 35 Ind Cas 575: 40 Mad 701 (DB), *Ramamurthi v. Thimmanna Gopayya*. (Agreement to refer to arbitration.)

2. (‘17) 4 AIR 1917 Pat 132 (133): 3 Pat L Jour 132: 44 Ind Cas 570 (DB), *Midnapur Zamindari Co. v. Deputy Commissioner, Manbhum*.

(‘72) 17 Suth W R 396 (398) (DB), *Mehroonissa v. Rowshun Jehan*.

3. (‘26) 13 AIR 1926 All 473 (474): 94 I C 482 (DB), *Mt. Sahodra v. Bhagwan Doss*.

the law. Section 15 will not therefore apply to such cases.¹ But it may be noted here that a creditor can proceed against the insolvent notwithstanding the insolvency proceedings, provided he gets the *leave* of the Court.² It is only when the leave is refused that he will be prevented from so proceeding against the insolvent. Such refusal cannot, however, be considered to be an order granting injunction or stay. A different view seems, however, to have been taken in the undermentioned cases^{2a} where it has been held that where leave is refused it can be said that there is an injunction or stay order. It is submitted that this view does not appear to be correct.

The insolvency of A does not operate as a bar to a proceeding against B,³ or even against A *personally* in the absence of a protec-

Section 15 Note 8

Section 15 — Note 8

1. ('29) 16 AIR 1929 Mad 715 (718): 121 Ind Cas 485, *Rama Pillai v. Kasamuthu Nadar*.
[See ('39) 26 AIR 1939 Lah 270 (272): 184 Ind Cas 573, *Nawab Khan v. Fateh Mohammad*. (Decree passed against judgment-debtor who was subsequently declared insolvent — Subsequent disability cannot suspend time for applying for execution — S. 15 does not apply as the decree-holder could have removed the disability by applying to insolvency Court for permission.)]
2. ('47) 34 AIR 1947 Mad 238 (239): ILR (1947) Mad 661 (DB), *Akkaya v. Appayya*.
('41) 28 AIR 1941 Nag 60 (61): ILR (1942) Nag 306: 191 Ind Cas 554, *Nandlal v. Ramdatta Hiralal*.
('39) 26 AIR 1939 Lah 270 (272): 184 Ind Cas 573, *Nawab Khan v. Fateh Mohammad*. (Provincial Insolvency Act, S. 28.)
('24) 11 AIR 1924 All 707 (707, 708): 82 Ind Cas 1, *Ram Bharosay v. Sohan Lal*. (There was no adjudication in this case.)
('18) 5 AIR 1918 Pat 505 (507): 47 Ind Cas 798 (SB), *Sheo Saran Ram v. Basudeo Prasad Sahu*. (Presidency Towns Insolvency Act.)
('28) 15 AIR 1928 Mad 627 (628): 51 Mad 583: 110 Ind Cas 518 (DB), *Parameswaran Nambudri v. Seshan Pattar*. (*Quære*.)
('19) 6 AIR 1919 Mad 656 (657): 42 Mad 319: 49 Ind Cas 625 (DB), *Ramaswamy Pillai v. Govindasamy Naicker*. (Provincial Insolvency Act.)
('23) 10 AIR 1923 Bom 33 (34): 67 Ind Cas 757: 47 Bom 244 (DB), *Sidraj Bhojraj v. Ali Haji*. (Presidency Towns Insolvency Act.)
('20) 7 AIR 1920 Low Bur 148 (149): 64 Ind Cas 50, *Greenburgh v. Xavier*. (Do.)
[See ('12) 14 Ind Cas 335 (338) (Lah), *Ram Das v. Kanshi Ram*. (Mere fact that judgment-debtor has applied to be declared insolvent does not prevent decree-holder from executing his decree.)
('33) 20 AIR 1933 Rang 75 (76): 146 Ind Cas 124, *Bandeally Jaffer v. Peer Muhammad*. (Suit brought before annulment should be allowed to be withdrawn with liberty to sue after annulment.)]
[See however ('74) 1874 Pun Re No. 66, *Wazir Muhammad Khan v. Muhammad Imam Khan*. (Period during which an order of discharge was in force till it was set aside on appeal was held deductible—Act IX of 1871.)]
- 2a. ('41) 28 AIR 1941 Nag 60 (61): ILR (1942) Nag 306: 191 I C 554, *Nandlal v. Ramdatta Hiralal*.
('23) 10 AIR 1923 Bom 33 (34): 67 Ind Cas 757: 47 Bom 244 (DB), *Sidhraj Bhojraj v. Alli Haji*.
3. ('47) 34 AIR 1947 Mad 271 (273): 1947-1 Mad L Jour 85 (DB), *Balayya v. Parvateeswararao*. (Decree against father and sons binding sons' interest in joint family properties — Insolvency of father is no bar to execution of decree against sons and their interest — Period of father's insolvency cannot be excluded in computing limitation for execution application against sons.)

Section 15
Notes 8-9

tion order.⁴

As to the exclusion under the Provincial Insolvency Act, 1920, of certain periods of the pendency of the insolvency proceedings, see S. 78 of that Act and the undermentioned cases.⁵ (See also Article 182, Note 5.)

Where the insolvency Court actually passes an order amounting to an injunction or stay, the section will of course apply.⁶

9. Partial stay of execution. — The section contemplates an *absolute* stay of execution which renders the decree-holder incapable of taking out any execution of the decree.¹ A stay of execution in *one*

('38) 25 AIR 1938 Pat 395 (396) : 176 Ind Cas 876, *Ram Ranbijaya Prasad v. Nagesar Tiwari*. (Insolvency of one judgment-debtor will not save limitation for execution against his co-judgment-debtors.)

('31) 18 AIR 1931 Lah 125 (126) : 131 Ind Cas 345, *Asa Nand v. Bishan Singh*.

4. ('18) 5 AIR 1918 Pat 505 (507) : 47 Ind Cas 798 (DB), *Sheo Saran Ram v. Basudeo Prasad Sahu*.

5. ('41) 28 AIR 1941 Nag 60 (61) : I L R (1942) Nag 306:191 Ind Cas 554, *Nandlal v. Ramdatta Hiralal*. (Section 78 (2), Provincial Insolvency Act, excludes time only in case of annulment of order of adjudication and therefore it cannot be applied even by analogy to a case where an absolute discharge has been granted to insolvent.)

('28) 15 AIR 1928 Mad 977 (978) : 51 Mad 862:114 Ind Cas 227 (DB), *Machanjeeri Ahmad v. Govinda Prabhu*. (Benefit of Section 78 can be claimed only after adjudication has been annulled.)

('29) 16 AIR 1929 Cal 159 (160) : 114 Ind Cas 415 (DB), *Krishna Chandra Das v. Jotindra Nath*.

('33) 20 AIR 1933 Lah 101 (102) : 142 Ind Cas 644, *Rali Ram v. Sant Ram Ganpat Rai*.

('33) 20 AIR 1933 Lah 953 (954) : 14 Lah 426 : 146 Ind Cas 686 (DB), *Amar Singh v. Imperial Bank of India, Jullundur*. ('Annulment' in Section 78, Provincial Insolvency Act, held to include setting aside of adjudication order on appeal.)

('32) 19 AIR 1932 Oudh 69 (70) : 134 Ind Cas 878 : 7 Luck 397 (DB), *Nak Ched Shah v. Kashmiri Bank Ltd., Fyzabad*.

('31) 131 Ind Cas 252 (253) (All), *Kundan Lal v. Bishambarnath*.

6. ('19) 6 AIR 1919 Lah 171 (172) : 51 Ind Cas 64, *Tara Chand Ghansham Das v. Jugal Kishore*. (Under the former Insolvency Act.)

('12) 14 Ind Cas 335 (338) (Lah), *Ram Das v. Kanshi Ram*. (No stay order however was passed in this case — Hence section held inapplicable.)

[See ('40) 27 AIR 1940 Pat 149 (151) : 184 Ind Cas 701 (DB), *Nathuni Prasad v. Firm Radha Kishun Dutt Rai*. (Execution stayed by executing Court till disposal of insolvency case.)

('32) 19 AIR 1932 Lah 281 (288) : 13 Lah 70 : 137 Ind Cas 820 (DB), *Umrao Bibi v. Ram Kisen*. (Property of insolvent passing in *custodia legis* under an erroneous order of Insolvency Court — S. 15 was held to be applicable because the creditors could not have sued the insolvent during the period of insolvency.)]

Section 15 — Note 9

1. ('44) 31 AIR 1944 Bom 303 (305, 306) : 46 Bom L R 666 (DB), *Virchand v. Marulappa*.

('40) 27 AIR 1940 Lah 75 (77) : 190 Ind Cas 379, *Kundo Mal v. Daulat Ram-Vaidya Parkash Firm*. (Only sale of particular house attached in execution stayed — Decree-holder cannot claim benefit of the section as it is open to him to proceed against person and other properties of judgment-debtor.)

('29) 16 AIR 1929 Pat 597 (600) : 120 Ind Cas 315 (DB), *Kirtyanand Singh v. Pirthichand Lal*. (Court refusing execution against property in hands of receiver — Decree-holder able to proceed against other properties.)

particular mode is consequently not a stay of execution within the meaning of this section if it is open to the decree-holder to execute his decree in any other mode.² An injunction restraining a decree-holder from executing the decree for the principal does not necessarily debar him from realizing the interest.³ An order staying an *execution sale* pending disposal of questions raised in the pending execution petition is not a stay of the *execution proceedings* within the meaning of this section.⁴ An order for stay of execution against one judgment-debtor alone does not operate as a stay against the other judgment-debtors.⁵ In *Kirtyanand Singh v. Pirthi Chand Lal Choudhri*,⁶ A became a surety for B for the due performance of the decree obtained by X against B. Thereafter an administration suit was filed against B and a receiver was appointed therein for the administration of B's property. X made an application in that suit for leave to execute his decree against B's *properties*, but the Court passed an order that he should wait. This order was subsequently set aside on appeal. X subsequently applied for execution against the surety A under S. 145 of the Civil Procedure Code. It was held by their Lordships of the Privy Council that the order that X should wait and not proceed against B's properties was not an order staying execution of the decree against A.

('24) 11 AIR 1924 Bom 383 (384): 48 Bom 485: 80 Ind Cas 239 (DB), *Chanbasappa Nagappa v. Holibasappa Basappa*. (Stay order under O. 21, R. 53 (1) (b).)

('89) 17 Cal 268 (271) (DB), *Raghunandan Pershad v. Bhugoo Lall*. (Bar only against a portion of the property being proceeded against in execution.)

[See also ('44) 31 AIR 1944 Nag 155 (156, 157): I L R (1944) Nag 250: 217 Ind Cas 298 (DB), *Sitaram v. Chunnilalsa*. (No restriction as regards particular judgment-debtor or particular property—Whole decree is stayed.)]

2. ('24) 11 AIR 1924 All 707 (708): 82 Ind Cas 1, *Ram Bharosay v. Sohan Lal*. (Arrest alone stayed under Section 55, C. P. C.)

('29) 16 AIR 1929 Pat 597 (600): 120 Ind Cas 315 (DB), *Kirtyanand Singh v. Pirthichand Lal*. (Stay of execution against property in hands of receiver — Execution against person or other property not stayed.)

[See also ('28) 15 AIR 1928 Mad 1154 (1156): 113 Ind Cas 260 (DB), *Tandavamurti v. Durgamba*. (Injunction restraining execution against only one of the properties of the judgment-debtor—*Obiter*.)]

3. ('27) 14 AIR 1927 Mad 927 (929): 101 Ind Cas 750 (DB), *Venkatarama Iyer v. South Indian Bank of Tinnevely*. (Per Odgers, J.)

4. ('20) 7 AIR 1920 Pat 570 (573): 53 Ind Cas 85 (DB), *Kesho Prashad Singh v. Harbans Lal*. (Stay was entirely due to decree-holder.)

5. ('40) 27 AIR 1940 Pat 149 (151): 184 Ind Cas 701 (DB), *Nathuni Prasad v. Firm Radha Kishun Dutt Rai*. (Stay of execution during pendency of insolvency proceedings against one judgment-debtor will not operate as a stay of execution against others.)

('28) 15 AIR 1928 Mad 627 (630): 51 Mad 583: 110 Ind Cas 518 (DB), *Parameswaran Nambudri v. Seshan Pattar*.

('31) 18 AIR 1931 Lah 125 (125, 126): 131 Ind Cas 345, *Asa Nand v. Bishan Singh*. (Only some of the judgment-debtors had applied to be declared insolvents.)

[But see ('21) 8 AIR 1921 Mad 116 (116): 61 Ind Cas 901 (DB), *Vellayyan Chetty v. Muthayya Chetty*. (Dissented from in AIR 1928 Mad 627.)]

6. ('33) 20 AIR 1933 P C 52 (54, 55): 141 Ind Cas 760: 12 Pat 195: 60 Ind App 43 (PC).

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It has, however, been held in some cases⁷ that a stay of execution of a part of the decree or as against a particular property will nevertheless avail to save limitation for the execution of the decree as a whole. The reasoning advanced for this view is that this section does not say that the execution must have been *wholly* stayed and that it is not justifiable to read into the section more than what it actually says.⁸ It is submitted that in view of the decision of the Privy Council in *Kirtyanand Singh's case*⁶ and the other cases referred to already, these decisions are not good law.⁹

10. Order granting time to judgment-debtor to pay, if amounts to stay order.—A obtains a decree against B for payment of money. B applies for and obtains an order from the Court granting him time for payment of the amount. It has been held by the High Courts of Patna and Nagpur that the order operates as a stay of execution.¹ A contrary view has been taken in the undermentioned cases² that such an order will not operate as a stay. It is submitted that this view is not correct. Where time is granted to the judgment-debtor, the decree-holder is clearly prevented from proceeding against the judgment-debtor. The view that the grant of time to pay up the decree amount is similar to an *adjournment* of the execution cannot be accepted as correct.

Where at the request of the parties the execution proceeding was consigned to the record room and no order granting stay or giving

7. ('14) 1 AIR 1914 Bom 211 (211): 38 Bom 153 : 21 Ind Cas 713 (DB), *Bai Ujam v. Bai Rukhmani*. (Stay as to part of decree — Subsequent execution seems to have been as to *that* part only — Held S. 15 would apply)

('18) 5 AIR 1918 Upp Bur 4 (5) : 46 Ind Cas 399 : 3 Upp Bur Rul 73, *Nachiappa Chetty v. Maung Pe*.

('21) 8 AIR 1921 Cal 606 (608):64 Ind Cas 594 (DB), *Govinda Nath Choudhury v. Basiruddin Mandal*. (Period of injunction restraining execution against particular property was excluded.)

[See also ('06) 33 Cal 689 (692) (DB), *Gurudeo Narayan Sinha v. Amrit Narayan Sinha*. (Under Act of 1877 — Injunction only against portions of the property proceeded against — But in the circumstances of the case this injunction was held to have effectually prevented the decree-holder from selling the remaining portion.)

('12) 14 Ind Cas 343 (345) : 34 All 436 (DB), *Ghulam Nasiruddin v. Hardeo Prasad*.]

8. (18) 5 AIR 1918 Upp Bur 4 (5) : 46 Ind Cas 399 : 3 Upp Bur Rul 73, *Nachiappa Chetty v. Maung Pe*.

9. ('44) 31 AIR 1944 Bom 303 (305, 306) : 46 Bom L R 666 (DB), *Virchand v. Marulappa*.

Section 15 — Note 10

1. ('47) 34 AIR 1947 Nag 101 (104) : I L R (1947) Nag 25 : 228 Ind Cas 576 (DB), *Meer Bismilla v. Jagannath Binjraj*. (A I R 1926 All 473 and A I R 1929 Pat 36 : 7 Pat 829, Relied on.)

('29) 16 AIR 1929 Pat 36 (37) : 119 Ind Cas 890 : 7 Pat 829 (DB), *Ganga Singh v. Sheo Prasad*.

[See also ('26) 13 AIR 1926 All 473 (474) : 94 Ind Cas 482 (DB), *Mt. Sahodra v. Bhagwandas*. (There was a stay order as well as an order granting time.)]

2. ('18) 5 AIR 1918 All 216 (218) : 40 All 198 : 44 Ind Cas 24 (DB), *Jurawan v. Mahabir Dube*.

('84) 1884 Pun Re No. 77, *Kurta Ram v. Kaithli Mal*.

time was made, it was held in the undermentioned case³ that there was no stay order.

11. Institution of collateral suit or proceeding, if will operate as stay. — Where A has obtained a decree against B, the institution of a collateral suit or proceeding by B or some other person in respect of the decree or the subject-matter thereof will not operate as a stay of execution of the decree within the meaning of this section.

Illustrations.

1. A obtains a decree against C. B files a suit against A for a declaration that the decree is invalid. The suit is decreed in the first Court but dismissed on appeal. The period of B's suit cannot be excluded under this section for an application to execute the decree.¹

2. Certain worshippers of a temple filed a suit against the *archakas* of the temple for a declaration that a lease of *hundial* collections to them by the devasthanam committee was invalid. It was held that the period of pendency of such suit cannot be excluded for the purpose of computing the period of limitation for a suit by the trustee against the same *archakas* for recovery of the collections taken by them.²

3. A obtained a preliminary mortgage decree against B. Subsequently C sued A and B for a declaration that the hypotheca did not belong to B but to C; but the suit was ultimately dismissed. It was held that the period of the pendency of the suit could not be excluded in computing the period of limitation prescribed for an application by A against B for passing a final decree.³ (Note. — The decision assumes that S. 15 might apply to an application for a final decree. This is not correct. See Note 5.)

4. A obtains a decree against B. B subsequently files a suit against A to set aside the decree on the ground of fraud. A cannot exclude the period of pendency of the suit in computing the period of limitation for an application for execution of the decree.⁴

See also the undermentioned cases.⁵

3. ('27) 14 AIR 1927 Lah 106 (106, 107) : 100 I. C. 475, *Amin Chand v. Khiali*.

Section 15 — Note 11

1. ('33) 20 AIR 1933 Mad 418 (419) : 143 Ind Cas 1 : 56 Mad 490 (FB), *Bala Tripura Sundaramma v. Abdul Khader*. (Dissenting from ('27) AIR 1927 Mad 997, *Lakshminarayana v. Lakshmipati*.)

('19) 6 AIR 1919 Oudh 85 (87) : 54 Ind Cas 426, *Kalka Singh v. Gur Saran Lal*.

2. ('25) 12 AIR 1925 Mad 1188 (1189, 1190) : 89 Ind Cas 938 (DB), *Sethu Rao v. Seethalakshmi Ammal*.

3. ('25) 12 AIR 1925 Mad 334 (335) : 85 Ind Cas 272 (DB), *Ammathayi Ammal v. Sivarama Pillai*.

4. ('16) 3 AIR 1916 Pat 367 (367, 368) : 35 Ind Cas 579 (DB), *Mahadeo Prasad Sahu v. Ram Chandra Narain Singh*.

('24) 11 AIR 1924 Bom 39 (40) : 76 Ind Cas 557 (DB), *Somshikharswami v. Shivappa Mallappa*.

5. ('49) 36 AIR 1949 Mad 279 (280) : 1948-2 Mad L Jour 314, *Ramaiya v. Suryanarayana*. (A obtaining a mortgage decree and purchasing property in execution — Suit by B challenging mortgage and decree — Temporary injunction restraining A from interfering with B's possession granted in appeal by B — B's suit ultimately failing — S. 15 not applicable as the order was merely made to avoid any inconvenience that might arise by permitting execution to proceed while the appeal was pending: A I R 1933 Mad 418 : 56 Mad 490 (FB), *Bala v. Abdul*, Foll.) ('47) 34 AIR 1947 All 256 (257) : 1 L R (1946) All 633 : 228 Ind Cas 493 (DB), *Murlidhar v. Ram Saran*. (L, one of the decree-holders transferring his half share in decree for money in favour of S — Suit by other decree-holder against L and S for specific performance of contract of sale in his favour of L's half

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Note 12

12. Attachment, if amounts to an injunction or a stay order.—An attachment of a book-debt or of a bond does not prevent a *suit* from being filed for the recovery thereof and does not operate as an injunction or a stay.¹ An attachment of a *decree* under O. 21, R. 53 of the Civil Procedure Code does not prohibit the *execution* of

share in the decree — Suit decreed — The other decree-holder realising whole amount of decree—Subsequently the decree reversed in appeal — Suit by S against the other decree-holder for his share in the decretal amount realised by the other decree-holder—S. 15 held not applicable.)

('47) 34 AIR 1947 Sind 48 (48) : I L R (1946) Kar 412: 227 Ind Cas 17, *Shamsdin Khan v. Jan Muhammad*. (Execution application dismissed—Decree-holder filing suit under O. 21, R. 63, Civil P. C. — Period of suit cannot be excluded under S. 15 for fresh execution application.)

('46) 33 AIR 1946 Mad 67 (69) : 221 Ind Cas 554, *Ambujammal v. Singarammal*. (Maintenance decree — Decree sought to be varied by suit — Period of suit for variation held could not be excluded as it was not a legal impediment in the way of execution.)

('39) 26 AIR 1939 All 82 (84, 86) : I L R (1939) All 207 : 180 Ind Cas 927 (DB), *Lakshmi Chand v. Bibi Kalsumannisa*. (The section does not contemplate the case of one decree being rendered impossible of execution by a subsequent decree inconsistent therewith passed in another suit — Decree for possession in favour of A—Subsequent decree in favour of B declaring him to be owner and restraining A from taking possession—Latter decree set aside in appeal—Period during which such decree was in force cannot be excluded in computing limitation for execution of the decree in A's favour.)

('39) 26 AIR 1939 Bom 1 (10, 21) : I L R (1939) Bom 173 : 179 Ind Cas 178 (DB), *Narayan Jivaji v. Gurnathgouda*. (A obtaining decree against B declaring A to be in possession of lands as sole owner and ordering B not to deprive A of his possession or to obstruct A in taking crops and ordering him not to receive rents from tenants — Decree set aside in Privy Council appeal — The period during which the decree was in force cannot be deducted in computing limitation for suit for possession by B against A.)

('38) 25 AIR 1938 Nag 534 (537) : I L R (1940) Nag 334 : 180 Ind Cas 903 (DB), *Rajaram Daduji v. Paiku*. (Attachment in execution raised on objection by third party — Period of claim suit by decree-holder cannot be deducted as it will not operate as bar to execution.)

('24) 11 AIR 1924 Cal 1059 (1061) : 84 Ind Cas 425 (DB), *Bijoy Chand Mohatab v. Khoka Sinha*. (Pendency of another suit does not operate as a stay order or injunction.)

Section 15 — Note 12

1. ('95) 17 All 198 (210, 211) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani v. Collector of Etawah*. (Attachment before judgment—('92) 14 All 162 (DB), *The Collector of Etawah v. Beti Maharani*, affirmed.)

('90) 13 All 76 (78) : 1890 All W N 194 (DB), *Shib Singh v. Sita Ram*. (Order of attachment under O. 21, R. 46.)

('19) 6 AIR 1919 Mad 317 (318) : 42 Mad 637 : 50 Ind Cas 380 (DB), *Rangasami Chetty v. Thangavelu Chetty*. (8 Mad 229, dissented from.)

('18) 5 A I R 1918 Cal 631 (632) : 40 Ind Cas 816 (DB), *Munsur Ali v. Abhoya Charan Das*, (Attachment before judgment.)

[But see (1862) 1 Mad H C R 150 (151) (DB), *Kadarbacha Sahib v. Rangasami Nayak*. (While the bond was attached and placed under power and control of a Court, no one could deal with it except by the direction and orders of the Court. Such attachment was held to be good and sufficient cause under Madras Regn, II of 1802, Section 18 clause 4 as to save the bond from limitation.)

('85) 8 Mad 229 (234) (DB), *Shunmugam v. Moidin*. (This is not good law after the Privy Council decision in 17 All 198 (PC).)]

the decree by the decree-holder² and therefore does not operate as an injunction or a stay order.³ Where A obtained a decree against B in Court X and B obtained a decree against A in Court Y and in execution thereof got A's decree against himself attached under O. 21 R. 53 of the Code, it was, however, held in the undermentioned case⁴ that such attachment operated as a stay of execution of A's decree against B. It is submitted that this view is not correct. The attachment, which is under O. 21 R. 53, sub-r. (1)(b), would be to merely request the Court X to stay execution of A's decree unless and until *the holder of the decree sought to be executed or his judgment-debtor* (in this case A) *applies* to Court X to execute its own decree. In other words, A can apply for execution at any time, and consequently there cannot be any stay of execution within the meaning of this section.

Where an order of attachment actually prohibits execution by *anybody*⁵ or is accompanied by a stay order,⁶ then S. 15 will apply.

13. Order allowing execution only on condition.—Where the Court made an order that the decree would be allowed to be executed only if the decree-holder furnished security for half a lakh of rupees and it was found that it was impossible for the decree-holder to furnish such security, it was held that the order effectually

2. See Forms 22 and 23 of Appendix E to the Code of Civil Procedure.

[See also ('24) 11 AIR 1924 Mad 673 (675) : 80 Ind Cas 103 : 47 Mad 641 (DB), *Rajitagiripathy v. Bhavani Sankaran*.

('24) 11 AIR 1924 Bom 383(384):48 Bom 485:80 Ind Cas 239 (DB), *Chanbasappa Nagappa v. Holibasappa*. (It can be executed by attaching decree-holder or by decree-holder in attached decree.)

('34) 21 AIR 1934 Lah 142 (143): 150 Ind Cas 174, *Mahesh Dass Chanan Das v. Mehnga Ram*. (Do.)

('12) 13 Ind Cas 179 (179) (DB) (Mad), *Gopala Menon v. Manavikraman*. (Under C. P. C., 1882.)

('34) 21 AIR 1934 Cal 140 (141): 149 Ind Cas 1130 (DB), *Saroj Ranjan Sinha v. Joy Durga Dassi*. (Attachment of decree by judgment-debtor.)]

[See however ('11) 9 Ind Cas 786 (787) : 35 Mad 622 (DB), *Thuchakovil Unni Koya v. Arapayil Pathutti*. (Attachment under the old Code under which the attached decree-holder was prevented from executing his decree.)

('69) 3 Beng L R App 52(53) (DB), *Chandi Prasad v. Raghunath Dhar*. (Attachment under the Code of 1859 under which the decree-holder was prohibited from executing his decree.)]

3. ('24) 11 AIR 1924 Mad 673 (675) : 80 Ind Cas 103 : 47 Mad 641 (DB), *Rajitagiripathy v. Bhavani Sankaran*.

('24) 11 AIR 1924 Bom 383 (384) : 48 Bom 485 : 80 Ind Cas 239 (DB), *Chanbasappa Nagappa v. Holibasappa*.

('74) 11 Bom H C R 206 (212, 213) (DB), *Mir Ajmuddin v. Mathuradas Govardhandas*. (In computing limitation for execution of a decree the period during which it was under attachment cannot be excluded.)

4. ('16) 3 AIR 1916 Cal 620 (621) : 30 Ind Cas 587 (DB), *Kiraushashi Deli v. Chandrika Prosad Singh*.

5. ('24) 11 AIR 1924 Mad 673 (675) : 80 Ind Cas 103 : 47 Mad 641 (DB), *Rajitagiripathy v. Bhavani Sankaran*. (Such order amounts to an injunction.)

6. ('23) 10 A I R 1923 Cal 310 (311):68 Ind Cas 897 (DB), *Charu Chandra Mazumdar v. Fanindra Narain Choudhury*.

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operated as a stay of execution within the meaning of this section.¹ In the undermentioned case² the decree-holder applied for execution by transfer to another Court, but the Court ordered him to produce the judgment in a certain suit before a certain date before the decree could be transferred. The judgment in that suit was passed at a much later date and so the copy was not produced on the date fixed and the petition was dismissed. In calculating the limitation for a subsequent application for execution it was held that the time during which the suit, the judgment in which was required to be produced, continued, should be excluded. Where a final decree in a mortgage suit was set aside in appeal against some of the defendants and the case was ordered to be re-tried, and the Court struck off the execution application against the other defendants until the case remanded finally settled the liability of former defendants, it was held that the order operated as a stay of execution.³

14. Adjournment of case is not stay. — The adjournment of an application for execution for hearing cannot operate as a stay of execution or as an injunction.¹

15. Appeal does not operate as a stay. — The preferring of an appeal cannot be said to be an order of a Court granting an injunction or stay. Order 41 Rule 5 of the Civil Procedure Code in fact provides that an appeal shall not operate as a stay of proceedings under the decree or order appealed from except so far as the appellate Court may order.

See also the undermentioned case.¹

Section 15 — Note 13

1. ('20) 7 AIR 1920 Pat 354 (356) : 53 Ind Cas 9 (DB), *Satdeo Narain v. Radhey Kuar*. (19 Suth W R 186 followed.)
[See also ('73) 19 Suth W R 186 (187) (DB), *Gunesh Dutt v. Mungree Ram*. (High Court ordering suspension of execution pending appeal to Privy Council until the decree-holder furnished security — Held that time was suspended until the decision of the Privy Council — Case under the Act of 1871.)]
2. ('21) 8 AIR 1921 All 174 (175) : 64 I. C. 598 (DB), *Baldeo Singh v. Ram Sarup*.
3. ('18) 5 AIR 1918 Cal 143 (143) : 47 Ind Cas 907 (DB), *Satish Mohini Debya v. Pabna Bank, Ltd.*

Section 15 — Note 14

1. ('17) 4 AIR 1917 Cal 444 (445) : 36 Ind Cas 939 (DB), *Thakamoyi Dasi v. Nadir Chand*.
('21) 8 AIR 1921 Bom 33 (33) : 60 Ind Cas 916, *Viswanath v. Narsu Tulsidas*.

Section 15 — Note 15

1. ('48) 35 AIR 1948 Nag 189 (194) : ILR (1947) Nag 497, *Prayagdas v. Indira-bai*. (Where the application for execution filed on 18-1-1934 could not be executed between 15-9-1938 and 9-4-1942 because of judgment of a single Judge of the High Court upholding the decision of the lower Court that the application was barred by time but the matter was still pending because a Letters Patent appeal was allowed and when the Division Bench reversed the decision of the single Judge on 9-4-1942 it was open to the decree-holder to continue with his original application, but that application was useless for purposes of execution because of the defects therein and therefore, he was compelled to file a second application : Held that the second application could not be given the benefit of S. 15, and as regards the former application there was no question of S. 15 because it was still pending on 9-4-1942 when the Division Bench gave its judgment.)

16. "The day on which it was issued or made, and the day on which it was withdrawn." — Where stay was ordered on condition of security being furnished by the party seeking the stay and the security was tendered, accepted and given finally only on a later date, the stay must be deemed to commence on the date of the order itself. The fact that the condition (about security) was fulfilled only subsequently cannot alter the position.¹

17. Duration of stay in case of an appeal. — When a stay or an injunction in respect of execution has been granted by a Court in a suit or proceeding and the suit or proceeding is dismissed, does the stay or injunction terminate on such dismissal or does it continue during the pendency of the appeal preferred in such suit? The answer is that the stay or injunction terminates with the dismissal of the suit or proceeding as the trial Court has no power to grant an interim injunction or stay so as to last after the dismissal of the suit or proceeding by the same Court.¹ Where the injunction or stay is granted "until the decision of the suit," the 'decision' contemplated is not the final decision in the litigation by a final Court of appeal or revision.² It was so held even in a case where injunction was

Section 15 — Note 16

1. ('27) 14 AIR 1927 Mad 391 (393) : 99 I. C. 632, *Thayyamuthu v. Odayappan*.

Section 15 — Note 17

1. ('21) 8 AIR 1921 All 99 (101) : 43 All 383 : 61 Ind Cas 417 (DB), *Madho Prasad v. Draupadi Bibi*. (Per Piggot J.)
- ('24) 11 A I'R 1924 Mad 178 (179) : 76 Ind Cas 126 (DB), *Ayissaumma v. P. K. Abdulla*. (('07) 31 Mad 71 (DB), *Chalaradi Kotiah v. Poloori Alimelammah*, relied on.)
- ('16) 3 AIR 1916 Pat 89 (90) : 42 Ind Cas 811 (DB), *Mahesh Ram Tewari v. Mt. Lachhan Kuer*. (Stay of execution of decree pending disposal of an application to set aside an *ex parte* decree — The application being dismissed, applicant applying for review—Stay does not continue during review.)
- ('20) 7 AIR 1920 All 174 (175) : 42 All 564 : 56 Ind Cas 1006, *Balwant Singh v. Budh Singh*.
- ('70) 14 Suth W R 384 (384)(DB), *Shaikh Moheeoodeen v. Shaikh Ahmad Hussein*. (It cannot be maintained pending appeal.)
- [See ('03) 26 All 140 (144) : 1903 All W N 211(DB), *Beni Prasad v. Sarju Prasad*. (Injunction pending decision in suit is not effectual up to final decree.)
- ('26) 13 AIR 1926 Pat 62 (63) : 89 Ind Cas 992 (DB), *Hajo Bibi v. Har Sahay Lal*. (Injunction granted pending appeal—It does not continue till dismissal of Letters Patent Appeal.)
- ('87) 1887 All W N 297 (297)(DB), *Chunni Kuar v. Dwarka Prasad*. (Injunction granted in cross suit.)]
- [See also ('98) 21 Mad 257 (260, 261) : 8 Mad L Jour 25 (DB), *Suryanarayana Pandarathar v. Gurunada Pillai*. (But there can be no revival of a petition which had been properly dismissed — In first execution petition decree-holder was relegated to a regular suit to establish his right and the execution petition was dismissed. But the decree-holder, without filing the suit again, put in an execution petition which was rightly dismissed. A further execution petition was held not to be a revival of the prior one.)]
2. ('03) 26 All 140 (144) : 1903 All W N 211 (DB), *Beni Prasad v. Sarju Prasad*.
- ('26) 13 AIR 1926 All 409 (410) : 94 Ind Cas 1005 (DB), *Sat Narain Lal v. Ganga Jal*. (Reversing decision of Walsh J. in ('25) AIR 1925 All 572, *Ganga Jee v. Sat Narain*.)
- [See however ('86) 1886 Bom P J 156 (DB), *Gopal v. Sita Ram*.]

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granted "pending *final* decision of the suit."³ In a case coming under O. 21 R. 29 of the Code of Civil Procedure under which execution may be stayed pending a cross suit by the judgment-debtor against the decree-holder, the Calcutta High Court^{3a} held that the words "until the pending suit has been decided" mean until the claim in the suit has *finally* been decided. This view, in the circumstances of the case, is not in conflict with the foregoing principle.

The first Court granted an injunction, but the suit itself was dismissed in the first appeal for misjoinder. On the second appeal the decision of the first appellate Court was reversed and the case was remanded for disposal on merits. It was held that the order of remand by the High Court was not tantamount to the issue of an injunction.⁴ But where in consequence of a remand the decree of the first Court itself is restored, it is not unreasonable to hold that the stay or injunction revives, if the form of the first Court's decree operates as a stay of execution.⁵

18. "Revival" of execution application and Section 15. — This section deals only with the computation of the period of limitation for an application for *execution*. It does not affect the law with regard to an application to *revive* an application for execution already made but suspended by an interruption and deemed to be pending final disposal by the Court. The section has not the effect of making such a revival application a fresh application for execution. It has not got the effect of destroying the equitable theory of revival of pending application uniformly recognized by Courts.¹ A decree-holder applied for execution of his decree on 4th January 1916 and while the execution was pending, a suit was brought to declare that the property proceeded against in execution was not liable to be sold and the execution was

3. ('21) 8 AIR 1921 All 99 (101): 61 Ind Cas 417: 43 All 383 (DB), *Madho Prasad v. Draupadi Bibi*. (Walsh, J. doubting.)

3a. ('28) 15 A I R 1928 Cal 222 (224): 107 Ind Cas 79: 55 Cal 512 (DB), *Mahesh Chandra v. Jogendra Lal Sarkar*. (The pending suit was decided in favour of the plaintiff-judgment-debtor in trial Court and also in appeal.)

4. ('15) 2 AIR 1915 Mad 756 (758): 26 Ind Cas 267 (DB), *Doraisami Reddi v. Venkatachallam Pillai*. (('12) 14 Ind Cas 343 (DB), *Ghulam Nasiruddin v. Hardeo Parsad*, distinguished.)

5. ('03) 26 All 140 (143): 1903 All W N 211 (DB), *Beni Prasad v. Sarju Prasad*. [See ('03) 26 All 156 (160): 1903 All W N 221 (DB), *Ruddar Singh v. Dhanpal Singh*. (Suit to set aside decree on ground of fraud — *Interim* stay of execution till disposal of suit granted — Suit itself decreed — During pendency of appeal from the decree the decree itself held to operate as stay though interim stay as such came to an end with the passing of the decree.)]

Section 15 — Note 18

1. ('27) 14 AIR 1927 All 16 (19, 20, 22): 100 Ind Cas 692: 49 All 276 (FB), *Chhattar Singh v. Kamal Singh*. (Right of revival is different and distinct from permitting exclusion of time.)

('36) 23 AIR 1936 Cal 239 (242): 63 Cal 57: 162 Ind Cas 654 (DB), *Kristo Kamini Debi v. Girish Chandra Mondal*. (Such application is not a fresh application for execution.)

[See however ('25) 12 AIR 1925 Pat 298 (299): 78 Ind Cas 478 (DB), *Lal Pasi v. Ramsaran Lal*. (Such application is governed by Art. 181.)]

stayed by injunction. The suit was finally disposed of on the 6th of July 1920 and the injunction was dissolved. The execution application was then "struck off" without notice to parties. On the 10th January 1923, the decree-holder again applied for execution and contended that his application was only to revive the prior execution application which was not finally decided in being so "struck off." It was contended that S. 15 of the Limitation Act had the effect of making every application in execution an application *for* execution and that the period of stay by injunction should alone be excluded and that the last application should be held to be time-barred. The Allahabad High Court in a Full Bench² decided that it was a case of a revival of a pending application and that S. 15, Limitation Act, did not affect the right to apply for revival. It is a well-recognized principle of law that where the execution of a decree has been suspended through no act or default of the decree-holder, the latter has a right to ask the Court to revive and carry through the execution proceedings which have been thus suspended.³ But where a break in the continuity arose

2. ('27) 14 AIR 1927 All 16 (20, 22): 409 All 276: 100 Ind Cas 692 (FB), *Chhattar Singh v. Kamal Singh*.

[See also ('44) 31 AIR 1944 Pesh 17 (19) : 212 Ind Cas 628 (DB), *Jawahar Singh v. Mohd. Rafiq*. (Where an execution case is struck off for the time being because some other suit is pending with regard to the property involved in the execution, the application to proceed with the execution after the matter has been finally decided in appeal and revision amounts to an application for revival of the original application, although the application may not say it in so many words : AIR 1927 All 16 : 49 All 276 (FB), Foll.)

3. ('05) 27 All 334 (338) : 32 Ind App 102 : 1 Cal L Jour 381 : 2 All L Jour 397 : 7 Bom L R 433 : 9 Cal W N 601 : 15 Mad L Jour 258 : 8 Sar 810 (PC), *Qamar-ud-din Ahmad v. Jawahir Lal*.

('21) 8 AIR 1921 All 99 (100) : 43 All 383 : 61 Ind Cas 417 (DB), *Madho Prasad v. Draupadi Bibi*. (A revival application is governed by Article 181.)

('28) 10 AIR 1923 All 600 (601) : 77 Ind Cas 871 (DB), *Mahamad Hadi v. Debi Prasad*. (Execution proceedings suspended at the instance of stranger.)

('26) 13 AIR 1926 Mad 698 (699) : 95 Ind Cas 718, *Lalumia v. Mazur Hannusa*, (There was no order of suspension.)

('21) 8 AIR 1921 Cal 472 (473) : 68 Ind Cas 207 (DB), *Ajodhya Nath Pahary v. Srinath Chandra Pahary*. (Execution suspended by pendency of proceeding under O. 21, R. 2, C. P. C., for recording satisfaction.)

('21) 8 AIR 1921 Cal 594 (595) : 64 Ind Cas 849 (DB), *Jira Bibi v. Majiruddin*. (Sale held in execution of decree set aside—Second application is one for revivals.)

('14) 1 AIR 1914 Cal 269 (270) : 20 Ind Cas 244 (DB), *Tilakdhari Lal v. Bikram Singh*. (An intermediate application in execution for another relief does not matter.)

('35) 22 AIR 1935 Lah 911 (912) : 157 Ind Cas 679 (DB), *Hira Lal v. Punjab National Bank*. (As successful claim proceedings were pending, it was held that subsequent execution petition was a continuation though prior execution petition had been dismissed for default ('09) 2 Ind Cas 76, *Mul Chand v. Muhammad* followed.)

('37) 24 AIR 1937 Oudh 158 (159) : 165 Ind Cas 798 : 12 Luck 743 (DB), *Narain Bakhsh Singh v. Shiva Bhikh*. (Execution suspended by order of Insolvency Court.)

('80) 5 Bom 29 (34, 35) : 1880 Bom P J 232, *Kalyanbhai Dipchandbhai v. Ghan-shamlal Jadunathji*. (Injunction against execution—Act of 1877.)

('78) 4 Cal 415 (416, 417) : 3 Cal L R 46 (DB), *Issurree Dasse v. Abdool Khalak*.

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by reason of the decree-holder's omission or default, the subsequent application cannot be regarded as a continuation of the previous one.⁴ On the question whether the application for revival should be within three years of the removal of stay, there is a difference of opinion among the High Courts, some holding that there is no limitation at all for such an application and others holding that it is governed by Art. 181 of the Act. See Article 182 Note 143.

19. Notice of "suit" — Sub-section (2). — The provision in sub-s. (2) will apply only where the enactment requires that notice should be given of the suit before such a suit is commenced.¹ It has

- (('75) 23 Suth W R 183 *Pyaroo Tulhobildarinee v. Nazir Hossein*, followed.)
(('08) 31 Mad 71 (76) : 18 Mad L Jour 46 : 3 Mad L Tim 329 (DB), *Chalavadi Kotiah v. Paloori Alamelammal*. (Provided no new relief is claimed.)
(('26) 13 AIR 1926 Pat 129 (130) : 89 Ind Cas 886 (DB), *Ibrahim Hussain Khan v. Sheo Pratap Narain*. (The scope of both the applications must be the same — ('19) 2 P L T 22, *Kesho Prasad v. Harbans Lal*, followed.)
(('13) 20 Ind Cas 439 (441) (DB) (Cal), *Lal Gobind Nath v. Bihar Sahu*.
(('01) 1901) All W N 117 (117), *Farzand Ali v. Bhup Indar Bahadur Singh*. (Decree was under attachment for more than three years.)
[See ('98) 1898 All W N 137 (138) (DB), *Anwarali Khan v. Phul Chand*.
(('18) 5 AIR 1918 Mad 1010 (1011) : 38 Ind Cas 300 (DB), *Satyanarayana v. Narayanswamy Naidu*.]
[See also ('11) 11 Ind Cas 972 (973, 974) (DB) (Cal), *Sheikh Mahomed v. William Alfred Thomas*.
(1865) 3 Suth W R Act X Rul 5 (6) (DB), *Md. Kalee Shikdar v. Sheikh Ali Hossein*. (Revival of suit wrongly struck off owing to pendency of connected suit.)
(('79) 4 Cal 877 (880) : 3 Cal L R 161 : 4 Ind Jur 236 (DB), *Hurronath Bhunjo v. Chunni Lal Ghose*. (Whether the previous application was finally disposed of or not is a question of fact depending on circumstances.)]
See also Article 182 Note 143.
4. (1900) 5 Cal W N 347 (348, 349) (DB), *Dhukiram Srimani v. Jogendra Chunder Sen*.
See also Article 182 Note 143.

Section 15—Note 19

1. ('39) 26 AIR 1939 All 277 (278) : ILR (1939) All 392 : 181 Ind Cas 948, *Shri Bhagwan v. Secretary of State*. (Notice to Secretary of State as required by S. 80 of the Civil Procedure Code.)
(('48) 52 Cal W N 494 (501) (DB), *Niaz Mohammad v. Alfred Morris*. (Defendant, Public Officer purporting to act in discharge of his public duty though in fact it was not so — Provisions of S. 80, Civil P. C. apply — Plaintiff entitled to exclusion of period of notice under S. 80.)
(('32) 19 AIR 1932 Bom 259 (261) : 137 Ind Cas 545 : 56 Bom 135 (DB), *Chhagan Lal Sakerlal v. Municipality of Thana*. (Notice under Bombay District Municipalities Act.)
(('14) 1 AIR 1914 Cal 396 (436) : 40 Cal 898 : 23 I C 25 (SB), *Weston v. Peary Mohan*.
(('17) 4 AIR 1917 Lah 212 (212, 213) : 1917 Pun Re No. 52 : 38 Ind Cas 600 (DB), *North Western Rly. v. Ram, Dhan Mal Shib Lal*. (Notice under S. 80, C. P. C.)
(('19) 6 AIR 1919 Oudh 26 (27) : 22 Oudh Cas 342 : 54 Ind Cas 535. *Ladly Parsad v. Nizam-ud-din Khan*. (The Secretary of State not a necessary party to the suit at all — Period of notice cannot be excluded.)
(('22) 9 AIR 1922 Pat 549 (550) : 70 Ind Cas 109, *B. & N. W. Ry. Company v. Ram Sarup, Lal Chowdhury*. (Notice under S. 77, Railways Act to Secretary of State.)
(('33) 20 AIR 1933 Sind 240 (244) : 148 Ind Cas 178, *Asandas Hashmatrai v. Khan Chand*. (Suit against a police head constable for alleged illegal search.)

no application where such notice is not notice of suit but is only intended as an information of the claim to the defendant² or a notice determining a tenancy.³ Where the Secretary of State was the certificate holder it was held that he was a necessary party to a suit under S. 36 of the Bengal Public Demands Recovery Act (1913) and hence the period of notice served upon him under S. 80, Civil P. C., could be excluded under this sub-section.^{3a} The provisions of this sub-section have been held applicable in computing the special limitation under S. 535 (2) of the Bengal Municipal Act (15 of 1932)^{3b} and the limitation provided in S. 146 of the Bengal Local Self-Government Act (3 of 1885).^{3c} For an instance of the application of the provisions of this sub-section to other Acts see the undermentioned case.^{3d}

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- ('28) 15 AIR 1928 All 625 (625) : 115 Ind Cas 613 (613), *Oudh Behari Lal v. Collector of Etah*. (Notice to Court of Wards.)
- ('25) 12 AIR 1925 Mad 1134 (1139) : 48 Mad 586 : 91 Ind Cas 82 (DB), *E.C. Kelu Nair v. Secretary of State*. (('16) AIR 1916 Mad 1093 (DB), *Srinivasa v. Secretary of State*, followed.)
- [See ('23) 10 AIR 1923 Mad 665 (655) : 74 Ind Cas 281 (DB), *Secretary of State v. Nagaraja Iyer*. (Notice under S. 80, C. P. C.)
- ('30) 17 AIR 1930 Nag 179 (179, 180) : 26 Nag L R 81 : 123 Ind Cas 903 (DB), *K. L. Niyogi & Co. v. District Council, Buldana*. (Suit against District Council.)
- [See also ('14) 1 AIR 1914 Sind 125 (128) : 8 Sind L R 294 : 29 Ind Cas 597, *Municipality of Tata v. Asanmal Chandoomal*. (Notice under Bombay District Municipalities Act.)]
2. ('38) 25 AIR 1938 Mad 612 (613) : 178 Ind Cas 880 (DB), *Sevugan Chettiar v. Raghunatha Doraisingam*. (Section 49 of the Madras Court of Wards Act (I of 1902) does not require notice of suit with regard to property of an institution of which a ward is only a trustee.)
- ('31) 18 AIR 1931 All 752 (754) : 133 Ind Cas 537 (DB), *Baroda Kant Sen v. Court of Wards in charge of Baraon Estate, Allahabad*. (Notice to the Collector under S. 17 of the United Provinces Court of Wards Act is not a notice covered by this section.)
3. ('37) 24 AIR 1937 Cal 656 (657) : ILR (1937) 1 Cal 499 : 174 Ind Cas 31, *Krishna Kanta Ghosh v. Rajeshwar Ghosh*. (Ejectment suit under S. 48 (c), Bengal Tenancy Act.)
- 3a. ('43) 30 AIR 1943 Cal 114 (116) : ILR (1943) 1 Cal 22 : 205 Ind Cas 523 (DB), *Gaibandha Loan Office v. Saiyadunnessa*.
- 3b. ('42) 29 AIR 1942 Cal 544 (545) : 202 Ind Cas 762, *Pabna Municipality v. Nirode Sundari*.
- 3c. ('40) 27 AIR 1940 Cal 305 (306) : 188 Ind Cas 705, *Dist. Board, Chittagong v. Emdadal Hoque*.
- 3d. ('50) 37 AIR 1950 Assam 101 (Prs 5, 7, 8, 9) : ILR (1950) 2 Assam 181 (DB), *Tinsukia Municipal Board v. Bankim Chandra*. (Per Ram Labhaya J.—S. 320 of the Assam Municipal Act covers a suit for malicious prosecution against a Municipality and is subject to S. 15 (2) of the Limitation Act by virtue of S. 29 (2).)
- ('48) 35 AIR 1948 Oudh 49 (51) : 231 Ind Cas 132, *Raunak Ali v. Unao Municipality*. (Suit for balance due for work done under contract—Notice period under S. 326 (1), U. P. Municipalities Act can be deducted under S. 15 (2) read with S. 29 (2), Lim. Act.)
- ('42) 46 Cal W N 786 (789), *Probhati Debi v. Tarak Nath*. (Notice under S. 155 (2) of the Bengal Tenancy Act is a notice of a suit within the meaning of S. 15 (2) of the Limitation Act.)

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The plaintiff is entitled to a deduction of the period of notice if *at the time* of giving it, it was required to be given by law though subsequently such notice may have become unnecessary.⁴

20. Notice required in case of only one or some only of the defendants. — Suppose in a suit against several defendants, notice is required to be given by law only in respect of one or some of them; is the period of notice to be excluded as against the others also? The Allahabad High Court¹ has held that if it is *necessary* or *even permissible* for a plaintiff to bring a suit claiming relief against all the defendants *jointly*, the period of notice should be excluded for the whole suit and not merely so far as the defendant to whom notice was given is concerned. Any other view will make the provisions of S. 15 nugatory in cases in which it is necessary to implead in one suit private individuals and a public officer against whom there is but one cause of action. All that the section requires is that a notice should have been given under law and if this condition exists, it declares without any qualification or reservation that the period of notice shall be excluded. The Bombay High Court is also of the same opinion.² The Calcutta High Court has however held to the contrary.³ But it was a case where the Court came to the conclusion that even as against the Secretary of State for India the period of notice could not be deducted on the basis of S. 29 of the Limitation Act as it stood before the amendment which made it applicable to local and special laws. The High Courts of Lahore⁴ and Patna⁵ and the Judicial Commissioner's Court of Sind⁶ are also of the same view as that of the High Courts of Allahabad and Bombay.

But, in any case, the plaintiff is not entitled to claim deduction of time as against private individuals by impleading the Secretary of

4. ('24) 11 AIR 1924 Bom 364 (365) : 81 Ind Cas 750 (DB), *Khanderao v. Channmallappa*, (Notice under Bombay Court of Wards Act—Ward ceasing to be such before suit came on for hearing.)

Section 15—Note 20

1. ('30) 17 AIR 1930 All 742 (745) : 53 All 44 : 132 Ind Cas 17 (DB), *Mahomed Sharif v. Nasir Ali*. (Suit against a Police Inspector and other private individuals for damages for malicious prosecution on the ground that all the defendants conspired to bring a false charge against the plaintiff.)
2. ('24) 11 AIR 1924 Bom 364 (365) : 81 I C 750, *Khanderao v. Channmallappa*. (Notice under Bombay Courts of Wards Act being required only in respect of some of the defendants.)
3. ('19) 6 AIR 1919 Cal 949 (950) : 47 Ind Cas 524 (DB), *Gangadhar Nanda v. Janakimoni Dasi*. (Held this section does not apply to suit under S. 104H, Bengal Tenancy Act.)
4. ('28) 15 AIR 1928 Lah 349 (350) : 9 Lah 519 : 111 Ind Cas 749 (DB). *E.I. Ry. Co. v. Rahimulla Ilahi Baksh*. (Provided all the defendants are properly impleaded in the plaint, it does not affect the application of this section that any or some of the defendants are found on trial not to be liable.)
5. ('22) 9 AIR 1922 Pat 549 (550) : 70 Ind Cas 109 (DB), *B. & N. W. Ry. Co. v. Ramsuruplal Chowdhary*. (Suit against several Railways—Notice to Secretary of State necessary only with respect to one of the Railways.)
6. ('37) 24 AIR 1937 Sind 281 (284) : 32 Sind L R 106 : 172 Ind Cas 622 (DB), *Udharam Vassanmal v. Grahams Trading Co, Ltd.* (Joint tort-feasors—One requiring notice under S. 80, C. P. C.)

State or a public officer *unnecessarily* and giving him notice, though he might have done so under a mistake of law or fact.⁷

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Notes 20-24

21. Adverse possession (Section 28) and extension of limitation under sub-section (2). — Where a suit for possession is instituted after twelve years of the cause of action but is within time by reason of the exclusion of the period of notice required to be given before suit, the defendant cannot claim that his title by adverse possession is perfected by the suit not having been instituted within twelve years of the cause of action. The reason is that the defendant can get a title only on the expiration of the *period limited by the Act* for instituting such suit, and such period will be twelve years *excluding* the period of notice.¹

22. Sub-section (2): "Enactment for the time being in force." — These words require that the enactment referred to must be in force in the *place* in which the suit is brought. 'Section 54 of the United Provinces Court of Wards Act requires two months' notice to be given before a suit is instituted against a ward represented by the Collector. In a suit instituted against the ward outside the United Provinces, viz., at Delhi, it was held by the Lahore High Court¹ that the fact that the defendant was a ward under the United Provinces Court of Wards Act would not make S. 15, sub-s. (2) of the Limitation Act applicable to the suit, as the United Provinces Court of Wards Act which required two months' notice to be given would not apply to suits instituted outside the Province to which alone the enactment applied though the suit was against that ward.

23. Section 15 sub section (2) and Sections 6 and 8. — See Note 41 to Section 6.

24. Section 15 and res judicata. — A decision between the same parties in a prior execution application as to the applicability of this section is binding on them and the same question of limitation cannot be agitated in a subsequent application.¹

7. ('19) 6 AIR 1919 Oudh 26 (27) : 55 Ind Cas 535 : 22 Oudh Cas 342, *Ladli Prasad v. Naizamuddin Khan*.

[See ('38) 25 AIR 1938 Mad 612 (613) : 178 Ind Cas 880 (DB), *Sevugan Chettiar v. Raghunatha Doraisingam*. (Suit concerning title, between plaintiff charity and temple represented by a ward who was trustee of the temple — Though ward is represented by the Estate Collector S. 80, C. P. C. does not apply as the subject-matter of the suit does not relate to any act done by the Collector or the Public Officer in his official capacity — Period of notice cannot be deducted.)]

Section 15 — Note 21

1. ('28) 15 AIR 1928 All 625 (625) : 115 Ind Cas 613, *Oudh Behari Lal v. Collector of Etah*.

Section 15 — Note 22

1. ('37) 24 AIR 1937 Lah 41 (48, 49) : 164 Ind Cas 1090 : ILR (1937) Lah 11 (DB), *Hargulal Mal v. Muhammad Ata Elahi Khan*. (Per Coldstream and Monroe JJ., *Jai Lal J. contra.*)

Section 15 — Note 24

1. ('32) 19 AIR 1932 Oudh 246 (246, 247) : 137 I C 603 (DB), *Mahomed Amir Mirza v. Gauri Nath*.

Section 16
Notes 1-2

16.* In computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

Exclusion of time during which proceedings to set aside execution-sale are pending.

Synopsis

1. Scope of the section.
2. "Suit."
3. "Proceeding."

TOPIC INDICATOR.

Symbolical possession obtained — Suit for actual possession — Section not applicable. See Note 1.

Prosecuting claim based on sale — Time not to be excluded. See Note 3.

1. Scope of the section. — Articles 137 and 138 prescribe the period of limitation for suits for possession by purchasers at sales in execution of decrees. This section enacts that in computing the period of limitation so prescribed, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

In order that this section may apply, the suit must be for possession by a *purchaser at a sale in execution of a decree*. In other words, the cause of action for the suit must be the *purchase*. A person who has purchased at a sale in execution of a decree and has obtained symbolical possession, and sues for *actual* possession, cannot be said to be suing as a *purchaser at a sale in execution of a decree* within the meaning of this section. The cause of action for the suit in such a case is not the *purchase* but the *adverse possession* of the defendant from the date of the delivery of symbolical possession; Article 144 and not Article 137 or Article 138 governs such cases.¹

2. "Suit." — This section applies, in terms, only to *suits* for possession by a purchaser at a sale in execution of a decree. The word "suit" in this Act does not include an "application." (See section 2, clause 10.)

An *application* for possession under Order 21 Rules 95 and 96 of the Civil Procedure Code will, therefore, not fall within the purview of this section. (See Art. 180 Note 4.)

* Act of 1877 : S. 16 ; Act of 1871 : S. 17.

Same as above, except for the following changes, viz., for the words "a proceeding to set aside the sale has been prosecuted" there was "the judgment-debtor has been prosecuting a suit to set aside the sale" in the Act of 1871 and "the judgment-debtor proceeding to set aside the sale" in the Act of 1877.

Act of 1859.

No corresponding provision.

Section 16—Note 1

1. ('50) 37 AIR 1950 Assam 50 (Pr 13) (DB), *Bireswar Banerjee v. Sadhiram Atoi*. ('46) 33 AIR 1946 Pat 202 (205, 206) : 24 Pat 717 (DB), *Balgobind v. Lila Kuer*. ('21) 8 AIR 1921 Cal 385 (387) : 70 Ind Cas 420 (DB). *Brojendra Kumar Roy Choudhri v. Ashutosh Roy*.

3. "Proceeding." — Under the Limitation Act of 1871, the period during which the judgment-debtor had been prosecuting a *suit* to set aside a sale was excluded. The word "proceeding" was substituted for the word "suit" in the Act of 1877. The intention of the Legislature is evidently to allow exclusion of time during which the validity of the sale is in controversy, whether the sale is impeached by a *suit* or by an *application* to set aside the sale.¹ Thus, where the judgment-debtor filed an application to set aside the sale and, on the application being dismissed, filed a suit to set aside the decree and the sale, and the suit was finally dismissed by the Privy Council, the entire time taken in respect of such proceedings, i. e., the period during which the legality of the sale was in question, was excluded under this section in a suit for possession by the auction purchaser.²

The word "proceeding" refers only to a proceeding to *set aside the sale* and the period during which the auction purchaser has been unsuccessfully prosecuting a *claim* based on the sale cannot be excluded in a suit by him for possession.³

17.* (1) Where a person, who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application.

* Act of 1877 : S. 17.

Same as above.

Act of 1871 : S. 18.

When a person who would, if he were living, have a right to sue, dies before the right accrues, the period of limitation shall be computed from the time when there is a representative in interest of the deceased capable of suing.

When a person against whom, if he were living, a right to sue would have accrued, dies before the right accrues, the period of limitation shall be computed from the time when there is a representative whom the plaintiff may sue.

Nothing in the former part of this section applies to suits for the possession of land or of an hereditary office.

Act of 1859.

No corresponding provision.

Section 16 — Note 3

1. ('17) 4 AIR 1917 Cal 802 (803, 805) : 38 Ind Cas 547 (DB), *Promotha Nath Roy v. Kishore Lal*. (Word 'proceeding' is comprehensive to include suit as well as application.)
2. ('17) 4 AIR 1917 Cal 802 (803, 804):38 Ind Cas 547 (DB), *Promotha Nath Roy v. Kishori Lal*.
3. (1864) 1864 Suth W R Gap 130 (130) (DB). *Wooma Churn v. Ranee Mohamoya*.

Section 17
Notes 1-2

(2) Where a person against whom, if he were living, a right to institute a suit or make an application would have accrued dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute or make such suit or application.

(3) Nothing in sub-sections (1) and (2) applies to suits to enforce rights of pre-emption or to suits for the possession of immoveable property or of an hereditary office.

Synopsis

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| 1. Legislative changes.
2. Scope of the section.
3. Relative scope of sections 6 and 17. See Note 3 to S. 6.
4. Where a person, who would, if he were living, have a right to sue, dies before the right accrues.
5. Death of creditor on day when debt becomes due. | 6. The starting point of limitation under the section.
7. "Legal representative," meaning of. See Note 43 to S. 6.
8. "Capable of instituting . . . such suit."
9. Claims against estate of deceased person — Applicability of section — Sub-section (2). See Note 4.
10. Suit on behalf of idol. |
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Topic Indicator

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| Suit by or against administrator. See Note 8. | Section not applicable to appeals. See Note 2. |
| Suit by or against executor. See Note 8. | |
| Disability of legal representative. See S. 6 Note 44. | Suit for partnership accounts after death of a partner. See Note 4. |

1. Legislative changes.

- (1) There was no corresponding section in the Act of 1859.
- (2) The corresponding section in the Act of 1871 did not apply to applications, but applied only to suits. The sections in the later Acts apply to applications as well as to suits.
- (3) The section in the Act of 1871 applied also to suits for pre-emption. But the sections in the later Acts do not apply to such suits.
- (4) The corresponding section in the Act of 1871 spoke of a "representative in interest" and a "representative." The subsequent Acts refer to a "legal representative."

2. Scope of the section. — It is a general principle that unless there is a completed cause of action, limitation cannot run and that unless, *inter alia*, there is a person who can sue and a person who can be sued, there cannot be a complete cause of action.¹ It follows that

Section 17—Note 2

1. ('38) 25 AIR 1938 Mad 353 (356) : I L R (1938) Mad 586 : 174 Ind Cas 459 (FB), *Subbiah Thevar v. Samiappa Mudaliar*.
 (1913) 2 K B 549 (552) : 82 L J K B 949 : 109 L T 77:29 T L R 486, *Gelmini v. Moriggia*. (Day of payment—Cause of action matures next day.)
 (1821) 5 B & Ald 204 (214) : 106 E R 1167:24 R R 325, *Murray v. East India Company*. (Referred in AIR 1919 Mad 798.)
 (1897) 1 Q B 702 (707, 708) : 66 L J Q B 462 : 76 L T 608 : 45 W R 488, *Coburn v. Colledge*. (Solicitors' costs—Cause of action accrues when work is completed.)

limitation will not run where there is no person who can sue or who can be sued.² This section is based on this principle. It provides that (except in certain cases enumerated in sub-s. (3)), where a cause of action accrues in favour of, or against, the estate of a deceased person, limitation must be postponed till there is some one who can sue or be sued on behalf of the estate.

The section is one of the provisions of the Act which enable the institution of proceedings *after* the period prescribed therefor by the first schedule. It has been seen in Note 2 to S. 6 that such provisions proceed in different ways to achieve this end; for instance, in some of them the starting point of limitation is postponed, while in some others the starting point of limitation is not postponed but the litigant is allowed an additional period. This section belongs to the former category which *postpones* the starting point of limitation.

The ground on which limitation is postponed under this section is the absence of any person who can sue or be sued on the cause of action. The cause of action contemplated is one which arises in favour of, or against, the *estate* of a deceased person. Sub-section (1) relates to cases in which such cause of action accrues *in favour of* the estate; sub-s. (2) relates to cases in which the cause of action is *against* the estate. In either case, the starting point of limitation is postponed till there is some person who is capable of suing or being sued on behalf of the estate.

The section applies only to *suits* and *applications*; it does not apply to *appeals*. Suits for pre-emption, suits for the possession of immovable property, and suits for the possession of an hereditary office are expressly exempted from the operation of this section. (Sub-s. (3).)

3. Relative scope of Sections 6 and 17. — See Note 3 to Section 6.

- (‘24) 11 AIR 1924 Cal 600 (609) : 79 Ind Cas 520 (DB), *Dwijendra Narain v. Joges Chandra*.
- (‘16) 3 AIR 1916 P C 202 (205) : 43 Ind App 113 : 35 Ind Cas 323 (PC). *Meyappa Chetty v. Supramanian Chetty*.
- (‘19) 6 AIR 1919 Mad 972 (984) : 40 Mad 1040 : 43 Ind Cas 31 (FB), *Seeti Kutti v. Kunhi Pathumma*. (Per Srinivasa Aiyangar, J.)
- (‘19) 6 AIR 1919 Mad 798 (808) : 41 Mad 749 : 47 Ind Cas 733 (DB), *Midnapore Zamindari Co. Ltd. v. Malayandi Appayasami Naicker*. (A I R 1916 P C 202, followed.)
- (‘23) 10 AIR 1923 Cal 1 (7) : 50 Cal 49 : 74 Ind Cas 630 (DB), *Charu Chandra Pramanik v. Nahush Chandra Kundu*.
- (‘18) 5 AIR 1918 Cal 933 (939) : 44 Cal 425:37 Ind Cas 277 (DB), *Priya Sakhi Debi v. Bireswar Samanta*. (Simple mortgage—Mortgagor dispossessed—Time runs against mortgagee from date when he is entitled to possession.)
- (‘17) 4 AIR 1917 Mad 706 (706) : 34 Ind Cas 945 (DB), *Manikkam Pillai v. Thanikkachalam Pillai*.
- (‘66) 6 Suth W R P C 3 (9) : 2 Moo Ind App 390 (PC), *Jewun Doss Sahoo v. Kubber-ood-deen*. (Time runs against mutwalli from date of his appointment.)
2. (‘49) 36 AIR 1949 Cal 199 (Pr 7) (DB), *Manmohan Haldar v. Dibbendu Prasad*.
- (‘13) 18 Ind Cas 373 (375) (DB) (Mad), *Palaniandi Malavarayan v. Vadamalai Oodayan*.
- (‘68) 10 Suth W R 15 (19) (DB), *Womesh Chunder Goopto v. Raj Narain Roy*.

Section 17
Note 4

4. Where a person who would, if he were living, have a right to sue, dies before the right accrues. — Sub-section (1) provides for cases where a person who would, if he were living, have a right to institute a suit dies before the right accrues. Sub-section (2) refers to cases in which a person *against* whom, if he were living, a right to institute a suit would have accrued, dies before the right accrues. Thus, both sub-ss. (1) and (2) refer to cases in which a right to sue accrues after the death of a person in circumstances in which such right would have accrued to or against such person if he were living. In other words, the section refers to cases where a right to sue accrues in favour of or against the *estate* of a deceased person. Thus, suppose A contracts with B to pay B a certain sum of money on the 15th January 1930. B dies on 10th January 1930. If B had been living on the 15th January 1930, a right to sue would have accrued in his favour on A's failure to pay the money on that date. Suppose, in the above illustration, A dies on 10th January 1930. In such a case, if A had been living on the 15th January 1930, a right to sue would have accrued *against* him on his failure to pay the money on that date. As it is, on A's failure to pay the money on the 15th January, a cause of action accrues *in favour of the estate* of B in the first instance: and in the second instance, a cause of action accrues *against the estate* of A. Sub-section (1) applies to the first case and sub-s. (2) applies to the second case.

It will be seen that in both the illustrations given above, the right to sue accrues *after* the death of the person to whose estate the right relates. If such cause of action accrues *before* the death of such person, the section does not apply although the right may be enforceable on behalf of or against the *estate* of the deceased person. The reason is that the section only applies where the person to whose estate the cause of action relates dies *before* the accrual of the cause of action.¹

Suppose, a cause of action which exists in favour of or against the estate of a deceased person has been the result of the death of such person in the sense that but for such death, the cause of action would not have arisen at all. Thus, suppose there is a partnership amongst A, B and C. A dies. A's death causes a dissolution of the partnership and gives rise to a cause of action in favour of his representatives to sue B and C for an account of the partnership business and for A's share of the profits of the business. In such a case, the cause of action owes its existence to the death of A. The question arises as to whether this section applies to such cases. It has been assumed in the under-mentioned cases² that this section will apply even to such cases. It is

Section 17—Note 4

1. ('23) 10 AIR 1923 Rang 98 (98) : 79 Ind Cas 284, *Burn v. Paul*. (Application.) ('18) 5 AIR 1918 Mad 526 (528) : 41 Ind Cas 605 (DB), *Lakshmi Narayana v. Venkata*. (Cause of action before death—S. 17 does not apply.) (1874) L R 17 Eq 71 (74) : 43 L J Ch 12, *Boatwright v. Boatwright*. (Do.)
2. ('81) 7 Cal 627 (631, 632), *Lawless v. Calcutta Landing and Shipping Co. Ltd.* (Agency.) ('96) 20 Bom 15 (44) (DB), *Rivett-Carnac v. Gokuldas Sobhanmull*. (Partnership.) ('05) 9 Cal W N 537 (541), *Mohit Lall Dutt v. Raj Narain Dutt*. (Do. — 20 Bom 15 followed.)

submitted that the said view is not correct. The cause of action being itself the death of such person, it cannot be said that the deceased person, if he were alive, would have had a right to institute a suit on such cause of action.³ In support of the view that the said decisions are not correct, it has also been said that in such cases the cause of action arises *at* death and not afterwards and that, therefore, it cannot be said that the deceased person has died *before* the accrual of the right to sue within the meaning of this section.⁴ But this latter reasoning also does not seem to be correct. The right to sue arises *on* the death of the deceased person and not at the same time as the death takes place. In other words, in such cases, the cause of action arises the next moment *after* the death and not at any time before.

5. Death of creditor on day when debt becomes due. [*Omitted.*]

6. **The starting point of limitation under the section.** — Limitation under the section runs from the time when there is a legal representative of the deceased by or against whom the suit may be instituted. Thus, three conditions are necessary for limitation to begin to run under the section :

- (1) There must be a legal representative of the deceased.
- (2) The legal representative must be *capable* of suing, or being sued, on behalf of the estate.
- (3) The legal representative must be capable of suing, or being sued, on the *particular* cause of action in question.

The provision that limitation begins to run from the time when there is a legal representative capable of suing or being sued on the cause of action, does not mean that limitation begins to run the moment there is such a person irrespective of the question whether the cause of action is *mature* at such time. Where the cause of action arises *after* the coming into existence of a person who is capable of suing or being sued on behalf of the estate, limitation under this section does not begin to run from the time of the coming into existence of such person but only from the time when the cause of action arises. Thus, suppose that at the time of the death of X there is a person capable of suing on behalf of the estate. If a cause of action arises

[See also ('16) 3 AIR 1916 P C 202 (204) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty v. Supramanian Chetty*. (Suit for accounts after death of partner—It was assumed by Privy Council without deciding that the suit should be deemed to be suit which the deceased partner would, if he were living, have a right to institute - Case under S. 17, Straits Settlements Limitation Ordinance.)]

3. ('41) 28 AIR 1941 Mad 449 (466) (FB), *Venkateswara Sarma v. Venkatesa Ayyar*. (See the observations of Abdur Rahman, J., in this case at page 466, where he points out that this section applies only where the accrual of the cause of action is *independent* of the death of the person. Accordingly His Lordship has held that S. 17 does not apply to a suit by the manager of a religious endowment for the recovery of endowment property transferred for valuable consideration by his predecessor in office as the cause of action for such a suit arises only on the death of the transferor.)

4. See U. N. Mitra's "Limitation Act," (Edn. 6), Vol. II, p. 882.

Section 17
Notes 6-8

subsequently in favour of the estate, limitation runs not from the death of X but from the time when the cause of action accrues. The section has not the effect of accelerating the cause of action so as to enable it to be treated as arising at the death of X.¹

7. "Legal representative," meaning of.—See Note 43 to Section 6.

8. "Capable of instituting such suit."—In order that limitation may begin to run under the section, the mere existence of a legal representative of the deceased is not enough. It is necessary that such legal representative should be *capable* of instituting a suit on the cause of action.¹

The section does not lay down as to when a legal representative may be held to be capable of instituting a suit on behalf of the estate of the deceased person. Where, for example, the incapacity is due to the fact that the legal representative is an alien enemy residing in a foreign country, he may become capable of instituting a suit if either he becomes a resident in British India with the permission of the Central Government or after the state of war ends. (See S. 83, Civil Procedure Code.)

Again, in the case of a person other than a Hindu, Muhammadan, Buddhist, Jain, Sikh or Indian Christian dying intestate, only an administrator can sue or be sued on behalf of the estate.² An administrator derives his right solely from the grant of the letters of administration and hence, in cases where he alone can sue or be sued on behalf of the estate, such suit cannot be brought before the grant of the letters of administration. In such cases, therefore, limitation does not begin to run under this section before the grant of the letters of administration.³

Where letters of administration have been granted only with reference to a portion of the estate, and the remaining portion of the estate continues to be unrepresented, suits in respect of such portion cannot be brought until letters of administration have been obtained with regard to such portion.⁴ Hence, it is conceived that if the cause

Section 17 — Note 6

1. ('36) 23 AIR 1936 P C 309 (311, 312) : 164 Ind Cas 337 : I L R (1937) Mad 94 : 63 Ind App 429 (PC), *Murugesam Pillai v. Minakshisundara Ammal*.

Section 17 — Note 8

1. ('16) 3 AIR 1916 P C 202 (204) : 43 Ind App 113 : 35 I. C. 323 (PC), *Meyappa Chetty v. Supramanian Chetty*. (Capability of administrator and executor.)
 2. See Ss. 211, 212, Indian Succession Act, 1925.
 ('25) 12 AIR 1925 Rang 186 (187) : 3 Rang 46 : 85 Ind Cas 325, *Barnett Bros. Ltd. v. E. Fowle*.
 ('94) 18 Bom 337 (341, 342) (DB), *Framji Dorabji Ghaswala v. Adarji Dorabji Ghaswala*.
 ('82) 4 All 192 (195) : 1882 All W N 3 (DB), *Sukh Nandan v. Rennick*.
 3. (1902) L R 1902 A C 257 (260) : 71 L J P C 49 : 86 L T 245 : 51 W R (Eng.) 18 : 18 T L R 420, *Chan Kit San v. Ho Fung Hang*.
 ('16) 3 AIR 1916 P C 202 (205) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty v. Supramanian Chetty*.
 4. ('94) 18 Bom 337 (340, 341) (DB), *Framji Dorabji v. Adarji Dorabji*.

of action relates to such unrepresented portion of the estate, limitation will be postponed under this section till the grant of letters of administration in respect of it.

The rule is different where there is an *executor*. An executor derives his title from the will and he can sue or be sued on behalf of the estate even before obtaining probate of the will.⁵ The rule requiring probate in his case will only prevent a *decree* being passed before such probate is obtained and will not prevent the *institution* of the suit. Hence, in such cases, there will be no postponement of limitation under this section.⁶

The rule that an administrator or executor alone can sue or be sued on behalf of the estate of a deceased person does not apply to Hindus, Muhammadans, Buddhists, Jains, Sikhs and Indian Christians.⁷ Hence, in such cases, a suit can be brought on behalf of or against the estate of a deceased person even before the grant of letters of administration^{7a} even though there may be no executor. Hence, there will be no postponement of limitation under this section in such cases. Where there is an executor in such cases, he can institute suits on behalf of the estate even before the grant of probate and consequently, there will be no postponement of limitation under this section.⁸

The fact that in the above cases a *decree* cannot be passed in a suit for the recovery of a debt due to the estate, before the grant of a succession certificate,⁹ does not bar the *institution* of the suit.¹⁰

5. ('16) 3 AIR 1916 P C 202 (204, 205) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty v. Supramanian Chetty*.

('13) 19 Ind Cas 409 (409):37 Bom 158 (DB), *Jamsetji Nassarwanji v. Hirjibhai*. (1872) 42 L J Ch 234 (240) : 5 H L 656, *Knox v. Gye*.

(1804) 10 Ves 93 (94) : 7 R R 351, *Webster v. Webster*.

6. ('16) 3 AIR 1916 P C 202 (204, 205) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty v. Supramanian Chetty*. (Straits Settlements Limitation Ordinance, 1896.)

7. See Section 212, Indian Succession Act, 1925.

7a. ('38) 25 AIR 1938 Mad 157 (160) : ILR (1938) Mad 533 : 174 I. C. 638 (DB), *Sivasankara Mudaliar v. Amaravathi Ammal*. (Executors appointed under will declining to accept office — Heir-at-law of testator can maintain action to recover possession of estate left by testator.)

('37) 24 AIR 1937 Sind 84 (84, 85) : 31 Sind L R 11 : 168 I. C. 55 (DB), *Shrimati Pevibai v. Motumal Kalachand*. (Will by Hindu made at Hyderabad, Sind, of property at Hyderabad — Probate is not necessary before suing as legatee.)

('37) 24 AIR 1937 Sind 318 (320):172 I. C. 805, *Jamnabai v. Jethamal*. (Residuary legatee under will is legal representative capable of instituting suit.)

8. ('14) 1 AIR 1914 Mad 51 (54) : 37 Mad 175 : 24 I. C. 852, *Balakrishnadu v. Narayanaswamy Chetty*.

('90) 17 Cal 272 (275, 276) (DB), *Krishna Kinkur Roy v. Panchuram Mondul*.

('26) 13 AIR 1926 Mad 434 (447):49 Mad 261 : 94 Ind Cas 83 (FB), *Ramiah v. Venkatasubbamma*. (Hindu will in moffussil.)

9. See Succession Act, 1925, Section 214.

10. ('14) 1 AIR 1914 Mad 51 (54) : 37 Mad 175 : 24 I. C. 852, *Balakrishnadu v. Narayanaswamy Chetty*.

('37) 24 AIR 1937 Sind 318 (320) : 172 I. C. 805, *Jamnabai v. Jethamal*. ("Capable of instituting a suit" not to be interpreted as "capable of instituting a suit and obtaining a decree.")

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Notes 8-10

At the same time, it must be noted that the expression "capable of instituting a suit" in the section means "capable of instituting a suit in which a decree might be obtained." Hence, although a suit may be instituted before the grant of probate of a will or succession certificate and the passing of the decree alone may be deferred till the grant of such probate or succession certificate, yet, if the case is one in which such probate or certificate cannot be obtained at all, the plaintiff cannot be said to be capable of instituting a suit in which a decree might be obtained and hence, it must be held that in such cases there is no one capable of instituting the suit on behalf of the estate.¹¹

As to whether the fact that the legal representative of the deceased is under a disability referred to in S. 6 will be a ground for the postponement of limitation under this section, see Note 3 to S. 6.

The section says that limitation must be computed from the time when there is a legal representative who is "capable of instituting such suit." That means that the mere existence of a person who can sue on causes of action accruing to the estate is not enough. Such legal representative must be competent to sue on the *particular* cause of action which is in question. Thus, suppose a certain sum of money would have fallen due to a deceased person, if he were alive in 1935. If he dies in 1930, the mere fact that there is at the time a legal representative who can sue on behalf of the estate will not start limitation under this section in 1930. Limitation can only run from 1935. The reason is that in 1930 the legal representative is not capable of suing on the cause of action for the simple reason that the cause of action has not arisen. The section has not the effect of accelerating the cause of action in such cases.¹²

9. Claims against estate of deceased person—Applicability of Section.—Sub-section (2).—See Note 4.

10. Suit on behalf of idol.—Where the shebait of an idol dies and there is a vacancy in the office of shebait, a suit on behalf of the idol can be brought by any one interested in the foundation, as the next friend of the idol with the permission of the Court. Hence, there will be no postponement of the starting point of limitation in such a case.¹

(16) 3 AIR 1916 P C 202 (204, 205):43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty v. Supramanian Chetty*.

11. (16) 3 AIR 1916 P C 202 (204) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty v. Supramanian Chetty*.

12. (36) 23 AIR 1936 P C 309 (311, 312) : 164 I. C. 337 : 63 I. A. 429:ILR (1937) Mad 94 (PC), *Murugesam Pillai v. Minakshisundara Ammal*.

Section 17—Note 10

1. (49) 36 AIR 1949 Cal 199 (Pr. 7) (DB), *Manmohan Haldar v. Dibbendu Prosad*.

Section 18
Note 1

18.* Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,

or where any document necessary to establish such right has been fraudulently concealed from him,

the time limited for instituting a suit or making an application—

- (a) against the person guilty of the fraud or accessory thereto, or
- (b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

Synopsis

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| <ul style="list-style-type: none"> 1. Legislative changes. 2. Scope of the section. 3. "Suit or application." 4. There must have been fraud. 5. Person defrauded must have been kept from knowledge of his right to sue or to apply. 6. Plea of fraud. 7. Burden of proof. 8. Fraud, if can be antecedent to the cause of action. 9. Pre-emption cases. | <ul style="list-style-type: none"> 10. Proceedings to set aside execution sales. 11. "Document necessary to establish such right." 12. "Has been fraudulently concealed from him." 13. Starting point. 14. Against whom time can be extended. 15. Applicability of the section to period fixed by Section 48, Civil Procedure Code. |
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Topic Indicator

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| <ul style="list-style-type: none"> Actual and active fraud necessary. See Note 4. Application against decree-holder and auction-purchaser. See Note 14. Article 95 and this section. See Note 2. Concealment of document. See Note 13. Concealment of title. See Note 4. Criminal complaint — Section not applicable. See Note 3. | <ul style="list-style-type: none"> Fraud after limitation has begun to run — Section not applicable. See Note 2. Fraud in Section 48, C. P. C. — Not same as fraud in this section. See Note 15. Mere concealment of facts. See Note 4. Mere suspicion is not knowledge. See Note 13. |
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1. Legislative changes. — Section 9 of the Act of 1859 and S. 19 of the Act of 1871, corresponding to this section, dealt with the effect of fraud on a person's right to institute a *suit*. The Act of 1877

* Act of 1877 : S. 18.
Same as above.

Act of 1871 : S. 19; Act of 1859 : S. 9.
(Section 19 of the Act of 1871 and S. 9 of the Act of 1859 were the same except for the change noted in the "Legislative changes," Note 1.)

Section 18
Notes 1-2

extended the section to *applications* also. There is no change effected in the present Act.

2. Scope of the section.—This is an enabling section¹ which postpones the starting point of limitation for suits and applications where the plaintiff's or the applicant's *right to seek relief* is, by means of fraud, *kept from his knowledge*. The mere fact that the *cause of action is founded on fraud* is not enough to bring the case within this section.² Article 95 will apply to such cases.

Whether this section or Art. 95 applies, time, however, runs from the date when the fraud first *becomes known* to the person injuriously affected by the fraud. The principle on which both the provisions are based is the same, namely, that where a remedy is given on the ground of fraud, the right of the party defrauded is not affected by the lapse of time so long as he remains in ignorance of the fraud.³ In *Rolfe v. Gregory*,⁴ where the relief claimed was founded on fraud, the Lord Chancellor observed as follows :

“As the remedy is given on the ground of fraud, it is governed by this important principle, that the right of the party defrauded is not affected by lapse of time, or generally speaking, by anything done or omitted to be done, so long as he remains, without fault of his own, in ignorance of the fraud that has been committed.”

A person desiring to invoke the aid of this section must establish two things —

- (1) that *there has been fraud*, and
- (2) that by means of such fraud *he was kept from the knowledge* of his right to sue or apply or of the title on which such right is founded.⁵

Both these things must be established. It is not enough for the plaintiff or applicant to show that the act done by the defendant was fraudulent. He must, as observed by Petheram, C. J., in *Kailash Chandra v. Bissonath*,⁶ “carry the fraud further” and show that his right to sue or to apply has been kept from his knowledge by means

Section 18 — Note 2

1. ('23) 10 AIR 1923 All 282 (283) : 45 All 316 : 71 Ind Cas 631 (DB), *Sheo Ram Koeri v. Ikramunnissa Bibi*.
[See also ('32) 19 AIR 1932 Cal 381 (381, 382) : 137 Ind Cas 378 (DB), *Surja Kanta v. Jogendra Nath*.]
2. ('29) 16 AIR 1929 Rang 62 (63) : 117 Ind Cas 63 : 7 Rang 104 (DB), *Bowramah v. A. N. A. N. Chettiar*. (It must be proved that a person's title or right has been kept from his knowledge by other party's fraud.)
3. ('22) 9 AIR 1922 Cal 157 (158) : 68 Ind Cas 94 : 49 Cal 886 (DB), *Biman Chandra Dutta v. Promotho Nath Ghose*.
(25) 12 AIR 1925 Mad 1255 (1257) : 48 Mad 925 : 91 Ind Cas 151 (DB), *Ramiah & Co. v. Sadasiva Mudliar & Bros.*
4. (1865) 146 R R 463 (466) : 13 W R (Eng) 355 (356) : 4 D J & S 576 : 34 L J Ch 274 : 11 Jur (N S) 98 : 12 L T (N S) 162.
5. See Notes 4, 5 and 7.
See also Article 166 Note 18.
6. ('96) 1 Cal W N 67 (70) (DB).

of such fraud. See also the undermentioned cases to the same effect.⁷ Exemption from the bar limitation on the ground of fraud cannot be claimed apart from statutory provisions.^{7a}

This section must be read consistently with the provisions of S. 9 and, so reading it, it is clear that the fraud must have existed *at the inception of the cause of action*. A fraud committed *after* the limitation has begun to run cannot, in view of section 9, stop limitation running and this section will not apply to such cases.⁸ But the Calcutta High Court seems to have taken a contrary view in the undermentioned case.⁹ In that case A obtained a decree against B and then died leaving a minor son C. Limitation for application for execution had begun to run even in the lifetime of A. After the death of A, B without disclosing the fact that he was the debtor to the estate of A appointed himself as the guardian of C and allowed the prescribed time for execution to elapse. It was held that the period of B's guardianship *should be excluded* in computing the period of limitation for an application for execution. Their Lordships did not refer to any provision of law under which such *exclusion* could be made. It is submitted that this view is not correct.¹⁰

As to whether the fraud can be *antecedent* to the accrual of the cause of action, see Note 8.

As to the applicability of this section to special or local laws, see S. 29 Notes 3 and 5.

3. "Suit or application."—A complaint of a criminal offence is not a suit or application and this section has no application to such cases.¹

4. There must have been fraud. — The expression "by means of fraud kept," etc., shows that the fraud contemplated is an *actual* and *active* fraud in the means adopted to keep the person

7. ('26) 13 AIR 1926 Cal 229 (231): 87 Ind Cas 555 (DB), *Nabin Chandra Haldar v. Bipin Chandra Haldar*.

('81) 1881 Pun Re No. 32, *Arsala v. Yar Muhammad*.

('19) 6 AIR 1919 Lah 422 (422, 423) : 50 Ind Cas 610, *Asanand v. Ghanji Ram*.

('20) 7 AIR 1920 Lah 261 (261) : 57 Ind Cas 15, *Mt. Lal Devi v. Amar Nath*.

('26) 13 AIR 1926 Lah 128 (129) : 92 Ind Cas 597, *Nand Ram v. Ishar*.

7a. ('51) 38 AIR 1951 S C 16 (Pr 25):1950 S C R 852 (SC), *Yeshwant v. Walchand*.

8. ('21) 8 A I R 1921 Mad 283 (283) : 60 Ind Cas 274 (DB), *Ramalagu Servai v. Solar Servai*. (Case covered by Art. 62, Limitation Act — This section cannot apply where there was no fraud at the date when the cause of action arose — In this case a subsequent act of fraud was relied on to save limitation.)

9. ('25) 12 AIR 1925 Cal 584 (585) : 52 Cal 63 : 88 Ind Cas 61 (DB), *Gobinda Lal Ghose v. Nalini Kanta Ghose*.

10. ('25) 48 Mad L Jour (N I C) 31 (31, 32). (Critical note on ('25) AIR 1925 Cal 584, *Gobinda Lal Ghose v. Nalini Kanta Ghose*.)

Section 18 — Note 3

1. ('96) 20 Bom 543 (544) (DB), *Queen-Empress v. Nageshappa Pai*. (This section does not apply to criminal cases and the peremptory terms of S. 11 of the Indian Salt Act (XII of 1882) are not affected by it.)

Section 18 Note 4

injured out of knowledge of his right.¹ There must be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts : a designed fraud by which a party, knowing to whom a right belongs, conceals the facts and circumstances giving that right.² A necessary element in fraud is *deception* or *deceit* and getting somebody to believe something that is really not correct.³ It is not enough that there should be merely a tortious act unknown to the

Section 18 — Note 4

1. ('31) 18 A I R 1931 Oudh 5 (6) : 129 Ind Cas 168 : 6-Luck 374, *Lalla Singh v. Mathur Upadhia*. (Omission by mortgagor to inform of his want of title to mortgagee is not active fraud so as to attract the application of this section.)
- ('29) 16 A I R 1929 Bom 119 (126) : 53 Bom 271 : 117 I. C. 417 (DB), *Raneegunge Coal Association Ltd. v. Tata Iron and Steel Co. Ltd.* (Not furnishing information in breach of contract is not fraud.)
- ('29) 16 AIR 1929 All 213 (213, 214) : 115 Ind Case 798 (DB), *Sheo Shankar v. Pratab Narain Singh*. (Active concealment with intention to deceive is fraud.)
- ('03) 1903 Pun L R No. 4, p. 8 (9) : 1902 Pun Re No. 86 (DB), *Ghulam Raza v. Sardar Khan*. (Mere non-disclosure of transaction cannot be held to amount to fraud.)
- ('23) 10 A I R 1923 Mad 353 (354) : 72 Ind Cas 46 (DB), *Muhammad Rowther v. Subba Naicker*. (Where a decree-holder not merely failed to serve the judgment-debtor with notice of the intended sale but even after the sale actively concealed from him the knowledge of his right to object to the sale—*Held* that Section 18 applied.)
2. Halsbury's "Laws of England," Vol. 19, page 172.
- ('33) 20 AIR 1933 Cal 253 (257) : 143 Ind Cas 402 (DB), *Swarnamoyee Dasi v. Probodh Chandra*.
- ('29) 16 AIR 1929 Pat 228 (230) : 117 I. C. 46 (DB), *Babu Lal v. Parem Kumari*.
- ('26) 13 AIR 1926 Pat 397 (398) : 97 I. C. 798 (DB), *Bihari Lal Mitter v. Tanuk Lal Mander*. (Mere carelessness or negligence does not substantiate a finding of fraud.)
- ('11) 11 Ind Cas 313 (313) (DB) (Lah), *Kaka Ram v. Mohammad Ali*. (Section 18 does not apply where there is an absence of indication of any active or intentional concealment.)
- ('12) 16 Ind Cas 464 (465) (DB) (Cal), *Narayan Sahu v. Damodar Das*. (Fraudulent concealment necessary to constitute fraud.)
- ('12) 16 Ind Cas 547 (548, 549) (DB) (Cal), *Lokenath Ruth v. Chintamani Tripathi*. (Ignorance of plaintiff of right to sue, not sufficient—Ignorance must be brought about by fraud of opponent.)
- [See also (1948) 2 All E L R 89 (94), *Beaman v. A. R. T. S. Ltd.* (English Limitation Act, 1939 (2 and 3 Geo. VI, C. 21, S. 26)—Fraud is not confused to fraudulent misrepresentation but does involve element of moral turpitude and dishonesty.)
- ('38) 25 AIR 1938 Cal 263 (266, 270) : I L R (1938) 1 Cal 512 : 182 Ind Cas 244 (DB), *Chaitanya Das v. Ranjit Pal*. (Decree-holder fraudulently selling property not belonging to judgment-debtor—Suit by auction-purchaser for refund of purchase-money—Decree-holder held guilty of fraud.)
- ('26) 13 AIR 1926 Nag 388 (389) : 94 Ind Cas 50, *M. B. Kinkhede v. Mohanya*. (Article 164 is not confined only to a case of fraud in service of notice but it covers any fraud and Section 18 can be applied.)]
3. ('29) 16 AIR 1929 Bom 119 (127) : 53 Bom 271 : 117 I. C. 417 (DB), *Raneegunge Coal Association Ltd. v. Tata Iron and Steel Co., Ltd.*
- ('03) 1903 Pun L R No. 4, p. 8 (9) : 1902 Pun Re No. 86 (DB), *Ghulam Raza v. Sardar Khan*. (Fraud as used in this section means, and can only mean, active deceit in defrauding or endeavouring to defraud a person of his rights by artful device.)

Section 18
Note 4

injured party, or enjoyment of property without title while the rightful owner is ignorant of his right.⁴ There must be something said or done which is directly intended to keep the plaintiff or applicant from knowledge of his right to sue or to apply.⁵ An *open* act of a party cannot be said to be a fraudulent act of concealment.⁶ Thus, an open extortion of documents from a party cannot be regarded as a fraudulent concealment of the document.⁷ A failure to give information which a party is bound to give under a *contract* is not fraud but only a breach of contract.⁸ Nor is the mere fact that a person was *ignorant* of his right sufficient to establish active fraud.^{8a}

4. Halsbury's "Laws of England," Vol. 19, page 172.

('27) 14 AIR 1927 All 437 (438) : 101 Ind Cas 322, *Gulab Rai v. Tulsi Ram*.

5. ('29) 16 AIR 1929 All 213 (214) : 115 Ind Cas 798 (DB), *Sheo Shankar v. Pratab Narain Singh*.

('27) 14 AIR 1927 All 437 (438, 439) : 101 Ind Cas 322, *Gulab Rai v. Tulsi Ram*.

(1864) 1864 Suth W R (Gap) 364 (364) (DB), *Sheikh Muksood Ali v. Sheikh Gowhur Ali*.

('68) 9 Suth W R 255 (255) (DB), *Byjnath Suhaye v. Brohmo Deo Narayan*.

('74) 21 Suth W R 109 (111) (DB), *Dwarkanath Bhooya v. Ajoodhya Ram Khan*. (Where a plaint sufficiently alleged that the plaintiffs being entitled to property were ousted from its enjoyment under colour of a fictitious revenue sale in pursuance of a fraudulent contract, the fraud having been so contrived as to make the plaintiffs believe that they had no right of action at all, it was held that the allegation, if true, showed that the plaintiffs had been kept by fraud from a knowledge of their right of action.)

('82) 1882 Pun Re No. 3, *Nihal Chand v. Foujdar Singh*.

('85) 1885 Pun Re No. 73, *Gauhri Mal v. Jainti Mal*.

('02) 1902 Pun L R No. 15, pp. 68, 70 : 1902 Pun Re No. 16 (DB), *Panna Lal v. Bhagwan Das*.

6. (1900) 24 Bom 104 (111) : 1 Bom L R 466 (DB), *Dhondo v. Vasudev*.

('09) 4 Ind Cas 313 (314) (Lah), *Khubi v. Nihala*. (Open gift of property followed by mutation of names.)

('81) 3 Mad 384 (397, 398) : 8 Ind App 149 : 5 Ind Jur 542 : 4 Sar 259 (PC), *Venkateswara Iyan v. Shekari Varma*. (Fact of registration displaces the theory of concealment.)

('20) 7 A I R 1920 Mad 295 (302) : 58 Ind Cas 689 (DB), *Secretary of State v. Bommadevara Venkatanarasimha*. (Open enjoyment of land.)

('15) 2 AIR 1915 Cal 738 (738) : 28 Ind Cas 708 (DB), *Panchkari Chattapadhya v. Maharaja Bahadur Singh*. (Open act of possession by defendant.)

7. ('74) 7 Mad H C R 22 (23) (DB), *Ananta Lakshminarasu v. Ankinid Bahadur*.

8. ('29) 16 AIR 1929 Bom 119 (126) : 117 Ind Cas 417 : 53 Bom 271 (DB), *Ranee-gunge Coal Association Ltd. v. Tata Iron and Steel Co., Ltd.*

('16) 3 A I R 1916 Low Bur 40 (41) : 36 Ind Cas 418 (DB), *Adrikappa Chetty v. Kadappa*. (Neglecting to settle accounts by agent with object of concealing misconduct from principal.)

('31) 18 A I R 1931 Oudh 5 (6) : 129 Ind Cas 168 : 6 Luck 374, *Lalta Singh v. Mathur Upadhia*. (Mere omission by mortgagor to disclose want of title.)

('12) 16 Ind Cas 804 (805) : 1913 Pun Re No. 32 (DB), *Hardhian Singh v. Delhi Cloth and General Mills Co.* (Mere omission to give plaintiff notice of a breach of contract.)

8a. ('67) 8 Suth W R 23 (23) (DB), *Azroal Singh v. Lalla Gopeenath*. (Except in cases in which such ignorance has been brought about by opposite party's fraud.)

('69) 1869 Pun Re No. 29, *Mt. Masea Davee v. Sukh Dyal*. (Do.)

('25) 12 A I R 1925 Cal 515 (516) : 78 Ind Cas 149, *Giribala Dasi v. Tarak Nath*. (Do.)

Section 18
Note 4

A mere concealment of facts may or may not amount to fraud. If the party is under no *duty* to disclose such facts to the other party, a mere concealment will not amount to fraud.⁹ Where there is, however, such a duty, a concealment may amount to active fraud (*suppressio veri*).^{9a} Thus, a concealment by a person in a fiduciary position may amount to active fraud.¹⁰

(1933) 20 A I R 1933 Cal 253 (257) : 143 Ind Cas 402 (DB), *Swarnamoyee Dasi v. Probodh Chandra*. (Do.)

(1912) 16 Ind Cas 547 (548) (DB) (Cal), *Lokenath v. Chintamani Tripathi*. (Do.)

9. Snell's "Principles of Equity," 11th Edition, page 471.

(1940) 27 AIR 1940 Lah 262 (264) : 192 Ind Cas 105, *Sita Ram v. Munshi Ram*. (Suit by reversioner challenging mortgage on the ground of want of consideration and necessity — Reversioner is not bound to disclose that mortgage property was gifted to him — Even attempt on his part to conceal factum of gift cannot bring case under Section 18.)

(1904) 28 Mad 168 (171) (DB), *Abdul Karim Sahib v. Official Assignee of Madras*. (There is no duty cast upon the insolvent to disclose to the Official Assignee that he has become possessed of property since the making of the order of personal discharge and consequently the non-disclosure of the fact cannot be regarded as fraud within the meaning of Section 18.)

(1865) 3 Suth W R S C C Ref. 9 (10) (DB), *Indorobhoosun Deb Roy v. Thomas J. Kenny*. (Where a lessee cut trees contrary to the provisions of his first lease, and the lease was renewed (the lessor then not looking to the infringement of the terms of the lease in this respect), limitation was held to run from breach of contract, and not from lessor's knowledge of it, because he might have known of it before.)

(1929) 16 AIR 1929 All 213 (214) : 115 Ind Cas 798 (DB), *Sheo Shanker Upadhia v. Pratab Narain Singh*. (Mere omission to inform the pre-emptor of the bare fact of concealing the sale transaction from him cannot amount to a fraud, but where there is an active concealment of the transaction coupled with an intention to deceive the pre-emptor, there would undoubtedly be a fraud within the meaning of Section 18.)

9a. Snell's "Principles of Equity," 11th Edition, page 471.

[See also (1939) 26 AIR 1939 All 113 (113, 114) : 180 Ind Cas 525, *Jagdish Rai v. Suraj Kumar*. (Held, under circumstances of the case, vendees were guilty of fraudulent concealment of the fact of sale from pre-emptor.)

(1939) 26 AIR 1939 Oudh 227 (229) : 14 Luck 694 : 183 Ind Cas 382 (DB), *Kazim Husain v. Mt. Mubarak Jahan Begam*. (Omission of existing debt from written statement of debtor under S. 8, U. P. Encumbered Estates Act, not explained satisfactorily — Presumption is that such omission is deliberate with intention to reap advantage of S. 13 of the Act — Creditor is entitled to benefit of S. 18, Limitation Act.)

(1982) 6 Bom 628 (636), *Merwanji Hormusji v. Rustomji Burjorji*. (Silence under particular circumstances may amount to active fraud satisfying the section.)]

10. (1974) 21 Suth W R 245 (245) (DB), *Hossein Buksh v. Tussuduck Hossein*. (Suit for money received by agent and concealed from principal.)

(1925) 12 AIR 1925 Cal 584 (585) : 52 Cal 63 : 88 Ind Cas 61 (DB), *Gobinda Lal Ghose v. Nalini Kanta Ghose*. (Decree obtained by minor — Judgment-debtor appointed guardian — Failure to execute decree — There is fraud.)

(1909) 4 Ind Cas 313 (314) (Lah), *Khubi v. Nihala*. (Where a *lambardar* gets a common land mutated in his own name on the basis of a fraudulent deed of transfer, limitation begins to run only when the claimants become aware of the fraud.)

(1929) 16 AIR 1929 Bom 119 (127) : 53 Bom 271 : 117 I C 417 (DB), *Raneegunge Coal Association Ltd. v. Tata Iron and Steel Co. Ltd.*

Section 18
Note 5

5 Person defrauded must have been kept from knowledge of his right to sue or to apply. — As has been seen already, there must not only have been fraud but the person injured by it must have been kept from knowledge of his right to institute a suit or make an application by means of such fraud.¹ It follows that if the person injured is *aware* of his right to seek relief, he cannot claim the benefit of this section.² But mere suspicion is not enough. It must be knowledge of such a character as will enable the person defrauded to seek his remedy in Court.^{2a} The mere fact that though he knew of his right to seek the necessary relief he was prevented by fraud from *exercising* his right, is not sufficient.³ Thus, where the decree-holder has the knowledge that he has the right to apply for the execution of his decree, the fact that the judgment-debtor prevents the decree-holder from knowing the existence of certain properties against which the decree could be enforced, does not bring the case within this

Section 18 — Note 5

1. ('50) 37 AIR 1950 Mad 460 (Para 8) : 1950-1 Mad L Jour 432, *Ghulam Kadir v. Municipal Council Negapattinam*.
 ('50) 1950 Nag L Jour 396 (Para 8), *Hariram v. Asaram*. (Case of pre-emption.)
 ('14) 1 AIR 1914 Cal 728 (729, 730) : 24 Ind Cas 249 (DB), *Jotindra Mohan Roy v. Brojendra Kumar*.
 ('19) 6 AIR 1919 Cal 836 (837) : 53 Ind Cas 562 (DB), *Ram Chandra v. Abeda Khatun*.
 ('82) 1882 Pun Re No. 3, *Nihal Chand v. Foujdar Singh*.
 ('23) 10 AIR 1923 Pat 435 (436) : 72 Ind Cas 625, *Mahabir Ram v. Ram Bahadur*.
 ('33) 20 AIR 1933 Rang 110 (111) : 144 Ind Cas 980, *Ramanathan Chettiar v. Baldeo Singh*.
 ('11) 11 Ind Cas 295 (298) (DB) (Cal), *Kishori Dasi v. Mukund Lal*.
 ('30) 17 AIR 1930 Pat 153 (154) : 119 Ind Cas 891, *Mohinuddin Meerza v. Mohamed Amin*.
 ('17) 4 AIR 1917 All 8 (8, 9) : 40 Ind Cas 37 (DB), *Lakhpat Pandey v. Jang Bahadur Pandey*.
2. ('50) 1950 Nag L Jour 396 (Para 8), *Hariram v. Asaram*.
 ('41) 38 AIR 1941 Cal 541 (545) : ILR (1941) 2 Cal 44 : 197 Ind Cas 376 (DB), *Jogendra Krishna v. Subasini Dassi*. (Transfer of non-transferable tenancy — Landlord aware of transfer—Transferee acquires limited interest of permanent tenant by adverse possession for more than 12 years.)
 ('14) 1 AIR 1914 Cal 728 (729) : 24 Ind Cas 249 (DB), *Jotindra Mohun Roy v. Brojendra Kumar Datta*.
 ('70) 2 N W P H C R 180 (181) (DB), *Sheo Sahae Panday v. Ratta Beebee*.
 ('89) 12 Mad 168 (175) (FB), *Venkata v. Chengadu*.
- 2a. ('51) 38 AIR 1951 T.C 107 (Pr 5) : 1950 K L T 653, *Samsudeen Peerumahamad v. Lekshmi Nadachi*. (So in order to fix a person proceeded against with knowledge of the execution proceedings and the sale, he must know the number and year of the decree, the Court which passed the same and the party who secured the decree.)
3. ('51) 38 AIR 1951 S C 16 (Pr 19) : 1950 S C R 852 (S C), *Yeshwant v. Walchand*. (Concealing from a person the knowledge of his right to apply for execution of a decree, is undoubtedly different from preventing him from exercising his right, of which he had knowledge. Section 18 postulates the former alternative.)
 ('12) 13 Ind Cas 63 (66) (DB) (Cal), *Biroo Gorain v. Jainurat Koer*.
 ('15) 2 AIR 1915 Cal 73 (73) : 25 Ind Cas 884 (DB), *Golam Mujahar Chowdhury v. Goloke Charan Das*.
 ('19) 6 AIR 1919 Upp Bur 26 (27) : 52 Ind Cas 958 : 3 Upp Bur Rul 169, *Maung On Myit v. Mauny Shwe Pi*.

Section 18 Notes 5-6

section.^{3a} A lost certain Government promissory notes, and some years thereafter the Government notified to him that the promissory notes had been presented by a stranger at the treasury, and that inspection would be given to him on his furnishing an indemnity bond. A did not furnish the indemnity and being unable to know the name of the stranger, could not file a suit against him. More than six years after the notification he sued for the recovery of the notes. It was held that after the notification he could not be said to have been kept from the *knowledge* of his right to institute a suit.⁴

A collected the debts due to a deceased person and actually concealed the said fact from B the heir. B was kept from knowledge of his right by such concealment. It was held that this section would apply.⁵ B was entitled to a share of the debt collected by a coparcener before partition but it was kept back from him at the time of partition on the representation that the debt was outstanding. It was held that B was kept from knowledge of his right by the fraud of the coparcener.⁶

6. Plea of fraud. — Order 6 Rule 4 of the Code of Civil Procedure provides, *inter alia*, that in all cases in which a party pleading relies on any fraud, particulars with date and items, if necessary, shall be stated in the pleading. A person seeking to avoid the statute of limitation on the ground of fraud must therefore specifically state the particulars thereof.¹ *General* allegations, however

(‘23) 10 AIR 1923 Rang 103 (106) : 11 Low Bur Rul 363 : 68 Ind Cas 924 (DB), *P. R. P. L. Chetty Firm v. G. Lon Pow.* (13 Ind Cas 63 followed — (‘22) AIR 1922 Low Bur 31, *P. R. P. L. Chetty Firm v. G. Lon Pow.* reversed on appeal.)

(‘25) 12 AIR 1925 Nag 374 (375) : 88 Ind Cas 48, *Maroti v. Narayan.* (Mere omission by the decree-holder to certify adjustment of the decree was held not sufficient to extend the period of limitation allowed to a judgment-debtor under Article 174.)

(‘18) 5 AIR 1918 All 336 (337) : 43 Ind Cas 671 (DB), *Harish Chander v. Ganga Bishun.* (Where a judgment-debtor was by fraud induced to omit to make an application under O. 21, R. 89, C. P. C., it was held that the fraud was not of the kind which would operate to extend to the limitation provided for an application to set aside a sale on the ground of irregularity inasmuch as it did not keep the judgment-debtor from the knowledge of his right but merely prevented him from making an application.)

3a. (‘51) 38 AIR 1951 S C 16 (Paras, 19, 22) : 1950 S C R 852 (SC), *Yeshwant v. Walchand.*

4. (‘67) 1 Agra 213 (214, 215) (DB), *Syud Ali Nuquee v. Bhugwan Dass.*

5. (‘21) 8 AIR 1921 All 155 (157) : 43 All 440 : 60 Ind Cas 774 (DB), *Saheb Ram v. Mt. Govindi.*

See also Article 62 Note 32.

6. (‘13) 21 Ind Cas 394 (396) (DB) (Mad), *Avancha Lakshminarasimma v. Lakshamma.*

[But see (‘27) 14 AIR 1927 All 437 (438, 439) : 101 Ind Cas 322, *Gulab Rai v. Tulsi Ram.* (A collecting money to which B was also entitled and not informing B—Held no active concealment.)]

Section 18 — Note 6

1. (‘27) 14 AIR 1927 All 437 (439) : 101 Ind Cas 322, *Gulab Rai v. Tulsi Ram.*
(‘19) 6 AIR 1919 Lah 152 (154) : 51 I C 447, *Bashi Ram v. Hassan Muhammad,*
(‘09) 2 Ind Cas 844 (845) : 36 Cal 654 (DB), *Purna Chandra Mandal v. Anukul Biswas.*

strong may be the words in which they are stated, are sufficient even to amount to an averment of fraud of which any Court ought to take notice.² Order 7, R. 6 requires that where a suit is instituted after the expiry of the period of limitation the plaint shall show the ground upon which exemption is claimed. When the pleading does not show how the exemption under this section is available to the plaintiff the plea cannot be allowed to be raised for the first time in Letters Patent Appeal.³ See also Note 2 to O. 6, R. 4 of the Authors' Commentary on the Civil Procedure Code, 3rd Edition and Note 16 to Article 95.

7. Burden of proof. — Where a plaint is *prima facie* barred by limitation, it is for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its

('21) 8 AIR 1921 Pat 145 (147) : 61 Ind Cas 823 : 6 Pat L Jour 319 (DB), *Das Narayan Singh v. Mir Muhammad Yusuf*. (Application to set aside execution sale on the ground of fraud.)

('34) 21 AIR 1934 P C 208 (210) : 151 Ind Cas 45 (P C), *Kalyan Mal v. Ahmad Uddin Khan*.

('16) 3 AIR 1916 Cal 120 (122, 123) : 35 Ind Cas 284 (DB), *Bansiram v. Secretary of State*.

[See also ('22) 9 AIR 1922 P C 336 (338, 339) : 1 Pat 733 : 67 Ind Cas 914 : 49 Ind App 312 (PC), *Radha Krishna v. Bisheshwar Sahay*.]

2. ('50) 37 AIR 1950 Mad 801 (Pr 2) : 1950-2 M L J 290 (DB), *Venkata Subba Rao v. Kanakaraju*. (Vague allegations of fraud, when facts alleged do not bear out the case of fraud will not enable the petitioner under S. 18 to get out of the bar of limitation.)

('15) 2 AIR 1915 P C 7 (13, 14) : 39 Bom 441 : 42 Ind App 135 : 29 Ind Cas 639 (PC), *Bal Gangadhar Tilak v. Shrinivas Pandit*.

('94) 18 Bom 144 (146) (DB), *Krishnaji v. Wamanji*. (A plaint seeking relief on the ground of fraud but omitting to give particulars does not disclose a cause of action and should be rejected or returned for amendment.)

('88) 15 Cal 533 (537) : 15 Ind App 119 : 5 Sar 168 : 12 Ind Jur 254 (PC) *Ganga Narain Gupta v. Tiluckram Chowdhury*. ((1880) 5 App Cas 685, *Wallingford v. Mutual Society*, followed.)

('16) 3 AIR 1916 Cal 120 (123) : 35 I C 284 (DB), *Bansiram v. Secretary of State*.

('82) 1882 Pun Re No. 3, *Nihal Chand v. Foujdar Singh*.

('02) 1902 Pun Re No. 86 : 1903 Pun L R No. 4, *Ghulam Raza v. Sardar Khan*.

('09) 1 Ind Cas 784 (785) : 36 Cal 134, *Jyotiprakash Nandi v. Jhowmull Johury*.

('09) 4 Ind Cas 495 (499) (DB) (Cal), *Promoda Nath Roy v. Kinoo Mollah*.

('98) 1 Oudh Cas 262 (267), *Munna Lal v. Auseri Lal*.

('21) 8 AIR 1921 Pat 145 (147) : 6 Pat L Jour 319 : 61 Ind Cas 823 (DB), *Das Narayan Singh v. Mir Muhammad Yusuf*.

('31) 18 AIR 1931 Oudh 5 (6) : 129 Ind Cas 168 : 6 Luck 374, *Lalta Singh v. Mathur Upadhia*. (Mere omission by mortgagor to inform of his want of title to mortgagee is not active fraud.)

[See also ('92) 19 Cal 683 (688) : 19 Ind App 166 : 6 Sar 209 (P C), *Prosunno Kumar Sanyal v. Kali Das Sanyal*.]

('30) 17 AIR 1930 Mad 12 (16) : 123 Ind Cas 24, *Changalwaraya Reddi v. Kollapuri Reddi*. (Section 18 applied under special circumstances though no specific allegations were made.)]

3. ('47) 34 AIR 1947 Mad 268 (270) : ILR (1947) Mad 721 (DB), *Bojjanna v. Kristappa*. (Principle of O. 7, R. 6 should be applied to an application to set aside a sale in execution.)

Section 18 Note 7

ordinary effect.¹ If he relies upon fraud as being such a circumstance, the initial burden is upon him to establish the fraud and that by means of such fraud he was kept from knowledge of his right to seek relief.² The same principle will apply to an application. Allega-

Section 18 — Note 7

1. ('42) 46 Cal W N 403 (404), *Jagiswar Das v. Debnarain Roy*. (Application under S. 174 (3), Bengal Tenancy Act, to set aside sale on ground of fraud, *prima facie* barred by limitation—Court ought to consider whether applicant's case of fraud has been established.)
- ('22) 9 AIR 1922 Cal 157 (158) : 49 Cal 886 : 68 Ind Cas 94 (DB), *Biman Chandra Dutta v. Promotho Nath Ghose*.
- ('09) 2 Ind Cas 844 (845) : 36 Cal 654 (DB), *Purna Chandra v. Anukul Biswas*.
- ('13) 18 Ind Cas 391 (392) (DB) (Cal), *Panchu Mandal v. Sheikh Isaf*.
- '22) 9 AIR 1922 Pat 507 (510) : 2 Pat 65 : 77 Ind Cas 957 (DB), *Ramdhuri Chowdhury v. Deonandhan Prasad Singh*.
- ('17) 4 AIR 1917 Pat 443 (445) : 41 Ind Cas 385 (DB), *Ram Pertap Lal v. Kesho Prasad Singh*.
- ('12) 16 Ind Cas 844 (845) (DB) (Lah), *Phula Singh v. Prem Singh*.
[See ('13) 20 Ind Cas 664 (664) (DB) (Cal), *Prohabati Dasi v. Taibaturinessa Chowdhurani*.]
[See also ('93) 6 C P L R 19 (21), *Vithoba v. Laxamangir*. (It is for the party who pleads fraud to prove it or to make out a very strong *prima facie* case before the onus can be shifted.)]
- See also Note 38 to Section 3 and Note 19 to Art. 91.
2. ('44) 31 AIR 1944 Pat 40 (40) : 211 Ind Cas 539, *Sobhan Khan v. Gangadhar*. (Person applying under O. 21, R. 90, C. P. C. to set aside sale beyond period of limitation has to prove want of knowledge until within 30 days of the application.)
- ('48) 28 AIR 1941 Nag 357 (361) : ILR (1942) Nag 564 : 197 Ind Cas 612 (DB), *Narainbhai Ichharam v. Narbada Prasad*. (S bequeathing property to plaintiff and dying in 1917—Plaintiff minor leaving with widow of S—Widow asserting hostile title and obtaining mutation in her own name in 1918 and continuing in possession till 1932—Plaintiff alleging to have been kept out of knowledge of will of S by fraud till 1928—Plaintiff becoming major in 1922 and regaining possession as owner in 1932—Plaintiff held lost title 12 years after 1918 unless he could avail himself of S. 18.)
- ('39) 26 AIR 1939 Cal 663 (664, 665) : ILR (1939) 2 Cal 163 : 186 Ind Cas 335, *Abdul Jamil v. Ambia Khatun*.
- ('38) 25 AIR 1938 Lah 577 (579) : 178 I C 504 (DB), *Nanak Chand v. Sardar Singh*.
- ('22) 9 AIR 1922 Cal 157 (158) : 49 Cal 886 : 68 Ind Cas 94 (DB), *Biman Chandra Dutta v. Promotho Nath Ghose*.
- ('24) 11 AIR 1924 Nag 94 (94) : 20 Nag L R 23 : 80 Ind Cas 590, *Ramchandra v. Hardeo*.
- ('29) 16 AIR 1929 Rang 62 (63) : 7 Rang 104 : 117 Ind Cas 63 (DB), *Bowrammah v. A. N. A. N. Chettiar*. (In certain circumstances it could be assumed from the act of fraud itself which gave the cause of action that this act of fraud was fraudulently concealed from the person affected.)
- ('20) 7 AIR 1920 Pat 725 (725, 726) : 57 Ind Cas 404, *Jagdhar Missir v. Dhoroi Khatwa*.
- ('34) 21 AIR 1934 Lah 878 (879) : 155 I C 654 : 16 Lah 408 (DB), *Bhagwana v. Shadi*.
- ('29) 16 AIR 1929 Cal 188 (189) : 116 Ind Cas 726 (DB), *Hassan Ali v. Gurudas Kapali*.
- ('27) 99 Ind Cas 946 (947) (Cal), *Kedar Hura v. Asutosh Roy*.
- ('14) 1 AIR 1914 Cal 728 (730) : 24 Ind Cas 249 (DB), *Jotindra Mohan v. Brojendra Kumar*.
- ('13) 20 Ind Cas 538 (539) (Oudh), *Kashiram v. Mt. Pragi*.
- ('19) 6 AIR 1919 Lah 152 (154) : 51 I C 447, *Bashi Ram v. Hassan Muhammad*.
- ('09) 2 Ind Cas 844 (845) : 36 Cal 654 (DB), *Purna Chandra v. Anukul Biswas*.

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tions of fraud must be *substantially* proved by the party making the same though it does not mean that every puzzling artifice or contrivance resorted to by the opposite party must be unravelled.³ Fraud, therefore, cannot be presumed until the person relying upon it establishes his case^{3a} and the Courts must not be too ready to presume fraud from suspicious circumstances,⁴ though a number of such circumstances may, when combined, lead to the inference of fraud.⁵ When one kind of fraud is alleged, another kind of fraud cannot, upon failure of the proof of the fraud alleged, be substituted for it.⁶

Once fraud is established, however, the burden will be shifted to the person who has committed the fraud to show that the person affected thereby had knowledge of the transaction beyond the period of limitation.⁷ The leading case on the point is *Rahimbhoy v.*

('74) 22 Suth W R 479 (479, 480), *Nutun Singh v. Modhun Singh*.

('66) 6 Suth W R 165 (165) (DB), *Brindaban Doss v. Jugodessuree Chowdhraim*.

[See ('20) 7 AIR 1920 Cal 202 (203) : 56 Ind Cas 811, *Manulla Kolu v. Prasanna Kumar Sarkar*.]

[See also (1942) 76 Cal L Jour 323 (323, 324), *Kshemada Kinkar v. Shyama Sundari*. (Suit under S. 36, Beng. Public Demands Recovery Act brought more than one year after the delivery of possession to purchaser, alleging fraudulent suppression of notice under S. 7, Public Demands Recovery Act—*Held*, that no fraud having been established under S. 18, plaintiff's suit was time barred.)

[See however ('29) 16 AIR 1929 All 721 (723) : 122 I C 598 (DB), *Sri Kishen Pandey v. Ghana Nand Joshi*. (But if notwithstanding the fact that the plaintiff did in most specific terms allege in his suit the date and circumstances in which he acquired knowledge for the first time, the defendant's pleadings are evasive and do not raise specifically an issue as to the date of the plaintiff's acquisition of knowledge, the burden of proving the date is not on the plaintiff.)]

See also Note 12 to Article 10.

3. ('23) 10 AIR 1923 P C 73 (76) : 73 I C 391 (PC), *Satish Chandra Chatterjee v. Kumar Satish Kantha Roy*. (Fraud must be proved by facts or inferences from facts as a whole—Suspicious or surmises or conjecture are no substitute for those facts—But fraud need not be exactly traced.)

3a. ('82) 1882 All W N 7 (8) (DB), *Girdhar Lal v. Jaunatunnissa*.

('94) 21 Cal 612 (621) (DB), *Mohamed Golab v. Mohamed Suliman*. (A person who charges another with fraud must himself prove it—He is not relieved of this obligation because the defendant has told an untrue story.)

4. ('03) 1903 Pun L R No. 27, p. 132 (133), *Bhagwan Das v. Ida*.

5. ('98) 1898 Pun Re No. 12, *Abdul Rahim Khan v. Muhammad Yar*.

6. ('87) 11 Bom 620 (643) : 14 Ind App 111 : 5 Sar 25 : 11 Ind Jur 352 (PC), *Abdul Hossein Zenail Abadi v. Charles Agnew Turner*.

('16) 3 AIR 1916 Cal 120 (123) : 35 I C 284 (DB), *Bansiram v. Secretary of State*.

('29) 16 AIR 1929 Bom 1 (5) : 53 Bom 75 : 113 Ind Cas 229 (DB), *Kondi Ravji Fadtare v. Chunilal Rupchand*.

('20) 7 AIR 1920 Cal 26 (32) : 55 Ind Cas 689 (DB), *Satish Kantha Roy v. Satish Chandra Chatterjee*.

('10) 6 Ind Cas 472 (472) : 37 Cal 856 (DB), *Rajendra Kumar v. Ganga Ram*. (But if relief is asked alternatively, either on the ground of fraud, or, failing that ground, then on some equity, a plaintiff may fail on the first but succeed on the latter alternative.)

7. ('42) 46 Cal W N 403 (404), *Jagiswar Das v. Debnarain Roy*. (If the auction-purchasers were parties to the fraud, the effect of that fraud would go on until knowledge of the sale was obtained by the applicant. If the auction-purchasers wished to show that, in fact, the applicant had knowledge of the sale at some

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Turner,⁸ decided by the Privy Council in the year 1892. In delivering the judgment of the Board, Lord Hobhouse observed as follows :

"Their Lordships consider that when a man has committed a fraud, and has got property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of

earlier date than that alleged in the petition, the burden of proving it lies upon them.)

('37) ILR (1937) 2 Cal 496 (499, 500) : 41 Cal W N 993, *Charles De Sa Fragoso v. Meher Ali*.

('33) 20 AIR 1933 Nag 244 (246) : 144 Ind Cas 724, *Ramji Rao v. Maruti*.

('93) 17 Bom 341 (347) : 20 I A 1 : 6 Sar 256 : 17 Ind Jur 40 (PC), *Rahimbhoy Habibbhoy v. C. A. Turner*. (But that some clues and hints which perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud, do not amount to such knowledge as is required by this section.)

('14) 1 AIR 1914 Cal 728 (729) : 24 Ind Cas 249 (DB), *Jotindra Mohan Roy Chowdhury v. Brojendra Kumar Datta Munshi*.

('05) 27 All 540 (543) : 2 All L Jour 350 : 1905 All W N 88, *Sukh Lal v. Madhuri Prasad*.

('12) 16 Ind Cas 464 (465) (DB) (Cal), *Narayan Sahu v. Mohanth Damodar Das*.

('15) 2 AIR 1915 Cal 268 (271) : 27 I C 294 (DB), *Arjun Dass v. Gunendra Nath*.

('22) 9 AIR 1922 Cal 157 (158, 159) : 49 Cal 886 : 68 Ind Cas 94 (DB), *Biman Chandra Dutta v. Promotha Nath Ghose*.

('34) 21 AIR 1934 Lah 878 (879) : 155 I C 654 : 16 Lah 408 (DB), *Bhagwana v. Shadi*.

('24) 11 AIR 1924 Nag 94 (94) : 80 I C 590 : 20 Nag L R 23, *Ramchandra v. Hardeo*.

('16) 3 AIR 1916 Cal 120 (123) : 35 I C 284 (DB), *Bansiram v. Secretary of State*.

('18) 5 AIR 1918 Cal 171 (173) : 46 Ind Cas 221 (DB), *Ram Kinkar Tewari v. Sthiti Ram Panja*.

('21) 8 AIR 1921 Cal 251 (252) : 60 Ind Cas 801 : 48 Cal 119 (DB), *Bhusan Mani Dasi v. Profulla Kristo Deb*.

('26) 13 AIR 1926 Cal 229 (230, 231) : 87 Ind Cas 555 (DB), *Nabin Chandra Halder v. Bipin Chandra Halder*.

('28) 15 AIR 1928 Cal 349 (350) : 108 Ind Cas 33 (DB), *Ramesh Chandra Patra-nabis v. Birajasundari Gupta*.

('33) 20 AIR 1933 Cal 253 (257) : 143 Ind Cas 402 (DB), *Swarnamoyee v. Probodh Chandra*.

('33) 20 AIR 1933 Cal 339 (340) : 153 Ind Cas 284, *Ramizaddin Basar v. Naimaddi Basar*.

('35) 22 AIR 1935 Cal 779 (783) : 160 Ind Cas 250, *Jadu Nath Guha Roy v. Kasiswar Guha Roy*.

('04) 1904 Pun Re No. 34, *GordhanDas v. Ahmad*.

('17) 4 AIR 1917 Pat 443 (445) : 41 Ind Cas 385 (DB), *Ram Pratap Lal v. Kesho Prasad Singh*.

('23) 10 AIR 1923 Pat 435 (436) : 72 Ind Cas 625, *Mohabir Ram v. Rambahadur*.

('29) 16 AIR 1929 Pat 228 (229) : 117 Ind Cas 46 (DB), *Babu Lal v. Parem Kumari*.

('10) 6 Ind Cas 154 (156) (DB) (Cal), *Basirruddin Mondal v. Sonallah*.

('28) 112 Ind Cas 847 (848) (Lah), *Mt. Jamnat v. Abdul Rahman Khan*.

('13) 17 Ind Cas 10 (11) (DB) (Bom), *Vithappa Devappa Patil v. Basagowda Devappa Patil*.

('18) 5 AIR 1918 Mad 76 (78) : 44 Ind Cas 551 (DB), *Venkateswara Iyer v. A. P. Ri*.

[See also ('43) 30 AIR 1943 Pat 377 (377) : 209 Ind Cas 521, *Sridhar Prasad v. Hara Prasad*. (Fraud established—It is for the party who is found to be guilty

of fraud to show that the applicant had clear and definite knowledge of the facts constituting the fraud beyond the period of limitation. Proof that some hint or clue reached the applicant which might lead to such knowledge is not enough.)]

See also Note 17 to Art. 95 and Note 18 to Art. 166.

8, ('92) 17 Bom 341 (347) : 20 Ind App 1 : 6 Sar 256 : 17 Ind Jur 40 (PC).

those facts which constitute the fraud, at a time which is too remote to allow him to bring the suit."

In *Narayan Sahu v. Damodar Das*,⁹ Jenkins, C. J., after citing *Rahimbhoy's case*,⁸ observed that "fraud is a *continuing influence* and until that influence ends, it retains its power of mischief. It has accordingly been held in the undermentioned cases¹⁰ that it is for the party guilty of fraud to show that the continuing effect of the fraud had been removed at a time too remote to allow a suit to be brought.

See also Note 17 to Article 95.

8. Fraud, if can be antecedent to the cause of action.—The fraud contemplated by this section is not confined to fraud committed at the inception of the cause of action, but may include fraud committed even before that date.¹ Thus, where fraud is committed by the decree-holder in execution proceedings taken for bringing the property of the judgment-debtor to sale, this section would apply to an application by the judgment-debtor to set aside the sale on the ground of fraud, though the right to apply only arises on the date of the sale and though no fresh act of fraud is proved at the date of the sale. The reason is that the fraud committed in the execution proceedings would have a *continuing influence* and would retain its power of mischief until that influence ends. If at the date of the cause of action the effect of the antecedent fraud continued so as to keep the person injured from knowledge of his right to seek relief, this section would clearly apply.² In *Narayan Sahu v. Damodar Das*,³ Jenkins, C. J.,

9. ('12) 16 Ind Cas 464 (465) (DB) (Cal).

[See also ('29) 16 AIR 1929 Pat 228 (229) : 117 Ind Cas 46 (DB), *Babu Lal v. Parem Kumari*

('25) 12 AIR 1925 Pat 521 (522) : 85 Ind Cas 622, *Bajrang Prasad Singh v. Mt. Sonejhari Kuer*.]

10. ('49) 36 AIR 1949 Cal 307 (308) (DB), *Masior Rahaman v. Somsannassa Bibi*. (Pre-emptor kept away from knowledge of sale by fraud of vendor and vendee — Onus is on latter to prove that influence created by fraud had disappeared beyond period of limitation.)

('24) 11 AIR 1924 Pat 496 (497) : 80 Ind Cas 761, *Thakur Mahlon v. Jhaman Mahlon*.

('30) 17 AIR 1930 Pat 58 (60) : 123 Ind Cas 637, *Beas Singh v. Khedu Mian*.

('23) 10 AIR 1923 Pat 435 (436) : 72 I. C. 625, *Mahabir Ram v. Rambahadur Dubey*.

('98) 1898 Pun Re No. 12, *Abdul Rahim Khan v. Muhammad Yar*.

Section 18 — Note 8

1. ('49) 36 AIR 1949 Cal 212 (213, 214) : 53 Cal W N 587, *Mahipati Haldar v. Atul Krishna*. (Fraud by decree-holder in bringing property of judgment-debtor to sale — Application to set aside sale under O. 21, R. 90 — S. 18 may apply.)

('25) 12 AIR 1925 Pat 521 (522) : 85 Ind Cas 622, *Bajrang Prasad Singh v. Mt. Sonejhari Kuer*.

('12) 17 Ind Cas 972 (973) (DB) (Cal), *Tookoomoni Dasi v. Dwarakanath Dinda*. (The question of fraud should be considered as a whole.)

2. See cases cited in Note 10.

3. ('12) 16 Ind Cas 464 (465) (DB) (Cal).

[See also ('11) 11 Ind Cas 295 (298) (DB) (Cal), *Kishori Dasi v. Mukund*. (It is doubtful whether this section applies to a case in which the fraud is antecedent to the accrual of the right. According to ('09) 2 Ind Cas 844 (DB), *Purna Chandra v. Anukul Biswas*, it does not so apply, but ('93) 17 Bom 341 (PC), *Rahimbhoy v. Turner*, is against this view.)]

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held that the view that the fraud contemplated by the section was fraud committed at the inception of the cause of action and not an antecedent fraud, was not in consonance with the view expressed by their Lordships of the Privy Council in *Rahimbhoy v. Turner*.⁴ The undermentioned cases,⁵ which have taken the view that the fraud referred to in this section is confined to fraud at the inception of the cause of action are, in view of the discussion above, not correct.

9. Pre-emption cases. — Where immediately after the sale, possession of the property sold was *openly* taken by the vendee and there was nothing to show that the sale was kept from the knowledge of the pre-emptor, it was held that it could not be said that there was any fraud within the meaning of the section,¹ even though the pre-emptor may not have known or may not have the means of knowing of the sale or of the change of possession under the sale.² Mere silence on the part of the vendor and vendee is not fraud.³ Nor is the mere failure or omission to give the pre-emptor notice of the sale enough to bring the case within the section⁴ as it does not amount to keeping the pre-emptor from a knowledge of his rights by means of fraud,⁵ though an omission to issue a notice with the deliberate intention of keeping the pre-emptor from a knowledge of his right may amount to fraud.⁶ Where there is an active concealment of the

4. ('93) 17 Bom 341 (347) : 20 Ind App 1 : 6 Sar 256 : 17 Ind Jur 40 (PC).

5. ('09) 2 Ind Cas 844 (845) : 36 Cal 654 (DB), *Purna Chandra Mandal v. Anukul Biswas*. (Fraud in bringing about the sale is not enough — Question of limitation depends on what took place after the sale.)

(20) 7 AIR 1920 Pat 725 (725) : 57 Ind Cas 404, *Jagdhari Missir v. Dhorai Khatwa*. (Do.)

Section 18 — Note 9

1. ('66) 1866 Pun Re No. 67, *Khazana v. Maigha Singh*.

('78) 1878 Pun Re No. 29, *Ram Dayal v. Beli Ram*.

[See also ('50) 1950 Nag L Jour 396 (Paras 8, 9), *Hariram v. Asaram*. (Once possession is taken by the vendee in pursuance of the sale, the would be pre-emptor becomes aware of his right of pre-emption & must make enquiries if he wants to enforce his right.)

('79) 1879 Pun Re No. 46, *Murad v. Bhag Singh*.]

2. ('78) 1878 Pun Re No. 29, *Ram Dayal v. Beli Ram*.

3. ('85) 1885 Pun Re No. 73, *Gauhri Mal v. Jainti Mal*.

4. ('11) 11 Ind Cas 313 (313) (DB) (Lah), *Kaka Ram v. Muhammad Ali*.

('98) 1 Oudh Cas 262 (266), *Munna Lal v. Auseri Lal*.

('02) 1902 Pun Re No. 86 : 1903 Pun L R No. 4, *Ghulam Raza v. Sardar Khan*. (Where a person transferred his immovable property to his wife in lieu of dower by a registered deed and both were so conducting themselves in relation to the property that the pre-emptor was kept away from the knowledge of such transfer but it was proved that they had no intention to conceal the transfer from him and were able to explain their conduct, it was held that mere non-disclosure of the transaction could not be held to amount to fraud.)

('93) 1893 Pun Re No. 91, *Atma Ram v. Mehardil Khan*. (Even if the omission to give due notice is intentional.)

('83) 1883 Pun Re No. 120, *Ghiba v. Hayat*.

('81) 1881 Pun Re No. 32, *Arsala v. Yar Muhammad*, (Mere absence of a public notification of the sale.)

5. ('83) 1883 Pun Re No. 120, *Ghiba v. Hayat*.

6. ('11) 11 Ind Cas 313 313 (DB) (Lah), *Kaka Ram v. Muhammad Ali*.

sale, as where the sale is ostensibly effected in favour of B but really in favour of M who actively conceals such fact, and the pre-emptor is thereby kept from knowledge of his right, this section would apply.⁷ These conclusions clearly follow from the principles discussed in Notes 4 and 5 above.

10. Proceedings to set aside execution sales. — The principles discussed in Notes 4 to 8 will apply also to proceedings to set aside sales in execution of a decree. Where owing to the fraudulent concealment of the proceedings by the decree-holder all knowledge of the proceedings up to the time of sale is withheld from the judgment-debtor, the latter can invoke the aid of this section and apply within the period prescribed, reckoned from the date when he becomes aware of the sale.¹ The fact that the sale has been *confirmed* in ignorance

(‘98) 1 Oudh Cas 262 (266, 267), *Munna Lal v. Auseri Lal*. (In this connection the Judge remarked that in cases of contract when it is the duty of a person to speak, silence is accepted as sufficient proof of fraud.)

7. (‘11) 10 Ind Cas 114 (114) : 1911 Pun Re No. 89, *Ismail v. Boji*. (It is immaterial that a possibly infructuous suit against the ostensible purchaser might have been instituted before the fraud became known to the plaintiff.)

[See (‘39) 26 AIR 1939 All 113 (113, 114) : 180 Ind Cas 525, *Jagdish Rai v. Suraj Kumar*. (Small portion of land in another Tahsil included in sale deed along with property over which pre-emptor had right of pre-emption — Sale deed registered in such other tahsil — To conceal fact of sale from pre-emptor, vendee not applying for mutation and neither getting possession nor recovering rent till after one year from registration — Vendee held guilty of fraud under S. 18.)

(‘37) 24 AIR 1937 Lah 97 (98) : I L R (1937) Lah 202 : 172 Ind Cas 104 (DB), *Ganesha v. Sadiq*. (Transaction of sale fraudulently described otherwise — Limitation begins to run from date on which fraud becomes known to pre-emptor.)

(‘29) 16 AIR 1929 All 213 (213, 214) : 115 Ind Cas 798 (DB), *Sheo Shanker v. Partab Narain*. (Pre-emption — Sale deed registered not in Tahsil in which property situate but in another tahsil — Stamp paper also purchased in another district several months before execution of document — No notice served on pre-emptor — Possession not taken for over a year after execution of sale deed — No mutation effected within one year from registration — Vendee held guilty of fraud — Pre-emptor held entitled to exclusion of such period.)

(‘98) 1898 Pun Re No. 12, *Abdul Rahim Khan v. Muhammad Yar*. (Sale deed registered at a place away from the village where land was situate — Attesting witnesses residents of other villages — Sale deed also described as mortgage deed — Held from these facts fraudulent concealment of sale could be inferred within meaning of this section.)]

[See also (‘50) 1950 Nag L Jour 396 (Para 8), *Hariram v. Asaram*. (This section would apply where the transaction giving rise to right of pre-emption is given a false appearance.)]

Section 18 – Note 10

1. (‘25) 12 AIR 1925 All 778 (779) : 88 Ind Cas 500 : 47 All 850 (DB), *Mt. Serrai Begam v. Ram Chander Sarup*.

(‘14) 1 AIR 1914 Cal 728 (729, 730) : 24 Ind Cas 249 (DB), *Jotindra Mohun Roy Chowdhury v. Brojendra Kumar Datta Munshi*. (Fraudulent execution sale — It is not necessary to prove that there has been fraud subsequent to the execution sale.)

[See also (‘49) 36 AIR 1949 Cal 212 (213, 214) : 53 Cal W N 587, *Mahipati Haldar v. Atul Krishna*. (Fraud by decree-holder in bringing about sale — S. 18 may apply.)]

See also Note 18 to Art. 166.

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of the fraud is no bar to the maintainability of the application.²

A mere failure to serve the judgment-debtor with the notice of sale³ or a mere under-valuation of the property to be sold in the sale proclamation⁴ is not by itself sufficient to justify the inference of fraud. But a suppression of notices or other processes by a deliberate contrivance,⁵ or a wilful mis-statement of the value of the property to

2. ('90) 17 Cal 769 (776) (FB), *Mohendra Narain Chaturaj v. Gopal Mondul*. (Dissenting from ('87) 14 Cal 679 (DB), *Gobind v. Uma*.)

('12) 16 Ind Cas 436 (436) (DB) (Cal), *Nilmoni Singh v. Brinda Dasya*.

('22) 9 AIR 1922 Pat 422 (423) : 70 Ind Cas 675, *Ram Pershad Lal v. Chamari Singh*.

('03) 30 Cal 142 (153) : 7 Cal W N 305 (DB), *Golam Ahad Chowdhry v. Judhister Chundra Shaha*.

('23) 10 AIR 1923 All 282 (283, 284) : 45 All 316 : 71 Ind Cas 631 (DB), *Sheo Ram Koeri v. Ikramunnissa Bibi*.

('28) 112 Ind Cas 847 (847) (Lah), *Mt. Jannat v. Abdul Rahman Khan*. (AIR 1923 All 282 followed.)

See also Note 18 to Art. 166.

3. ('25) 12 AIR 1925 Pat 521 (521) : 85 Ind Cas 622, *Bajrang Prasad Singh v. Mt. Sonejhari Kuer*. (Fraud is essentially different from irregularity in the conduct of sale.)

('26) 13 AIR 1926 Pat 397 (398) : 97 Ind Cas 798 (DB), *Bihare Lal Mitter v. Tanuk Lal Mander*.

4. ('45) 49 Cal W N 731 (732) (DB), *Sarat Chandra v. Abdul Kaiyam*.

('39) 26 AIR 1939 Cal 663 (665) : I L R (1939) 2 Cal 163 : 186 Ind Cas 335, *Abul Jamil v. Ambia Khatun*.

('37) I L R (1937) 2 Cal 496 (500) : 41 Cal W N 993, *Charles De Sa Fragoso v. Meher Ali*. (Mis-statement of price of property in sale proclamation does not constitute fraudulent concealment.)

('11) 11 Ind Cas 295 (297) (DB) (Cal), *Rai Kishori Dasi v. Mukund Lall Dutt*.

('12) 16 Ind Cas 464 (465) (DB) (Cal), *Narayan Sahu v. Damodar Das*. (Fraud is not to be lightly charged or lightly found — The mis-statement in an execution petition of the value of the property may be an irregularity; but assuming that it is a fraud, it does not constitute such fraudulent concealment as is required by this section.)

('26) 13 AIR 1926 Cal 577 (578) : 91 Ind Cas 407 (DB), *Nripati Nath Bhattacharjee v. Jatindra Kumar Das*.

('22) 9 AIR 1922 Pat 507 (511) : 77 Ind Cas 957 : 2 Pat 65 (DB), *Ramdhuri Chowdhuri v. Deonandhan Prasad Singh*. (But a wilful mis-statement by a decree-holder in the sale proclamation of the value of the property may be sufficient evidence, in particular cases, to justify an inference of fraud.)

('02) 26 Bom 543 (549) : 4 Bom L R 249 (DB), *Chitambar v. Kristnappa*.

5. ('24) 11 AIR 1924 Mad 859 (859) : 84 Ind Cas 970, *Pallayya v. Bhimaraju*.

('30) 17 AIR 1930 Mad 12 (15, 16) : 123 Ind Cas 24, *Chengalraya Reddi v. Kolapuri Reddi*.

('23) 10 AIR 1923 Mad 353 (354) : 72 Ind Cas 46 (DB), *Sheikh Muhammad Rowther v. Subba Naicker*. (Decree-holder not merely failing to serve the judgment-debtor with notice of sale but even after sale actively concealing from him the knowledge of his right to object to the sale.)

('24) 11 AIR 1924 Pat 496 (497, 498) : 80 Ind Cas 761, *Thakur Mahton v. Jhaman Mahton*.

[See ('51) 38 AIR 1951 Orissa 149 (Pr 2) : ILR (1950) Cut 405 (409), *Babaji Krishna Chandra v. Dasarathi Das*. (If the price fetched at the Court sale is a gross under-valuation, this must be attributed to the irregularity in the service of notice and the judgment-debtor must be given the benefit of S. 18.)

be sold, in the sale proclamation,⁶ or a dishonest combination to obtain by artifice the property at a low value,⁷ may amount to fraud. Where after the decree amount has been paid, the decree-holder brings the properties to sale and takes steps so that no notice of the sale may reach the judgment-debtor, this section will apply.⁸

As to whether it is necessary for the applicability of this section that the *auction purchaser* should have also been guilty of fraud, see Note 14.

11. "Document necessary to establish such right"— Where the right to a sum of money could be established on certain admitted facts, and a particular document is only evidence of the obligation, it cannot be said that the document is "necessary" to establish the right. Consequently, the fraudulent concealment thereof would not extend the time under this section.¹

12. "Has been fraudulently concealed from him."— The words "has been fraudulently concealed from him" refer to a fraudulent concealment from the knowledge of the plaintiff or the applicant. In other words, the plaintiff or the applicant must, through the fraudulent concealment, be unaware of the existence of the document.¹

13. Starting point.— The time limited for a suit or application will, in the cases contemplated in the section, be computed from the time *when the fraud becomes known* to the person injuriously affected by the fraud.¹ The knowledge referred to is clear and *definite*

(26) 13 AIR 1926 Pat 397 (398) : 97 Ind Cas 798 (DB), *Bihare Lal Mitter v. Tanuk Lal Mander*.]

[See also (51) 38 AIR 1951 T C 107 (Pr 3) : 1950 KLF 653 (Pr 6), *Samsudeen Peerumohamed v. Lekshmi Nadachi*.]

6. (11) 11 Ind Cas 295 (297) (DB) (Cal), *Raikishori Dasi v. Mukund Lal Dutt*.

(22) 9 AIR 1922 Pat 507 (510, 511) : 77 Ind Cas 957 : 2 Pat 65 (DB), *Ramdhuri Chowdhuri v. Deonandhan Prasad Singh*.

(25) 12 AIR 1925 Pat 521 (521) : 85 Ind Cas 622, *Bajrang Prasad Singh v. Mt. Sonejhari Kuer*.

7. (07) 6 Cal L Jour 111 (115, 116) (DB), *Ambika Prasad Singh v. R. H. Whitwell*.

[See also (44) 31 AIR 1944 Pat 40 (40) : 211 Ind Cas 539, *Sobhankhan v. Gangadhar*. (It may be that in the circumstances of a particular case, owing to the disparity between the value of the property sold as stated in the proclamation of sale and the real value of the property, it is possible to infer fraud in the service of processes, when the disparity is so great as to shock the conscience. But the presumption is rebuttable by credible evidence that the processes were in fact served.)]

8. (28) 15 AIR 1928 All 354 (354) : 108 Ind Cas 899, *Jagdeo v. Ujiyari Kunwar*.

Section 18 — Note 11

1. (74) 7 Mad H C R 22 (23, 24) (DB), *Lakshminarasu Pantulu v. Ankinid Bahadur*.

Section 18 — Note 12

1. (74) 7 Mad H C R 22 (23, 24) (DB), *Lakshminarasu Pantulu v. Ankinid Bahadur*.

Section 18 — Note 13

1. (43) 30 AIR 1943 Lah 215 (217) : I L R (1944) Lah 186 : 209 Ind Cas 157 (DB), *Khadim Bibi v. Burekhan*. (Where a Muhammadan husband has deli-

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Note 13

knowledge of the facts constituting the particular fraud,^{1a} and not a mere *suspicion*. It must be such knowledge as will enable the person defrauded to seek his remedy in Court.² Where this section is held to apply to a case *prima facie* barred by limitation, the Court must find exactly when the plaintiff got knowledge of the fraud : without a finding to that effect it cannot say that the suit is in time.³

The terms of this section are materially different from those of s. 26 of the English Real Property Limitation Act, 1833, (3 & 4 will. IV, c. 27). Under the terms of the latter section, the right of the person defrauded to sue for relief would be deemed to have first accrued at and not before the time such fraud was, or *with reasonable diligence might have been*, discovered. But under this section, it is, however, clear that time will begin to run only when the fraud becomes *known*. Negligence in pursuing the means available for discovering the fraud will not, therefore, in this country start limitation running before the

berately and fraudulently withheld from the wife all knowledge of the divorce, time for instituting a suit for dower by the wife would only begin to run against her when the fraud has become known to her.)

('31) 18 AIR 1931 P C 12 (15) : 57 Ind App 251 : 128 Ind Cas 257 : 5 Luck 492 (PC), *Abdul Rahman v. Parsotam Das*.

('21) 8 AIR 1921 Cal 786 (789) : 70 Ind Cas 525 (DB), *Sarat Chandra Gupta v. Kanai Lal Chuckerbutty*.

('14) 1 AIR 1914 Lah 209 (209) : 23 Ind Cas 397, *Afzal Ali v. Aman Ali*.

('37) 24 AIR 1937 Lah 97 (98) : 172 Ind Cas 104 : 1 L R (1937) Lah 202 (DB), *Ganesha v. Sadiq*.

('93) 3 Mad L Jour 255 (257) (DB), *Iswara Pattar v. Karuppan*.

('15) 2 AIR 1915 Mad 150 (156) : 26 Ind Cas 369 (DB), *Grace Rosamund Rhodes v. Padmanabha Chettiar*.

('22) 9 AIR 1922 Pat 507 (509, 510) : 77 Ind Cas 957 : 2 Pat 65 (DB), *Ramdhuri Chowdhuri v. Deonandhan Prasad Singh*.

('83) 7 Bom 542 (545) (DB), *Collector of Broach v. Rajaram Laldas*.

('99) 3 Cal W N 333 (335) (DB), *Luchmipat v. Mt. Mandil Koer*.

('15) 2 AIR 1915 Cal 496 (498) : 20 I C 860, *Rajendra Kumar Ghosh v. Adinadi*.

('18) 5 AIR 1918 Cal 223 (225) : 42 Ind Cas 548 (DB), *Sarat Chandra Bose v. The Khararea Mezejula Zamindari Syndicate Ltd*.

1a. ('43) 30 AIR 1943 Pat 377 (377) : 209 Ind Cas 521, *Sridhar Prasad v. Haraprasad*. (Proof of fact that some hint or clue had reached the aggrieved party which might have led to such knowledge is not enough.)

('22) 9 AIR 1922 Cal 157 (159) : 68 Ind Cas 94 : 49 Cal 886 (DB), *Biman Chandra Dutta v. Promotho Nath Ghose*.

('34) 21 AIR 1934 Lah 878 (879, 880) : 155 Ind Cas 654 : 16 Lah 408 (DB), *Bhagwana v. Shadi*.

('24) 11 AIR 1924 Nag 94 (94, 95) : 20 Nag L R 23 : 80 Ind Cas 590, *Ramchandra v. Hardeo*.

('68) 9 Suth W R 329 (329) : 2 Beng L R A C 270 (DB), *Dhanpat Singh Dogar v. Rahman Mandal*.

2. ('21) 8 AIR 1921 Cal 251 (252) : 48 Cal 119 : 60 Ind Cas 801 (DB), *Bhusan Mani Dasi v. Profulla Kristo Deb*. (Hearsay information is not knowledge.)

('90) 14 Bom 408 (414) (DB), *Rahimbhoy Habibbhoy v. C. A. Turner*.

3. ('18) 5 AIR 1918 Cal 77 (78) : 48 Ind Cas 970 (DB), *Abha Munshi v. Komu Molla*.

('12) 17 Ind Cas 10 (11) (DB) (Bom), *Vithappa Devappa v. Basagowda Devappa*. (Court ought to have evidence of definite character to arrive at such finding.)

('68) 9 Suth W R 329 (329) : 2 Beng L R A C 270 (DB), *Dhanpat Sing Dogar v. Rahman Nandal*.

date of actual knowledge.⁴ In *Rahimbhoy v. Turner*,⁵ their Lordships of the Privy Council, in answer to the contention that the plaintiff had the means of discovering the fraud, but did not do so, observed as follows:

"But their Lordships consider,—and in this they agree with both the Courts below — that all that the appellant Rahimbhoy has done is to show that some clues and hints reached the assignee in the year 1881, which perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud, but that there was no disclosure made which informed the mind of the assignee that the insolvent's estate had been defrauded by Rahimbhoy of these assets in the year 1867."

In the case of a document necessary for establishing a right to sue or to apply, which is fraudulently concealed from the person having such right, time will run from the date when the plaintiff has the means of producing it or compelling its production.⁶

14. Against whom time can be extended.— Time will be extended under the section only as against *the person guilty of fraud*, or who is accessory thereto or who claims through the person guilty of fraud otherwise than in good faith and for valuable consideration.¹ It seems to be clear, therefore, that where an execution sale is brought about by the fraud of the decree-holder and the property is purchased

4. ('38) 25 AIR 1938 Cal 263 (266, 267) : I L R (1938) 1 Cal 512 : 182 Ind Cas 244 (DB), *Chaitanya v. Ranjit*. (Mere fact that some hints and clues reach plaintiff which if followed up might lead to complete knowledge of fraud is not enough.)

('93) 17 Bom 341 (347) : 20 Ind App 1 : 6 Sar 256 : 17 Ind Jur 40 (P C), *Rahimbhoy Habibbhoy v. C. A. Turner*.

('22) 9 AIR 1922 Cal 157 (159) : 68 Ind Cas 94 : 49 Cal 886 (DB), *Biman Chandra Dutta v. Promoth Nath Ghose*.

('35) 22 AIR 1935 Cal 779 (783) : 160 Ind Cas 250, *Jadu Nath Guha v. Kasiswar*.

('33) 20 AIR 1933 Cal 253 (257) : 143 Ind Cas 402 (DB), *Swarnamoyee Dasi v. Probodh Chandra*.

('90) 1890 Bom P J 268 (DB), *Jetha v. Rupchand*. (Question under this section is not whether plaintiff had the means of ascertaining the truth, but whether he had, by means of fraud on the part of the defendant, been kept from the knowledge of his right.)

('34) 21 AIR 1934 Lah 878 (879) : 155 Ind Cas 654 : 16 Lah 408 (DB), *Bhagwana v. Shadi*.

('12) 17 Ind Cas 10 (11) (DB) (Bom), *Vithappa Devappa v. Basagowda Devappa*.

5. ('93) 17 Bom 341 (347) : 20 Ind App 1 : 6 Sar 256 : 17 Ind Jur 40 (P C).

6. ('74) 7 Mad H C R 22 (23) (DB), *Lakshminarasu v. Ankinid Bahadur*.

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1. ('40) 27 AIR 1940 Cal 207 (208) : 188 Ind Cas 169 (DB), *Dhirendra Nath v. Charu Chandra*. (Bengal Public Demands Recovery Act of 1913, S. 36—Suit by certificate-debtor to set aside sale in execution of certificate—Fraud of auction-purchaser cannot extend limitation against certificate-holder.)

('36) 23 AIR 1936 Cal 706 (707) : 166 Ind Cas 127, *Majaharali v. Mafijaddi Sardar*. (('27) 44 C L J 565 *Kedar Hura v. Asutosh*, relied on.)

('76) 2 Cal 1 (18) : 25 Suth W R 425 (DB), *Ramdoyal Khan v. Ajoodhia Ram Khan*.

[See also (1948) 2 All E L R 89 (93), *Beaman v. A. R. T. S. Ltd.* (English Limitation Act, 1939 (2 and 3 Geo. VI. C. 21), S. 26 — Conversion of goods — Innocent purchaser—Time runs in his favour not merely from time of purchase but from date of initial conversion.)]

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Note 14

by a third person in good faith and for valuable consideration, the period prescribed for an application to set aside the sale on the ground of fraud cannot be extended as against the auction purchaser,² though, if an application is filed within the prescribed period, it is not necessary in order to set aside the sale under the provisions of O. 21, R. 90 of the Code of Civil Procedure that the purchaser should also be guilty of fraud. A contrary view has been expressed in the undermentioned cases³ that it is not necessary for the applicability of *this section* that the purchaser should also be guilty of fraud. It is submitted that such a view is against the plain provisions of this section and is not correct.

Where the decree-holder is not guilty of fraud but the auction purchaser is; does the section apply so as to extend the time for an application against either to set aside the sale? There is a difference of opinion on the point. It was held in the undermentioned case⁴ that it will not apply, while a contrary view has been held in the cases noted below.⁵ It is submitted that the latter view is correct. The

2. ('50) 37 AIR 1950 Mad 460 (Pr 8) : 1950-1 M L J 432, *Ghulamkadir v. Municipal Council Nagapattanam*. (The applicant to set aside sale, however, can file a suit against the appropriate parties for damages on the ground of fraud governed by Art. 95.)
- ('51) 55 Cal W N 196 (199), *Manmatha Nath Mukherjee v. Jiaul Huq*. (AIR 1950 Cal 520 : 54 Cal W N 637, *Mihirlal v. Panchkari Santra*, Ref.)
- ('48) 35 AIR 1948 Cal 63 (64) : 82 Cal L Jour 9, *Saila Bala v. Atul Krishna*. (Application under S. 174 (3), Bengal Tenancy Act, made outside limitation — Applicant must show that auction purchaser was himself guilty of fraud or was accessory thereto.)
- ('42) 46 Cal W N 403 (404), *Jagiswar Das v. Debnarain Roy*.
- ('36) 23 AIR 1936 Cal 706 (707) : 166 Ind Cas 127, *Majaharali v. Mafijaddi Sardar*. (Fraud of decree-holder—Purchase *bona fide*—Section 18 does not apply to an application to set aside the sale.)
- ('16) 3 AIR 1916 Mad 33 (38) : 38 Mad 1076 : 29 Ind Cas 314 (DB), *Pasumarti Payidanna v. Lakshminarasamma*.
- ('09) 2 Ind Cas 844 (845) : 36 Cal 654 (DB), *Purna Chandra Mandal v. Anukul*. [See also ('50) 37 AIR 1950 Cal 520 (Para 22): 54 Cal W N 637 (DB), *Mihirlal v. Panchkari Santra*. (Application for setting aside execution sale under Beng. Ten. Act, S. 174 (3)—No extension of time under S. 18, Limitation Act, unless auction purchaser was guilty of fraud or accessory to fraud that prevented judgment-debtor from knowing of sale.)]
3. ('50) 37 AIR 1950 Cal 166 (Para 36), *Sailendra Nath v. Sudhanya Charan*. (S. 18, Limitation Act, may be availed of to extend the period of limitation of an application for setting aside a sale where fraud is proved to have been committed by the decree-holder though the auction-purchaser who was a stranger was not a party or accessory to the fraud. AIR 1949 Cal 212, *Mahipati Halder v. Atul Krishna*, foll.)
- ('49) 36 AIR 1949 Cal 212 (213, 214) : 53 Cal W N 587, *Mahipati Halder v. Atul Krishna*.
- ('23) 10 AIR 1923 Pat 435 (436) : 72 Ind Cas 625, *Mahabir Ram v. Rambahadur Dubey*. (Fraud in publishing and conducting sale — Not necessary that purchaser should be guilty of fraud in order to apply Section 18.)
- ('28) 15 AIR 1928 All 354 (354) : 108 Ind Cas 899, *Jagdeo v. Ujiyari Kunwar*.
- ('27) 99 Ind Cas 946 (947) (Cal), *Kedar Hura v. Asutosh Roy*.
4. ('25) 12 AIR 1925 Cal 1227 (1228) : 86 Ind Cas 745 (DB), *Azizannessa v. Dwarka Prosad*.
5. ('50) 37 AIR 1950 Mad 509 (Pr 4) : 1950-1 M L J 471, *P. Venkanna v. C. Venkanna*. (Judgment-debtor can invoke S. 18 whether the fraud was by the

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application so far as it is against the auction purchaser guilty of fraud will be clearly governed by this section and will not be barred. The fact that the application so far as it was against the decree-holder would be barred cannot take away the right of the applicant to set aside the sale on the ground of the fraud of the auction purchaser.

See also Note 18 to Article 166.

15. Applicability of the section to period fixed by S. 48, Civil Procedure Code.— There is a divergence of judicial views as to the applicability of the general provisions of the Limitation Act to the calculation of the twelve years period prescribed by S. 48 of the Civil Procedure Code. (See S. 29 Note 6a.)

But S. 48 of the Civil Procedure Code itself provides that the Court can order the execution of a decree upon an application presented after the expiration of the term of twelve years referred to in it, where the judgment-debtor has, by *fraud* or force, *prevented* the execution of the decree at some time within twelve years immediately before the date of the application. The "fraud" referred to therein is not the fraud referred to in this section, namely an active fraud intended to keep the applicant from *knowledge of his right to apply*, but is a fraud which prevents *exercise* of the right to apply. For a full discussion, see Note 15 to S. 48 of A. I. R. Commentary on the Code of Civil Procedure, 5th (1950) Edn.

19.* (1) Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment in writing.

Section 19

* Act of 1877 : S. 19.

19. If, before the expiration of the period prescribed for a suit or application, in respect of any property or right an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed ; but oral evidence of its contents shall not be received.

Explanation 1.— For the purposes of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform, or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

decree-holder or auction-purchaser or both — AIR 1933 Mad 626 : 56 Mad 634, *Pulla Reddi v. Pattabhirama Reddi*, Rel. on.)

('33) 20 AIR 1933 Mad 626 (627): 56 Mad 734: 145 Ind Cas 388 (DB), *Pulla Reddi v. Pattabhirama Reddi*. (('25) AIR 1925 Cal 1227 (DB), *Azizannessa v. Dwarka Prosad*, not followed.)

('35) 22 AIR 1935 Cal 89 (90) : 154 Ind Cas 347 (DB), *Parthasarathi Ray v. Ahindra Nath Ray*. (Where auction purchaser along with some of the judgment-debtors, is guilty of fraud, the applicants can avail themselves of the provisions of this section.)

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ledgment of liability in respect of such property or right has been made in writing signed by the party against whom such

Explanation 2.—In this section 'signed' means signed either personally or by an agent duly authorized in this behalf.

Act of 1871 : S. 20 and Art. 148.

20. (a) No promise or acknowledgment in respect of a debt or legacy shall take the case out of the operation of this Act, unless such promise or acknowledgment is contained in some writing signed, before the expiration of the prescribed period, by the party to be charged therewith or by his agent generally or specially authorized in this behalf.

(b) When such writing exists, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the promise or acknowledgment was signed.

(c) When the writing containing the promise or acknowledgment is undated oral evidence may be given of the time when it was signed. But when it is alleged to have been destroyed or lost, oral evidence of its contents shall not be received.

Explanation 1.—For the purposes of this section, a promise or acknowledgment may be sufficient, though it omits to specify the exact amount of the debt or legacy, or avers that the time for payment or delivery has not yet come, or is accompanied by a refusal to pay or deliver, or is coupled with a claim to a set-off, or is addressed to any person other than the creditor or legatee ;

but it must amount to an express undertaking to pay or deliver the debt or legacy or to an unqualified admission of the liability as subsisting.

Explanation 2.—Nothing in this section renders one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them.

Illustrations.

Z, a bond-debtor, himself writes a letter promising to pay the debt to his creditor A. Z affixes his seal, but does not sign the letter :

Z pays part of the debt and promises orally to pay the rest :

Z publishes an advertisement, requesting his creditors to bring in their claims for examination :

In none of these cases is the debt taken out of the operation of this Act.

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| 148. Against a mortgagee to recover possession of immoveable property mortgaged. | Sixty years. | The date of the mortgage, unless where an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period, been made in writing signed by the mortgagee or some person claiming under him, and, in such case, the date of the acknowledgment. |
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Act of 1859 : S. 4 and S. 1 cl. 15.

4. If, in respect of any legacy or debt, the person who, but for the law of limitation, would be liable to pay the same shall have admitted that such debt or legacy, or any part thereof, is due by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission :

Provided that, if more than one person be liable, none of them shall become chargeable by reason only of a written acknowledgment signed by another of them.

Proviso.

Section 1, clause 15
or if in the meantime an acknowledgment of the title of the depositor, pawnor, or mortgagor, or of his right of redemption, shall have been given in writing signed by the depositary, pawnee or mortgagee or some person claiming under him, from the date of such acknowledgment in writing.

property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed ; but, subject to the provisions of the Indian Evidence Act, I of 1872, oral evidence of its contents shall not be received.

Explanation I. — For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation II. — For the purposes of this section "signed" means signed either personally or by an agent duly authorized in this behalf.

Explanation III. — For the purposes of this section an application for the execution of a decree or order is an application in respect of a right.

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Acknowledgment of liability made under prior enactment — Test of sufficiency. 3. English law. 4. Principle of the section. 5. Distinction between Sections 19 and 20. 6. Distinction between this section and Article 183. See Section 20 Note 37. 7. Acknowledgment does not confer title. 8. Acknowledgment, if operates as fresh contract. 8a. Acknowledgment, if operates as fresh cause of action. See Note 8. 8b. Acknowledgment, if good evidence of debt. 9. Distinction between this section and Section 25, clause 3, Contract Act. 10. Acknowledgment and accounts stated — Distinction between. See Note 3 under Art. 64. | <ol style="list-style-type: none"> 11. Section to be liberally construed. 12. "Before the expiration of the period prescribed for a suit or application." 13. Acknowledgment made under prior Act — Meaning of expression "period prescribed," with respect to such acknowledgment. 14. Applicability of section to period prescribed by special or local law. 15. Applicability of section to period of twelve years under Section 48 of the Civil Procedure Code. 16. "Suit or application in respect of any property or right." 17. "Application." 18. "Acknowledgment of liability" — Essentials. 19. Conditional acknowledgment of liability. 20. Acknowledgment of past liability. |
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21. Admission of execution of document, whether implies admission of liability under it.
22. Admission of execution of document before Sub-Registrar.
23. Submission to arbitration, if can be acknowledgment. See Note 19.
24. Admission of existence of open and unsettled accounts, whether acknowledgment. See Note 19.
25. Acknowledgment, if may be made by a person who is not liable at the time of the acknowledgment.
26. Acknowledgment must be in respect of the particular property or right claimed in the suit or application.
27. Acknowledgment of anything includes acknowledgment of its legal consequences.
28. Acknowledgment of liability with reference to portion of claim made by plaintiff — Effect.
29. Acknowledgment of liability in respect of promissory note, whether available in respect of original cause of action.
30. "In writing."
31. "Signed."
32. Admissibility of external evidence for construction of documents alleged to contain acknowledgments of liability.
33. "Party against whom such property or right is claimed."
34. "Person through whom he derives title or liability."
35. Acknowledgment of mortgage by mortgagor, whether binds transferees of the equity of redemption claiming under transfers made prior to acknowledgment.
36. Renewal of first mortgage after second mortgage — Effect.
37. "Fresh period of limitation shall be computed from the time when the acknowledgment was so signed."
38. Admissibility of oral evidence as to date of acknowledgment — Sub-section (2).
39. Oral evidence of contents of acknowledgment — Sub-s. (2).
40. Oral evidence of the factum of acknowledgment.
41. Admissibility of evidence for contradicting or varying, etc., matters stated in document containing acknowledgment of liability.
42. Acknowledgment need not specify exact nature of property or right. See Note 26.
43. Acknowledgment of liability coupled with averment that time for payment, etc., has not yet come.
44. Acknowledgment of liability may be accompanied by refusal to pay, etc.
45. Acknowledgment of liability coupled with a claim of set-off.
46. Acknowledgment not addressed to person entitled, sufficiency of — Explanation I.
- 46a. Acknowledgment contained in balance sheet.
47. Admission contained in document addressed to Court.
48. Admission contained in deposition of witness.
49. Entry in Settlement Record, etc.
50. Explanation II: Acknowledgment by agent.
51. Acknowledgment of liability by pleader on behalf of client.
52. Acknowledgment by receiver.
53. Acknowledgment of liability by Official Assignee — Effect.
54. Acknowledgment by one of several co-judgment-debtors.
55. Acknowledgment of liability by administrator.
56. Acknowledgment by executor.
57. Acknowledgment, if may be made by Court.
58. Acknowledgment by Court of Wards.
59. Acknowledgment by one of several co-heirs, if binds others. See Note 8 to S. 21.
60. Acknowledgment on behalf of Hindu joint family. See Notes to S. 21.
61. Acknowledgment by manager of Malabar tarwad. See Note 21 to S. 21.

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Note 1

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| <p>62. Husband and wife—Authority to acknowledge on each other's behalf.</p> <p>63. Applicability of section to applications for execution.</p> <p>64. Promissory note for pre-existing debt, if can be used as acknowledgment of liability in suit on original cause of action.</p> <p>65. Admission of liability by person in adverse possession.</p> <p>66. Acknowledgment contained in letter marked "without prejudice."</p> <p>67. Material alteration of document containing acknowledgment.</p> <p>68. Acknowledgment contained in document thirty years old.</p> <p>69. Acknowledgment under circumstances that would vitiate contract.</p> | <p>70. Acknowledgment made in official confidence.</p> <p>71. Mortgage invalid under tenancy laws, if can operate as acknowledgment of liability.</p> <p>72. Offer of Collector under Section 16 of Bombay Court of Wards Act, if acknowledgment.</p> <p>73. Agreement to extend time for performance of contract.</p> <p>73a. Suit based on default clause in mortgage deed, etc.</p> <p>74. Stamp.</p> <p>75. Registration.</p> <p>76. Onus of proof.</p> <p>77. Pleading.</p> <p>78. Acknowledgment, whether question of law or fact.</p> |
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TOPIC INDICATOR

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| <p>Acknowledgment and promise to pay. See Notes 8 and 9.</p> <p>Acknowledgment by minor. See Note 69.</p> <p>Acknowledgment by telegram. See Note 31.</p> <p>Acknowledgment during vacation but after limitation. See Note 12.</p> <p>Acknowledgment in agreement of reference to arbitration. See Note 46.</p> <p>Acknowledgment in letter to attorney of creditor. See Note 46.</p> <p>Acknowledgment in plaint and written statement. See Note 47.</p> <p>Acknowledgment in schedule of creditors in insolvency proceedings. See Note 47.</p> <p>Acknowledgment in unregistered document compulsorily registrable. See Note 75.</p> <p>Acknowledgment in will. See Note 46.</p> <p>Acknowledgments pertaining to execution proceedings. See Notes 47 and 51.</p> | <p>Admission of correctness of account and requesting for time for payment. See Note 18.</p> <p>Application for extension of time for payment of decretal amount. See Note 47.</p> <p>Assertion of claim coupled with admission of right to set off—No acknowledgment. See Note 45.</p> <p>Authority to borrow or to settle and pay claims includes authority to acknowledge. See Note 50.</p> <p>Date given scored out—Admissibility of oral evidence. See Note 38.</p> <p>Extra time under S. 4—Not part of period prescribed. See Note 12.</p> <p>Payment and acknowledgment. See Notes 5 and 30.</p> <p>Unstamped or insufficiently stamped acknowledgments. See Notes 29, 64 and 74.</p> |
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1. Legislative changes.

The law prior to Act of 1859 :

The doctrine of an acknowledgment of liability, as an exception to the bar of limitation, was recognised in various portions of British Indian law even prior to the coming into force of the Act of 1859. For instance, under the exception to cl. (14) of the Bengal Regulation III of 1793, clear and positive proof that the plaintiff asserted his claim within the period of limitation and that the defendant had admitted this claim to be as of right, was sufficient to save limitation under that section.¹ Analogous provisions were also contained in the Madras

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1. ('69) 13 Moo Ind App 37 (53) : 12 Suth W R P C 36 : 3 Beng L R P C 37 : 2 Suther 261: 2 Sar 479 (PC), *Gopeekishen Goshamee v. Bindabunchunder Sircar*.

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Note 1

Regulation II of 1802² and the Punjab Code.³

Differences between Acts of 1859 and 1871 :

- (1) Under S. 4 of the Act of 1859, an acknowledgment by the *agent* of the debtor was not sufficient,⁴ whereas such acknowledgment was sufficient under S. 20 of the Act of 1871.
 - (2) Section 20 of the Act of 1871 required that the acknowledgment should be made *before the expiry of the prescribed period* of limitation, while such a provision did not exist in S. 4 of the Act of 1859.⁵
 - (3) Section 20 of the Act of 1871 referred to a "*promise or acknowledgment*," while section 4 of the Act of 1859 only referred to an "*acknowledgment*."
 - (4) Clause (c) of section 20 of the Act of 1871 which dealt with the admissibility of oral evidence as to the date and contents of an acknowledgment was new ; there was no such provision in S. 4 of the Act of 1859.
 - (5) Explanation I to S. 20 of the Act of 1871 (corresponding to explanation I to S. 19 of the Acts of 1877 and 1908) was newly added in the Act of 1871. Nevertheless, the principles embodied in the above explanation were given effect to in the decisions on S. 4 of the Act of 1859. Thus, it was held under that section that an acknowledgment addressed to a third party was sufficient.⁶ Similarly, it was held that a *promise* to pay, express or implied, was not necessary to constitute an acknowledgment under that section.⁷ So also, it was held that an admission of liability for
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- (1859-61) 8 Moo Ind App 225 (235): 3 Suth W R P C 31 : 1 Suther 405: 1 Sar 749 (PC), *Government of Bengal v. Mt. Shurruffutoonnissa*.
2. (1855) 6 Moo Ind App 232 (249): 1 Sar 536 (PC), *Rajah Bommarauze Bahadoor v. Rangasamy Mudaly*.
3. ('66) 5 Suth W R P C 18 (20, 21) : 10 Moo Ind App 362 : 1 Suther 612 : 2 Sar 160 (PC), *Shah Mukkun Lal v. Imtiazooddowlah*.
- ('70) 1870 Pun Re No. 25, *Shahzada Gholam Mahomad v. Bheem Sein*.
4. (1864) 2 Mad H C R 84 (87), *Raja Iswara Das v. Richardson*.
- ('67) 8 Suth W R 1 (1) (DB), *Budoobhoosun Bose v. Enaet Moonsee*.
- ('68) 10 Suth W R 175 (176) (DB), *Shaikh Reazooddeen v. Collector of Cuttack*.
- ('69) 6 Bom H C R O C 67 (70), *Purshotam Mancharam v. Mirza Abdul Latif*.
- ('81) 6 Cal 340 (347, 348) : 7 Cal L R 121 (DB), *Mohesh Lal v. Busunt Kumaree*.
5. ('75-77) 1 Bom 590 (592) : 1877 Bom P J 74 (DB), *Raghoji Bhikaji v. Abdul Karim*.
- '75) 24 Suth W R 282 (284) (DB), *Heera Lal Mookerjee v. Roy Dhunput Singh*.
- '67) 3 Mad H C R 308 (310) (DB), *John Young v. Mangalapilly Ramaiya*. (It is probably the better opinion that an admission made after an action brought will suffice.)
- [See also ('74) 6 N W P H C R 306 (306, 307) (DB), *Uncovenanted Service Bank v. Marshall*.]
6. ('69) 4 Mad H C R 385 (391) (DB), *Nizamudin v. Mahammadali*.
- (1865) 3 Suth W R S C C Ref 6 (7) (DB), *Huro Chunder Roy v. Monee Mohinee Dossee*.
- ('68) 5 Bom H C R A C 176 (178, 179) (DB), *Ahiloji Khandoji v. Dongar Harichand Gujar*.
- ('70) 6 Beng L R 299 (301, 302), *Madhusudan Chowdhry v. Brajanath Chandra*.
7. ('72) 6 Mad H C R 197 (200) (DB), *Hirada Karibasappa v. Gadigi Muddappa*.

a debt would be sufficient under that section although it was accompanied by a statement that the time for payment had not yet come.^{7a}

- (6) Section 20 of the Act of 1871 required "an express undertaking to pay or deliver the debt or legacy or an unqualified admission of the liability as subsisting." Section 4 of the Act of 1859 required an acknowledgment admitting that "the debt or legacy or any part thereof is due."⁸
- (7) The proviso to section 4 of the Act of 1859 (corresponding to S. 21, sub-s. (2) of the present Act) was differently worded from the corresponding portion (explanation II) of S. 20 of the Act of 1871. (See Notes under S. 21.)
- (8) The illustrations to S. 20 of the Act of 1871 were new.
- (9) Both S. 4 of the Act of 1859 and S. 20 of the Act of 1871 applied only to "*debts and legacies*." But S. 1, cl. (15) of the Act of 1859 and Arts. 147 and 148 of the Act of 1871 which prescribed the period of limitation for suits against a depositary, pawnee or mortgagee for the recovery of property moveable or immovable, contained provisions for allowing a longer period where there was an acknowledgment of liability. These two sets of provisions differed from each other in the following respect :

While S. 1, cl. (15) of the Act of 1859 provided a period of sixty years or thirty years according as the property was immovable or moveable unless there was an acknowledgment of liability "*in the meantime*,"⁹ Arts. 147 and 148 of the Act of 1871 required that the acknowledgment should be made "*before the expiration of the prescribed period*."¹⁰

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- (69) 4 Mad H C R 385 (390, 391, 392) (DB), *Nizamudin v. Mahamadali*.
- (67) 3 Mad H C R 308 (309, 311) (DB), *John Young v. Mangalapilly Ramaiya*.
- (1865) 2 Mad H C R 307 (309, 310) (DB), *Kristna Row v. Hachhappa Sugapa*. (It is left to the Court to decide in each case whether the written acknowledgment, reasonably construed, contains a sufficient admission that the debt or part of it is due.)
- 7a. (69) 4 Mad H C R 385 (391) (DB), *Nizamudin v. Mahamadali*.
- (67) 3 Mad H C R 308 (311) (DB), *John Young v. Mangalapilly Ramaiya*.
8. (74) 6 N W P H C R 206 (307) (DB), *Uncovenanted Service Bank v. Marshall*.
- (70) 2 N W P H C R 403 (404) (DB), *Gash v. Mclean*.
- (67) 3 Mad H C R 308 (310) (DB), *John Young v. Mangalapilly Ramaiya*.
9. (82) 5 Mad 182 (183) (DB), *Mukkanni v. Manan Bhatta*. (The expression "in the meantime" referred to the period of sixty years from the date of the mortgage.)
- (84) 1884 Pun Re No. 109, *Sheodan v. Surjit*. (Do.)
- (03) 1903 Pun L R No. 82, p. 321 (324), *Shag Mal v. Dhouna*. (Do.)
- (18) 5 AIR 1918 Mad 86 (87, 88): 43 Ind Cas 50 (DB), *Raman Kurup v. Chappan Nair*. (Do.)
- (71) 3 N W P H C R 119 (120) (DB), *Mahomed Abdool Ruzzah v. Asif Ali Shah*. (Do.)
- (85) 1885 All W N 194 (194) (DB), *Muniruddin v. Muhammad Karim*. (Do.)
- [But see (71) 6 Mad H C R 267 (270) (DB), *Narain v. Ukkoma*. (The Act does not require that the acknowledgment should be made at any particular time.)]
10. (75-77) 1 All 425 (427) : 2 Ind Jur 115 (DB), *Daia Chand v. Sarfraz Ali*. (Decision under Act of 1871—Acknowledgment made before coming into force of

Section 19
Note 1*Differences between Acts of 1871 and 1877 :*

- (1) Section 19 of the Act of 1877 applied to acknowledgments in respect of "*any property or right*," while S. 20 of the Act of 1871 (and S. 4 of the Act of 1859) only applied to acknowledgments in regard to "*debts or legacies*."¹¹
- (2) Section 19 of the Act of 1877 referred to an *acknowledgment* of liability in respect of a right or property, while S. 20 of the Act of 1871 referred to a *promise*¹² or *acknowledgment*.
- (3) Section 19 of the Act of 1877 applied also to acknowledgments made by a person from whom the defendant derived his title or liability, while S. 20 of the Act of 1871 did not apply to such acknowledgments.¹³
- (4) Section 20 of the Act of 1871 provided that oral evidence of the contents of a document containing an acknowledgment could not be given *where the document was alleged to have been destroyed or lost*. The words as to the document being alleged to be destroyed or lost were omitted in S. 19 of the Act of 1877.¹⁴
- (5) Section 20 of the Act of 1871 provided that a promise or acknowledgment might be sufficient though it omitted to specify the exact *amount* of the debt or legacy. Section 19 of the Act of 1877 provided that the acknowledgment might be sufficient though it omitted to specify the exact *nature* of the property or right.
- (6) Section 19 of the Act of 1877 required in the case of an acknowledgment by an agent that the agent must be "*duly*" authorised in this behalf. Section 20 of the Act of 1871 required that the agent must be *generally or specially* authorised in this behalf.
- (7) Section 20 of the Act of 1871 provided that the promise or acknowledgment under it must amount to an express

Act of 1859 — As there was no period of limitation for a suit for redemption before the above Act, the acknowledgment must be deemed to have been made before the expiration of the "prescribed period" within the meaning of Article 148 of Act of 1871 notwithstanding that the date of the mortgage may not be known.)

11. ('32) 19 AIR 1932 Bom 531 (532) : 139 Ind Cas 218, *Amarchand Rajaram v. Narayan Vishnu*. (Section 20 of Act of 1871 did not apply to an acknowledgment of a mortgage by a mortgagee.)

[See ('68) 5 Bom H C R A C 50 (54) (DB), *Amritrav v. Anyaba*. (Acknowledgment of right to share in vatan not within S. 4 of Act of 1859.)

('72) 17 Suth W R 271 (272) (DB), *Lalla Doorga Pershad v. Lalla Luchman Sahoy*. (Acknowledgment of title to land is not acknowledgment of debt or legacy.)]

12. ('75-77) 1 Bom 590 (592) : 1877 Bom P J 74 (DB), *Raghoji Bhikaji v. Abdul Karim*. (The "promise" referred to is not a *new contract* but one introduced by way of an exception to the statute with reference to the *original cause of action*.)
('78-80) 2 Bom 230 (231) : 1877 Bom P J 237 (DB), *Chatur Jagsi v. Tulsi*. (Do.)
('75) 23 Suth W R 462 (462) (DB), *Tara Soonduree Kuloonee v. Bhoobun Chunder Ghose*.

13. ('35) 22 A I R 1935 Mad 899 (901) : 161 Ind Case 924 (DB), *Modhugari Narayana v. Venkataramanna Patnaik*.

14. ('88) 12 Bom 268 (269, 270) (DB), *Ziulnissa Ladlim Begam v. Motidev Ratan-dev*. (Oral evidence is not admissible even where the writing containing the acknowledgment has been returned to the debtor.)

undertaking to pay or deliver the debt or legacy or to an unqualified admission of the liability as subsisting.¹⁵ This provision was omitted in section 19 of the Act of 1877.¹⁶

- (8) The provision in S. 20 of the Act of 1871 as to one partner or executor not being bound by an acknowledgment by another partner or executor, was omitted in S. 19 of the Act of 1877 and was removed to S. 21 of that Act. (See Notes under S. 21.)
- (9) The illustrations to S. 20 of the Act of 1871 were omitted in S. 19 of the Act of 1877.
- (10) The separate provisions as to acknowledgments in Arts. 147 and 148 of the Act of 1871 were omitted in the Act of 1877. At the same time, as already said in para. 1 above, the scope of S. 19 of the Act of 1877 was made wider than that of S. 20 of the Act of 1871, so as to make it applicable to all suits in respect of any property or right and not merely to suits for debts and legacies as was the case under the previous Act. The chief points of distinction between the relevant portions of the above articles and the corresponding provision in the Act of 1859, viz., S. 1 cl. (15) on the one hand, and S. 19 of the Act of 1877 on the other, which superseded them, were as follows :
 - (a) The former provisions required an acknowledgment of the title of the mortgagor, depositor or pawnor or of his right of redemption.¹⁷ But S. 19 of the Act of 1877 required an acknowledgment of *liability* in respect of such property or right.¹⁸
 - (b) The former provisions did not recognise acknowledgments by the agent of the mortgagee, depositary or pawnee,¹⁹ but S. 19 of the Act of 1877 recognised such acknowledgments.

15. ('78) 1 All 683 (685) (DB), *Mathura Das v. Babu Lal*. (Letter admitting the existence of a debt due to the plaintiff but not admitting that the amount claimed by the plaintiff is correct is unqualified admission of existence of debt.)

16. ('87) 10 Mad 259 (264, 265) (DB), *Sitayya v. Rangareddi*. (Hence, an admission of liability qualified by a condition would be within S. 19 of the Act of 1877 while it would not be within the Act of 1871 or that of 1859 under which an acknowledgment that a debt is due was necessary.)

17. ('70-71) 6 Mad H C R 267 (269, 270) (DB), *Narraina Tantri v. Ukkoma*. (Relationship of mortgagor and mortgagee was admitted but the right to redeem was denied—*Held*, that this was sufficient.)

18. ('85) 1885 All W N 211 (212, 213) (DB), *Bisheshar v. Bhagirattu Ram*.

19. ('73) 20 Suth W R 375 (376, 377) : 13 Beng L R 177 (P C), *Luchmee Buksh Roy v. Runjeet Ram Pandey*.

('11) 12 Ind Cas 604 (604, 605) : 34 All 109 (DB), *Zaib-un-nissa Bibi v. Prabhu Narain Singh*.

('85) 1885 All W N 194 (194) (DB), *Muniruddin v. Muhammad Kaim*.

('83) 1883 All W N 202 (202) (DB), *Kidar Nath v. Ulfat Rai*.

('97) 1 Cal W N 513 (516) (DB), *Sundar Das v. Fatimatunissa Begam*.

('69) 12 Suth W R 443 (444) (DB), *Lutchmee Buksh Roy v. Ranjeet Ram Pandey*.

('28) 15 AIR 1928 Bom 28 (29, 30) : 107 Ind Cas 60 (DB), *Narayan Balaji v. Govind Sakharan*.

('77) 1 All 642 (643) (DB), *Rahmani Bibi v. Hulasra Kuar*.

('88) 1888 Pun Re No. 157, *Hakikat Rai v. Ganga Das*.

Section 19
Note 1

- (c) The former provisions required that the acknowledgment should be made by the mortgagee, depositary or pawnee or by some person claiming under him.²⁰ But S. 19 of the Act of 1877 required that the acknowledgment should be made by the party against whom the property or right (in respect of which the acknowledgment was made) was claimed or by some person through whom he derived his title or liability.
- (d) The former provisions did not contain any provision analogous to the second paragraph of S. 19 of the Act of 1877 which dealt with the question of the admissibility of oral evidence as to the date or contents of the writing containing the acknowledgment.
- (e) The former provisions did not also contain any provision similar to any of those contained in explanation I to S. 19 of the Act of 1877. Nevertheless, some of the principles embodied in explanation I were followed in the decisions on the above provisions. For instance, although there was no provision in S. 1, cl. (15) of the Act of 1859 that an acknowledgment addressed to a third person was sufficient, it was held in cases decided under that clause that such acknowledgment was sufficient.²¹

Differences between Acts of 1877 and 1908 :

- (1) The words "according to the nature of the original liability" which occurred after the words "a new period of limitation" and before the words "shall be computed"²² have been omitted.
- (2) The provision in cl. (2) excluding oral evidence of the contents of a writing which embodies an acknowledgment of liability

('04) 1 All L Jour 355 (357) (DB), *Hanuman Prasad v. Raghunandan Singh*.
[See ('25) 12 A I R 1925 All 176 (177, 178) : 85 Ind Cas 633, *Ganga Ram v. Lachman Singh*.]

[See also ('68) 3 Agra 255 (257) (DB), *Esree Singh v. Bisheshar Singh*. (By virtue of cl. 1 of S. 12, Regn. 27 of 1814, it was held that the act of the wakil in acknowledging was the act of the mortgagee himself.)]

20. ('15) 2 AIR 1915 Mad 951 (951) : 26 Ind Cas 127 (DB), *Muhammade v. Mayi Kunhi Haji*. (Anandavan cannot be said to be claiming under karnavan to extend limitation by acknowledgment of mortgage.)

('09) 3 Ind Cas 725 (727) : 32 All 33 (DB), *Shib Shankar Lal v. Soni Ram*.

(1900) 1900 Pun Re No. 62, *Bhawani Das v. Muhammad Yusuf*. (Acknowledgment by father — Mortgage — Joint Hindu family.)

('80) 1880 Pun Re No. 32, *Lala Mal v. Ghulam Mahomed*. (A sub-mortgagee could not be said to be "claiming under" the mortgagee.)

('80) 1880 Pun Re No. 85, *Hakim Devi Dyal v. Prab Dyal*.

21. ('68) 3 Agra 255 (257) (DB), *Esree Singh v. Bisheshar Singh*.

('71) 3 N W P H C R 78 (79) (DB), *Ali Hossein v. Ram Dyal*.

(1865) 3 Suth W R 3 (4) (DB), *Dur Gopal Singh v. Kasheeram Pandey*.

('68-69) 4 Mad H C R 359 (364, 365) (DB), *Kunhi Kutti Nair v. Kunhammad Kutti Maraccar*.

('70) 6 Mad H C R 267 (270) (DB), *Narraina Tantri v. Ukkoma*.

[See also (1900) 27 Cal 1004 (1011, 1012) : 4 Cal W N 565 : 27 Ind App 103 : 7 Sar 718 (PC), *Fatimatulnissa v. Sunder Das*.]

22. ('66) 5 Suth W R S C C Ref 3 (4) (DB), *Nobin Chunder Moozoomdar v. T. J. Kenny*. (Case under 1859 Act which resembled Act of 1877 in this respect.)

has been qualified by the introduction of the words "subject to the provisions of the Indian Evidence Act, 1872" which did not occur in the Act of 1877.

(3) Explanation III is new.

2. Acknowledgment of liability made under prior enactment — Test of sufficiency. — It is a settled principle that the law of limitation applicable to a suit is the law in force at the time of the institution of the suit, although the acknowledgment relied on may have been made while a previous enactment was in force. The validity and sufficiency of such acknowledgment must, therefore, be determined in accordance with the provisions of the law in force at the time of the institution of the suit.¹ But, there is one exception to this rule, viz., that where the acknowledgment was not sufficient according to the provisions of the prior enactment, with the consequence that the right to sue had become barred at the time of the coming into force of the Act under which the suit was instituted, such later Act cannot revive the right of suit.² (See Preamble Note 15.)

See also Note 13.

Section 19 — Note 2

1. ('13) 19 Ind Cas 291 (294, 295) : 35 All 227 : 40 Ind App 74 (PC), *Sonilal v. Kanhaiya Lal*.
- ('25) 12 AIR 1925 All 176 (177, 178) : 85 Ind Cas 633, *Ganga Ram v. Lachman Singh*.
- ('11) 12 Ind Cas 604 (605) : 34 All 100 (DB), *Zaib un-nissa Bibi v. Prabhu Narain Singh*. (Acknowledgment made by agent when Act of 1859 was in force, though invalid, is valid under the Act of 1908.)
- ('32) 19 AIR 1932 Bom 531 (533) : 139 Ind Cas 218, *Amarchand v. Narayan*.
- ('09) 3 Ind Cas 725 (728) : 32 All 33 (DB), *Shib Shankar Lal v. Soni Ram*.
- ('33) 20 AIR 1933 Lah 47 (47, 48) : 141 Ind Cas 425, *Punjab Ram v. Jowayr*.
- ('77) 1 All 425 (427) : 2 Ind Jur 115 (DB), *Dair Chand v. Sarfraz Ali*.
2. ('41) 28 AIR 1941 Bom 178 (183) (DB), *Haji Yoonus v. Shekh Hasan*. (27 Cal 1004 (P C) followed.)
- ('30) 17 AIR 1930 Bom 55 (57) : 122 Ind Cas 862 (DB), *Dhondi Shivaji v. Lakshman*. (Redemption of mortgage of 1799 — Mortgagor relying upon acknowledgment of 1865 in suit brought in 1924 — Remedy barred under previous enactment in 1862 — Right having extinguished subsequent enactment is not of any use.)
- ('28) 15 AIR 1928 Bom 28 (31) : 107 Ind Cas 60 (DB), *Narayan v. Govind*.
- ('25) 12 AIR 1925 Bom 339 (340) : 87 Ind Cas 699 (DB), *Indurai v. Shivalal*. (Mortgage executed in 1761 — Acknowledgment alleged in 1858 — Suit to redeem filed in 1916.)
- ('83) 8 Bom 99 (103, 104) : 8 Ind Jur 261 (DB), *Dharma Vithal v. Govind Sadvalkar*.
- ('18) 5 AIR 1918 Mad 86 (87, 88) : 13 I.C. 50 (DB), *Raman Kurup v. Chappan Nair*.
- ('83) 1883 All W N 202 (202, 203) (DB), *Kidar Nath v. Ulfat Rai*.
- ('94) 1894 Pun Re No. 53, *Ghulam Hassan v. Haji Muhammad*.
- ('82) 5 Mad 182 (184) (DB), *Mukkanni v. Manan Bhatta*.
- ('84) 1884 Pun Re No. 109, *Sheodan v. Surjit*.
- ('80) 1880 Pun Re No. 85, *Hakim Devi Dyal v. Prab Dyal*.
- [But see ('80) 6 Cal 340 (348, 349) : 7 Cal L R 121 (DB), *Mohesh Lal v. Busunt Kumaree*. (Acknowledgment made while 1859 Act was in force — Acknowledgment insufficient under 1859 Act — Suit filed under 1871 Act — Acknowledgment sufficient as per later Act — Later Act applies notwithstanding that the suit was time-barred at the time of coming into force of 1871 Act — Reason is that only remedy is barred but right is not put an end to.)]

Section 19
Notes 3-4

3. English law. — The doctrine of an acknowledgment of liability as an answer to the bar of limitation is also recognised under the English law. But, the doctrine is not contained in a single enactment as under the Indian law. Various sections in various statutes are based on a recognition of the doctrine.¹ The language of these provisions is not always similar to the language of this section. Further, the English theory underlying the doctrine of acknowledgment in the case of contract debts is quite different from the theory on which this section is based. (See Note 8.) In the former case, an acknowledgment will be no acknowledgment unless it amounts to a *promise* to pay the debt. But under this section an acknowledgment may be good although the debtor *refuses* to pay the debt. Hence, English decisions cannot be applied *in toto* to the determination of the law under this section. But such decisions may be consulted where the language of the statutory provisions concerned is identical in material particulars with the language of this section or where they lay down general principle which are not inconsistent with the principles on which this section is based.²

4. Principle of the section. — The following views have been expressed as to what is the true theory on which the provision as to acknowledgment of liability contained in this section based :

- (1) In *Dharma Vithal v. Govind Sadvalkar*,¹ West, J., observed as follows: "The intention of the law is manifestly to make an admission in writing of an existing jural relation of the kind specified, equivalent for the purposes of limitation to a new contract" This view was followed by Wilkinson, J., in *Venkata v. Parthasaradhi*.²
- (2) In *Anantram v. Inayat Ali*,³ the Lahore High Court observed as follows: "One object of the law of limitation is to prevent claims being preferred after such a time that the real character of the transaction can no longer be cleared up, but S. 19 provides that an acknowledgment of the existence of a liability will give a fresh term, and it may be presumed that in such a case it is considered that the object of the law of limitation has been attained."
- (3) In a critical note in 3 Madras Law Journal⁴ the view has been

Section 19 — Note 3

1. See Halsbury's "Laws of England," (1911) Vol. 19, pp. 58, 79, 92 and 131.
2. ('11) 9 Ind Cas 944 (945) : 35 Bom 383, *Shri Gopal Chiranji Lal v. Dhana Lal Ghasinam*.
3. ('32) 19 AIR 1932 Oudh 1 (4) : 138 Ind Cas 800 : 7 Luck 270 (DB), *Amir Mirza Beg v. Lachmi Narain*.
4. ('20) 7 AIR 1920 Oudh 236 (239) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh v. Bir Ram*.

Section 19 — Note 4

1. ('83) 8 Bom 99 (102) 8 Ind Jur 261 (DB).
2. ('92) 16 Mad 220 (227) : 3 Mad L Jour 35 (DB).
3. ('20) 7 AIR 1920 Lah 447 (448) (DB).
4. ('93) 3 Mad L Jour 96 (101) (Jour). (Critical Note on ('92) 16 Mad 220, *Venkata v. Parthasaradhi*.)

expressed that the section is based on the theory that the defendant *waives* the benefit of the period of time that has run in his favour.

It is submitted that each of the above views is open to objection. As regards the first view, in the face of the express provision in the section that an acknowledgment may be accompanied by a *refusal to pay*, it cannot be said that the acknowledgment contemplated by the section is one which implies a *promise* by the defendant to fulfil his obligation.⁵ As regards the second view, it is not clear how the giving of an acknowledgment of liability will help to clear up the real character of the transaction at the time of the suit, when it is remembered that under this section it is expressly provided that an acknowledgment need not specify the exact nature of the property or right in regard to which the acknowledgment is made. As regards the third view, the law of limitation does not permit any *waiver* of its provisions. (See Notes 17 and 23 to section 3.)

It has been seen in Note 4 to the Preamble, that one of the considerations on which the law of limitation is based is that there is a presumption that a right not exercised for a long time is non-existent. But, where the person against whom the right is claimed admits the existence of the right, there is no room for the above presumption.

It was held in England at one time, with reference to contract debts, that the Statute of Limitations rested on the presumption of payment and that where such presumption was repelled by means of an acknowledgment of liability, the plaintiff was entitled to succeed.⁶ But this view has not been accepted in the later decisions and according to them, the true theory with regard to an acknowledgment in such cases is that it imports a *promise* to pay, giving rise to a new cause of action to the plaintiff. According to these later English decisions, therefore, an acknowledgment of a debt will not entitle the plaintiff to a fresh period of limitation unless it amounts to a *promise* to pay.⁷ But, as already seen, this view has not been accepted by the framers of this section under which an acknowledgment may be quite good although it is accompanied by a refusal to perform the obligation. Hence, the true theory on which this section is based seems to be that on which the earlier English decisions were based, namely that an admission of liability rebuts the presumption which the law raises, to wit, that a right which has not been exercised or asserted for a long time does not exist.

5. See (1940) 27 AIR 1940 P C 63 (67) : I L R (1940) Kar P C 134: ILR (1940) Lah 470 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Ram Shah v. Lal Chand*. (This section is not to be read as based upon the theory of implied promise.)

6. See cases cited in (1827) 30 R R 461 (462) : 6 B & C 603 : 9 Dowl & Ry. 549 : 5 L J K B 218, *Tanner v. Smart*.

7. (1827) 30 R R 461 (463) : 6 B & C 603 : 9 Dowl & Ry. 540 : 5 L J K B 218, *Tanner v. Smart*.

[See also (1864) 33 Beav 452 (456) : 140 R R 216 : 12 W R (Eng.) 328 : 55 E R 443 : 10 Jur (NS) 117 : 9 L T (NS) 746, *Hammond v. Smith*.]

Section 19
Note 5

5. **Distinction between Sections 19 and 20.** — As in the case of an acknowledgment under this section, a payment under S. 20 is also required to be recorded in *writing*. But under S. 19, the writing must contain *within itself* an admission of an existing liability, while under S. 20, it is sufficient if the writing merely records the *fact of payment*.

But ss. 19 and 20 are not mutually exclusive^{1a} and therefore a writing which records a payment may amount to an acknowledgment of liability within this section, if from the words used in the writing, it is clear that an existing liability is admitted.¹ Thus if the writing

Section 19 — Note 5

- 1a. ('45) 32 AIR 1945 Nag 181 (182): I L R (1945) Nag 745 (DB), *Abdul Hussain v. Rev. Livesay*.
1. ('49) 36 AIR 1949 East Punj 219 (220), *Thakar Das v. Sant Ram*. (The test to see if an endorsement of payment constitutes an acknowledgment is to see if it is possible to read the words used as acknowledging liability for no more than the amount actually paid — Endorsement on promissory note by debtor that certain amount is credited to debtor — Inference is that it has been credited in account evidenced by promissory note — Endorsement constitutes acknowledgment.)
- ('45) 32 AIR 1945 Nag 181 (182): I L R (1945) Nag 745 (DB), *Abdul Hussain v. Rev. Livesay*. (The words "paid . . . towards the satisfaction" in an endorsement imply that a balance, for the payment of which the executant of the note was liable was due and hence amount to an acknowledgment of liability.)
- ('42) 29 AIR 1942 Bom 218 (220): I L R (1942) Bom 512: 202 Ind Cas 277 (DB). *Kesarmal v. Narayan*. (Entry by debtor in creditor's *khata* "credited Rs. 30-10-0 towards the above amount" — Held entry amounted to acknowledgment though it did not save limitation under S. 20 (before amendment).)
- ('42) 29 AIR 1942 Mad 353 (353, 354): I L R (1942) Mad 590: 201 Ind Cas 586 (FB), *Venkata Chelamiah v. Annapoornamma*. (An endorsement on a promissory note, "paid Rs. 350 towards this promissory note and endorsed the payment thereon," can be read as an acknowledgment of liability. The use of the word "towards" in itself implies that more remains to be paid *i. e.*, that the payment is made on account of a larger sum due under the instrument.)
- ('41) 28 AIR 1941 Lah 23 (25): 192 Ind Cas 118 (DB), *Saraj Din v. Umar Din*. (Endorsement on bond thumb-marked by debtor ran: "today . . . Rs. 360-10-0 . . . were paid towards this bond" — Held it amounted to acknowledgment.)
- ('40) 27 AIR 1940 Lah 106 (107): 189 Ind Cas 264 (DB), *Bur Singh v. Sikri Brothers*. (Where an executant of a promissory note pays a certain sum and makes an endorsement on the back of the note in his own hand that it will be adjusted in the promissory note account, the endorsement is clearly an acknowledgment of subsisting liability under the promissory note.)
- ('40) 27 AIR 1940 Oudh 305 (307): 15 Luck 537: 187 Ind Cas 624 (DB), *Deputy Commissioner, Kheri v. Brijendra Bahadur Singh*. (Entry in debtor's account books that payment is made "alal hisab" is acknowledgment.)
- ('38) 25 AIR 1938 Rang 84 (86): 1937 Rang L R 421: 175 Ind Cas 550, *Kasiviswanathan Chettyar v. Lakshmanan Chettyar*. (The endorsement in this case was " . . . paid towards this Rs. 410 . . . only, through the account of K" — Held there was an acknowledgment.)
- ('38) 25 AIR 1938 Rang 401 (404): 1938 Rang L R 594: 178 Ind Cas 869 (DB), *U Tun Maung v. L. Ah Choy*. (Endorsement on back of promissory note "paid on a/c Rs. 10" held to be acknowledgment of liability.)
- ('16) 3 AIR 1916 Mad 638 (638): 27 Ind Cas 744 (DB), *Visvanatha Santhasingara v. Sri Ramachandra Mardraja Deo*. (Lessee paying instalment and writing that amount be credited to lease account — Held this was an acknowledgment.)
- ('34) 21 AIR 1934 Lah 971 (972), *Harbans Lal v. Arjan*. (Mortgage bond — Sum payable as profits — Endorsement of payment — Effect of.)

Section 19
Note 5

itself states that money is paid for interest or for part of principal, it would clearly imply an admission of liability for the debt.²

- ('36) 28 AIR 1936 Mad 616 (617) : 163 Ind Cas 803, *Chandukutti Nambiyar v. Kunhi Kalandan*. (Endorsement on promissory note that 'out of the amount due under the promissory note Rs. 1000 was paid this day' held to be an acknowledgment of liability.)
- ('82) 5 All 201 (205) : 1882 All W N 221 (DB), *Janki Prasad v. Ghulam Ali*.
- ('36) 28 AIR 1936 Lah 276 (277, 278) : 162 Ind Cas 306, *Shanti Lal v. Lyallpur Bank Ltd.* (Sale of immovable property by debtor to creditor—Latter asked to credit price towards prior promissory note—Document amounts to acknowledgment.)
- ('09) 2 Ind Cas 522 (522) (Mad), *Ranganayakalu Aiya v. Subbayan*. (Where a debtor acknowledged on 10th September 1899 a liability as existing on 20th July 1898 without suggesting that it had been paid after that date and before the date of acknowledgment, it was held equivalent to acknowledgment on 10th September 1898.)
- ('37) 24 AIR 1937 Oudh 391 (393) : 13 Luck 334 : 168 Ind Cas 799 (DB), *Satgur Nath v. Brahma Dat.* (Letter accompanying payment asking for time to pay balance is acknowledgment.)
- [See ('39) 26 AIR 1939 All 177 (179) : I L R (1939) All 200 : 180 I. C. 535 (DB), *Ishri Prasad v. Chandrabhan Prasad*. (Endorsement to the effect that Rs. 25 are being paid in respect to the promissory note held not to amount to acknowledgment.)]
2. ('35) 22 AIR 1935 All 946 (955, 956) : 159 Ind Cas 387 : 58 All 261 (FB), *Udey-pal Singh v. Lakshmi Chand*.
- ('17) 4 AIR 1917 Mad 805 (805) : 40 Mad 698 : 36 Ind Cas 240 (DB), *Venkatakrishniah v. Subbarayudu*. (Endorsement of part payment.)
- ('37) 24 AIR 1937 Nag 304 (304) : 170 Ind Cas 213 : ILR (1937) Nag 374, *Sunderlal Sharma v. Bisahoo Bodhrail Teli*. (Endorsement of payment on back of pronote implies acknowledgment of liability for the balance due on the note.)
- ('21) 8 AIR 1921 Cal 331 (332) : 64 Ind Cas 988 : 48 Cal 1046 (DB), *Prasanna Kumar Ray v. Niranjan Ray*.
- ('23) 10 AIR 1923 Bom 369 (369) : 74 Ind Cas 302 (DB), *Devchand Chatraji v. Jamsedji Shapurji*.
- ('26) 13 AIR 1926 Nag 252 (253) : 91 Ind Cas 402, *Raghoba v. Gopi*. (Payments not satisfying either bond—Thumb-impression of debtor is admission of debts under both bonds.)
- ('18) 5 AIR 1918 Nag 203 (204) : 48 Ind Cas 724, *Mohan Lal v. Ganesh Ram*. (Endorsement of payment implying liability for balance amounts to acknowledgment.)
- ('23) 10 AIR 1923 Bom 239 (240) : 72 Ind Cas 249 : 47 Bom 632 (DB), *Ganesh Narhar v. Dattatraya Pandurang*. (The whole endorsement and the words of the note should be taken together.)
- (1865) 2 Mad HC R 307 (309, 310) (DB), *Krishtna Row v. Hachapa Sugapa*. (Case under Act of 1859—It is left to the Court to decide in each case whether the writing, reasonably construed, contains a sufficient admission that the debt or part of it is due.)
- ('71) 6 Beng L R 299 (301), *Madhusudan Chowdhry v. Brajanath Chandra*.
- ('66) 5 Suth W R 45 (46) (DB), *Shumboo Chunder Shaha v. Baroda Soonderee*.
- [See also ('44) 31 AIR 1944 Mad 57 (58) : 215 Ind Cas 287, *Vira Raghavayya v. Sita Ramayya*. (Pronote by D in favour of B with a contemporaneous agreement by D to pay amount by instalments—Whole sum to become due on default of one instalment—B endorsing pronote to P—Endorsement of payment on pronote made after three years from note but within three years from default of sixth instalment on which suit was brought—P held could take advantage of agreement for purpose of saving limitation—Endorsement of payment amounted to acknowledgment and saved limitation.)]

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But, an endorsement of payment *need not* imply an acknowledgment of liability.³ Whether it does so depends on the language used in each case.⁴ Thus, a mere endorsement that a certain amount has been paid without there being anything to imply that there is due anything further is not an acknowledgment.^{4a}

Where on account of some defect an endorsement of payment fails to be effective under section 20, it may nevertheless operate as an acknowledgment of liability under this section.⁵ Thus, where an

[But see ('67) 8 Suth W R 334 (336) (DB), *Gorachand Dutt v. Lokenath Dutt*. (Admission must be *direct* and not implied—Case under Act of 1859.)]

3. ('70) 5 Beng L R 619 (638) (DB), *Shearman v. Fleming*. (The words "remittance of £40 to old account" were ambiguous, and did not necessarily import that a further sum was due.)
- ('35) 22 AIR 1935 All 946 (956) : 159 Ind Cas 387 : 58 All 261 (FB), *Udeypal Singh v. Lakshmi Chand*. (Endorsement of payment without specification—No acknowledgment.)
- ('33) 20 AIR 1933 All 453 (455) : 55 All 632 : 144 Ind Cas 899 (DB), *Ram Prasad v. Binaek Shukul*. (Payment by debtor—There is implied acknowledgment of amount paid, but not of the remaining liability proved *aliunde*.)
- ('10) 8 Ind Cas 349 (349) (DB) (Mad), *Lakshminarasimham v. Bharata Mahanty*.
4. ('42) 29 AIR 1942 Bom 218 (220) : ILR (1942) Bom 512 : 202 Ind Cas 277 (DB), *Kesarmal v. Narayan*. (Payment in respect of promissory note and payment towards amount due under note—Distinction pointed out.)
- ('42) 29 AIR 1942 Mad 353 (353) : ILR (1942) Mad 590 : 201 Ind Cas 586 (FB), *Venkata Chelamiah v. Annapoornamma*.
- ('39) 26 AIR 1939 All 177 (179) : I L R (1939) All 200 : 180 Ind Cas 535 (DB), *Ishri Prasad v. Chandrabhan Prasad*.
- 4a. ('46) 33 AIR 1946 Pat 404 (406, 407) : 224 Ind Cas 65 (DB), *Ajodhya Prasad v. Gobind Missir*.
- ('45) 32 AIR 1945 Pat 271 (272) : 24 Pat 96 : 220 Ind Cas 255 (DB), *Firm Ram Chandra v. Firm Shaikh Shitu*. (A mere endorsement of payment without further specification does not operate as an acknowledgment within the meaning of S. 19. AIR 1944 Lah 88 : I L R (1944) Lah 528, *Dial Singh v. Mahammad Ali*, Rel. on.)
- ('44) 31 AIR 1944 Bom 37 (39) : 215 Ind Cas 12 (DB), *Harkubai v. Shankerbhai*,
- ('44) 31 AIR 1944 Lah 88 (90) : I L R (1944) Lah 528 : 213 Ind Cas 253 (DB), *Dial Singh v. Mohammad Ali*.
- ('43) 30 AIR 1943 Mad 133 (133) : 205 Ind Cas 546, *Narsinga Rao v. Rangayya*.
- ('42) 29 AIR 1942 Mad 353 (353) : I L R (1942) Mad 590 : 201 Ind Cas 586 (FB), *Venkata Chelamiah v. Annapoornamma*.
- ('42) 29 AIR 1942 Oudh 508 (510) : 18 Luck 241 : 202 Ind Cas 750 (DB), *Durga Prasad v. Kishnaji*.
- ('42) 29 AIR 1942 Pat 395 (396) : 200 Ind Cas 306 (DB), *Shyam Ballav v. Dologobind Sahu*.
5. ('42) 29 AIR 1942 Bom 218 (220) : I L R (1942) Bom 512 : 202 Ind Cas 277 (DB), *Kesarmal v. Narayan*.
- ('42) 29 AIR 1942 Mad 146 (147, 148) : I L R (1942) Mad 405 : 201 Ind Cas 182 (DB), *Ramayya v. Anjayya*. (An endorsement on a pro-note : "Paid on November 15, 1938, towards this promissory note, Rs. 2" held, though not under S. 20, saved limitation under S. 19.)
- ('39) 26 AIR 1939 Bom 252 (253) : 182 Ind Cas 965, *Tayarali Mahomed Ali v. Garabad Sadu*. (Endorsement on pronote stating that certain amount is paid towards payment without specifying whether it is towards interest as such—Payment being on account of debt secured by note, endorsement amounts to acknowledgment of liability.)

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endorsement of payment towards the debt due on a promissory note is made, but no payment is actually made, the plaintiff will not be entitled to a fresh period of limitation under section 20. Nevertheless, the endorsement may amount to an acknowledgment of liability under this section.⁶

An acknowledgment under S. 19 only operates against the person who makes the acknowledgment and those claiming under him, but subject to the provisions of S. 21, sub-s. (2), a payment under S. 20 saves limitation against all the persons who are liable for the debt.⁷

An acknowledgment need not be addressed to the person entitled. But a payment under S. 20 must be made to the person entitled.⁸

Under S. 19, a mere writing containing an admission of liability in respect of the right claimed is enough. But under S. 20, two things are necessary, viz., (1) a payment and (2) a writing recording such payment.

Under S. 20, it is enough if the payment is acknowledged in the handwriting of the person making the payment; it need not be signed

(1935) 22 AIR 1935 Mad 245 (245) : 157 Ind Cas 272, *Krishnaswami Naicker v. Thiruvengada Mudaliar*.

(1917) 4 AIR 1917 Mad 805 (805, 806) : 40 Mad 698 : 36 I C 240 (DB), *Venkatakrishniah v. Subbarayudu*. (The fact that S. 20 deals with an acknowledgment of a particular kind and is therefore a *special* section when compared with S. 19 is no objection to this as the operation of the two sections is different.)

(1916) 3 AIR 1916 Mad 624 (626) : 27 Ind Cas 747 (DB), *Jaganadha Sahu v. Rama Sahu*.

(1926) 13 AIR 1926 Nag 252 (253) : 91 Ind Cas 402, *Raghoba v. Gapi*.

6. (1945) 32 AIR 1945 Nag 181 (182) : I L R (1945) Nag 745 (DB), *Abdul Hussain v. Rev. Livesay*.

(1916) 3 AIR 1916 Mad 138 (139) : 28 Ind Cas 15, *Ramakrishna Chetty v. Venkatasubbiah Chetty*.

(1916) 3 AIR 1916 Mad 512 (512) : 26 Ind Cas 754 (DB), *Lakshmi Ammal v. Ramaswamy Iyengar*. (Endorsement even without actual payment is good as acknowledgment if it was the intention of the parties that it should be treated as such.)

7. (1942) 29 AIR 1942 Mad 200 (201, 202) : I L R (1942) Mad 308 : 201 Ind Cas 218 (DB), *Thayyanayaki Ammal v. Sundarappa*. (Payment by mortgagor after he has parted with mortgaged property saves right of suit against purchaser of equity of redemption.)

(1941) 28 AIR 1941 Mad 110 (110), *Kunjandi v. Chinnavava Rowther*.

(1938) 25 AIR 1938 Cal 129 (131) : 176 Ind Cas 191 (DB), *Azizur Rahman v. Upendra Nath*.

(1935) 22 AIR 1935 Mad 101 (103) : 58 Mad 418 : 154 Ind Cas 1053 (DB), *Lakshmi Naidu v. Gunnamma*.

(1932) 19 AIR 1932 Oudh 1 (5) : 7 Luck 270 : 138 Ind Cas 800 (DB), *Amir Mirza Beg v. Lachhmi Narain*.

(1930) 17 AIR 1930 Mad 738 (739) : 127 Ind Cas 641, *Lokhanda Naiko v. Lokhono Naiko*. ((1917) AIR 1917 Mad 805 (DB), *Venkatakrishniah v. Subbarayudu*, followed.)

[See (1910) 5 Ind Cas 484 (485) : 37 Cal 461 (DB), *Saroda Charan v. Durga Ram De*. (There is nothing in S. 20 that the extended period of limitation is intended to operate only against the person making payment.)]

8. (1917) 4 AIR 1917 Mad 805 (805) : 40 Mad 698 : 36 Ind Cas 240 (DB), *Venkatakrishniah v. Subbarayudu*.

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by him. But, under s. 19, the acknowledgment must be signed by the person making the acknowledgment.⁹

Section 19 applies to *any* right or property. But s. 20 applies only to debts and legacies.

Under this section, a fresh period of limitation is allowed from the date when an acknowledgment of liability is *signed*. But, under s. 20, the fresh period is allowed from the time when the payment mentioned in the section is made.

6. Distinction between this section and Article 183. — See Section 20, Note 37.

7. **Acknowledgment does not confer title.**—An acknowledgment of liability only extends limitation. It does not *confer* any right or title on the person whose right is acknowledged.¹

See also Note 8 below.

8. **Acknowledgment, if operates as fresh contract.** — Under this section, an acknowledgment of liability may be accompanied by a refusal to pay or deliver the thing claimed. (See Note 44.) The section is not based upon the theory of implied promise.¹ Hence a promise to pay is not a necessary ingredient of an acknowledgment under this section.² But, at the same time, an *unqualified* acknow-

9. See ('40) 27 AIR 1940 Nag 354 (357) (DB) *Gajadhar Prasad Ramlal v. Udai Chand Kapurchand*.

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1. ('45) 32 AIR 1945 Bom 143 (145) : 46 Bom L R 931 (DB), *Supdu Laxmanshet v. Soniram Ragho*. (Partition suit — Compromise petition by parties embodying an agreement that the defendant should deliver into the possession of plaintiff in the right of ownership certain lands outside the suit — Compromise made rule of Court and decree passed only with regard to matters in suit — Subsequent suit by plaintiff to recover land outside former suit — Held, that if the compromise be regarded as acknowledgment of plaintiff's title it might be used only for saving the bar of limitation provided the title was proved by independent evidence — It was not by itself sufficient to prove any subsisting title.)
- ('42) 29 AIR 1942 Nag 102 (103) : ILR (1942) Nag 541 : 201 Ind Cas 748, *Parasram v. Punamchand*. (The acknowledgment of a charge under S. 55 (4) (b), T. P. Act does not in itself create any title or right in the owner.)
- ('09) 3 Ind Cas 725 (728) : 32 All 33 (DB), *Shib Shankar Lal v. Soni Ram*.
- ('13) 19 Ind Cas 291 (295) : 35 All 227 : 40 Ind App 74 (PC), *Soni Ram v. Kanhaiya Lal*. (Acknowledgment is not a "thing done" within Section 6 of the General Clauses Act.)

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1. ('40) 27 AIR 1940 P C 63 (67) : ILR (1940) Kar P C 134 : ILR (1940) Lah 470 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah v. Lal Chand*.
2. ('50) 37 AIR 1950 Bom 94 (Para 13) : ILR (1949) Bom 741 (DB), *Udhavji Anandji v. Bapudas Ramdas*. (An acknowledgment of liability is different from a promise to pay. There might be an acknowledgment of liability without a promise to pay.)
- ('38) 25 AIR 1938 Pat 139 (139) : 174 Ind Cas 585, *Ramprabha Ojha v. Bishunath Ojha*.
- ('69) 13 Moo Ind App 37 (55) : 12 Suth W R P C 36 : 3 Beng L R PC 37 : 2 Suther 261 : 2 Sar 479 (PC), *Gopee Kishen Goshamee v. Bindabun Chunder Sircar Chowdhry*. (It is one thing to acknowledge a debt and another to promise to pay it.)

ledgment of liability in respect of a debt necessarily implies a promise to pay the debt.³

Under the English law, a suit on such an implied promise is regarded as a suit on a new contract, the consideration for the promise being presumed to be the giving up by the creditor of the old debt;⁴ and it will be so regarded even where the pleadings do not show that the suit is based on the new contract or the suit purports to be on the old contract, and the new promise is only relied on for the purpose of avoiding the bar of limitation.⁵ Under the Indian law, such a promise does not constitute a new contract⁶ or give rise to a new cause

('06) 33 Cal 1047 (1058, 1059, 1060) : 33 Ind App 165 : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 16 Mad L Jour 300 : 1 Mad L Tim 199 : 3 All L Jour 525 : 2 Nag L R 130 (PC), *Maniram Seth v. Seth Rupchand*. (An acknowledgment of liability should the balance turn out to be against the person making it, is a sufficient acknowledgment under this section.)

('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai & Bros. v. R. D. Mehta & Co.*

('72) 9 Beng L R App 43 (43), *Harrison v. Hope*.

('71) 6 Beng L R 299 (302), *Madhusudan v. Brajanath*.

('36) 23 AIR 1936 Mad 939 (939) : 166 Ind Cas 750, *Chinna Subbaroyudu v. Narasimha Reddi*.

('25) 12 AIR 1925 Mad 261 (263) : 48 Mad 693 : 85 Ind Cas 297 (DB), *Ramasami v. Chandra Kottayya*.

('21) 8 AIR 1921 Mad 704 (706) : 44 Mad 971 : 68 Ind Cas 100 (DB), *Govindasami Pillai v. Desai Goundan*.

('21) 8 AIR 1921 Mad 464 (465) : 70 Ind Cas 593 (DB), *Subbarama Aiyar v. Veerabadra Pillai*.

('20) 7 AIR 1920 Mad 488 (489) : 58 Ind Cas 446 (DB), *Perumal Goundan v. Jananukoola Sankanidhi*.

('13) 21 Ind Cas 30 (30) (DB) (Mad), *Shaik Meera Sahib & Co. v. Nainar Lubbay*.

'25) 12 AIR 1925 Sind 8 (8) : 86 Ind Cas 228 (DB), *Secretary of State v. Kotumal Maghanmal*.

3. ('44) 31 AIR 1944 Bom 19 (20, 21) : 211 Ind Cas 155 (DB), *Bai Shanta v. Trikamlal*.

('06) 33 Cal 1047 (1058) : 33 Ind App 165 : 4 Cal L J 94 : 8 Bom L R 501 : 10 Cal W N 874 : 16 Mad L Jour 300 : 1 Mad L Tim 199 : 3 All L Jour 525 : 2 Nag L R 130 (PC), *Maniram Seth v. Seth Rupchand*.

('95) 22 Cal 434 (444) : 22 Ind App 68 : 5 Mad L Jour 14 : 6 Sar 545 : R & J's No. 137 (PC), *Kalka Singh v. Paras Ram*.

('30) 17 AIR 1930 Lah 177 (178) : 119 Ind Cas 417, *Ram Ditta Mal Ram Dhan v. Kesar Das*.

[See ('38) 25 AIR 1938 Pat 139 (139) : 174 Ind Cas 585, *Ramprabha Ojha v. Bisunath Ojha*. (Endorsement by debtor acknowledging correctness of account showing extent of his liability implies a promise to pay.)]

[See also ('34) 21 AIR 1934 P C 144 (146) : 151 Ind Cas 90 (PC), *Siqueira v. Noronha*. (An account stated may only take the form of a mere acknowledgment of a debt, and in those circumstances, though it is quite true it amounts to a promise, and the existence of a debt may be inferred, that can be rebutted, and it may very well turn out that there is no real debt at all, and in those circumstances there would be no consideration and no binding promise.)]

4. Halsbury's "Laws of England", (1911), Vol. 19, pages 58, 59.

5. (1837) 7 LJ Ex 25 (32) : 3 M & W 90; M & H 313; 49 RR 511, *Irving v. Veitch*.

6. ('20) 7 AIR 1920 Low Bur 136 (137) : 10 Low Bur Rul 332 : 64 Ind Cas 361, *Shwe Hla Gyi v. Sandwe*. (Promise to pay wages of servant which the person was already under obligation to pay is without consideration and therefore does not constitute fresh contract.)]

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- of action,⁷ it being considered that a promise to pay an *existing* debt
- ('41) 28 AIR 1941 Nag 100 (102) : ILR (1941) Nag 144 (DB), *Shivjiram v. Gulabchand*.
- ('38) 25 AIR 1938 Lah 234 (239) : ILR (1938) Lah 193 : 174 Ind Cas 277 (FB), *Shanti Parkash v. Harnam Das*. (Where acknowledgment implies a promise to pay, a suit can be brought on the basis of such acknowledgment considered as an agreement provided consideration is proved.)
- ('35) 22 AIR 1935 All 129 (131) : 57 All 434 : 152 Ind Cas 370 (DB), *Ghulam Murtaza v. Mt. Fasiunnissa Bibi*.
- ('30) 17 AIR 1930 Nag 298 (299) : 26 Nag L R 320 : 127 Ind Cas 894, *Chhedilal v. Manoharlal*.
- ('77) 1 Bom 590 (592) : 1877 Bom P J 74 (DB), *Raghogi Bhikaji v. Abdul Karim*.
- ('22) 9 AIR 1922 Lah 425 (425, 426) : 3 Lah 326 : 69 Ind Cas 502 (DB), *Nand Lal v. Partab Singh*.
- ('15) 2 AIR 1915 Lah 279 (280) : 1916 Pun Re No. 16 : 30 Ind Cas 491 (DB), *Jas Ram v. Attar Chand*.
- ('23) 10 AIR 1923 Lah 301 (301) : 74 Ind Cas 939 (939), *Tikkan Ram v. Lal*.
7. ('41) 28 AIR 1941 Nag 294 (294) : ILR (1942) Nag 177 : 201 Ind Cas 77, *C. Khisty v. K. B. Subbarao*. (No cause of action can be founded on an acknowledgment. All that an acknowledgment can do is to extend limitation.)
- ('38) 25 AIR 1938 Nag 180 (181) : ILR (1940) Nag 441 : 174 Ind Cas 374, *Ramprasad Jagbandhoo v. Anandi Brindawan*. (Suit cannot be based on acknowledgment of liability.)
- ('35) 22 AIR 1935 All 129 (131) : 57 All 434 : 152 Ind Cas 370 (DB), *Ghulam Murtaza v. Mt. Fasiunnissa Bibi*.
- ('34) 21 AIR 1934 All 76 (77) : 56 All 281 : 149 Ind Cas 571 (DB), *Bal Krishna v. Debi Singh*.
- ('33) 20 AIR 1933 All 280 (281) : 144 I C 130 (DB), *Dhonkal Singh v. Harbans Lal*. (Debt due on unstamped pro-note acknowledged — Acknowledgment is part of the same transaction and cannot be treated as an independent transaction upon which the plaintiff could frame a cause of action.)
- ('26) 13 AIR 1926 All 155 (156) : 89 Ind Cas 402, *Reoti Ram v. Lachman Prasad*.
- ('09) 1 Ind Cas 759 (759) (DB) (All), *Ram Charan v. Ram Das*.
- ('01) 23 All 502 (504) : 1901 All W N 150 (DB), *Ganga Prasad v. Ram Dayal*.
- ('97) 1897 All W N 144 (145) (DB), *Gopal Lalji v. Raman Lalji*.
- ('01) 25 Bom 616 (621, 622, 623) : 3 Bom L R 213 (DB), *Atmaram v. Umedram*. (An instrument which creates a liability and gives rise to a cause of action is one thing and a written acknowledgment of that liability is another.)
- ('98) 22 Bom 513 (517, 518) (DB), *Shankar v. Mukta*. (Account stated or adjusted — Such account is only evidence of the existing debt and not a fresh contract.)
- ('85) 9 Bom 516 (518) (DB), *Tribhovan Gangaram v. Amina*. (Do.)
- ('88) 1888 Bom P J 129 (DB), *Govind v. Devchand*.
- ('84) 8 Bom 194 (195) (FB), *Chowksi Himutlal Harivalubhdas v. Chowksi Achrutlal Harivulabhdas*. (Suit on khata—Such khata is a mere acknowledgment.)
- ('33) 20 AIR 1933 Lah 174 (175) : 145 Ind Cas 159, *Balri Das v. Besu*. (Suit for mortgage amount by sale—Contention that only possession could be asked for as per the mortgage deed and not sale—Plaintiff's contention that acknowledgment gave him right to sue for sale, held not sound.)
- ('15) 2 AIR 1915 Lah 167 (168) : 1915 Pnn Re No. 76 : 31 Ind Cas 209 (DB), *Ram Adin v. Munshi Ram*.
- ('13) 20 Ind Cas 501 (501) (DB) (Lah), *Mukand Lal v. Abdul Majit*.
- ('08) 1908 Pun W R No. 206, p. 776 : 1908 Pun Re No. 119, *Pala Mal v. Tulla Ram*.
- ('04) 1904 Pun L R No. 123 (pp. 436, 437, 438) : 1904 Pun Re No. 68 (DB), *Ganpat v. Daulat Ram*.
- ('27) 14 AIR 1927 Mad 1200 (1200) : 106 Ind Cas 619, *Somasundaram Ayyar v. Krishna Ayyar*.
- ('20) 7 AIR 1920 Nag 244 (244) : 58 Ind Cas 30, *Jethmal v. Saroo*.

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is not for any consideration. Hence, even where a person *expressly* promises to pay an existing debt, there is no new *contract* but only an *acknowledgment* of liability.⁸ But, where a party promises to do something in consideration of the other party giving up his original rights against the former, there is a *fresh contract* which gives rise to a new cause of action.⁹ In such a case the promise may be oral or

(198) 11 C P L R 65 (71), *Beohar Raghubir Singh v. Udechand*.

(189) 2 C P L R 40 (41), *Vittalsha Nanesha v. Sheodin*.

(132) 19 AIR 1932 Oudh 49 (50) : 7 Luck 313 : 135 Ind Cas 390 (DB), *Mt. Janaka v. Sheo Charan*.

(129) 16 AIR 1929 Oudh 529 (529) : 121 Ind Cas 83 (DB), *Deo Dutt v. Lal Behari*.

(129) 16 AIR 1929 Pat 258 (259, 260) : 8 Pat 706 : 120 Ind Cas 470 (DB), *Deoraj Tewari v. Indrasan Tewari*.

(120) 7 AIR 1920 Pat 161 (161) : 56 Ind Cas 379, *Suraj Prasad Pandey v. W. W. Boucke*.

(192-96) 2 Upp Bur Rul 462 (464), *Maung Aung Gyi v. Maung Shwe Kyu*.

[See also (111) 12 Ind Cas 617 (617) (Lah), *Amir Chand v. Sundar Mal*.

(113) 19 Ind Cas 291 (295) : 35 All 227 : 40 Ind App 74 (P C), *Soni Ram v. Kanhaiyalal*. (Acknowledgment does not create title.)

(109) 3 Ind Cas 725 (728) : 32 All 33 (DB), *Shib Shankar Lal v. Lala Soni Ram*. (Do.)

(169) 13 Moo Ind App 37 (55) : 12 Suth W R P C 36 : 3 Beng L R P C 37 : 2 Suther 261 : 2 Sar 479 (PC), *Gopee Kishen Goshamee v. Bindabun Chunder Sircar Chowdhry*. (It is one thing to acknowledge a debt and another to promise to pay it.)]

8. (191) 14 Mad 258 (262) : 18 Ind App 37 : 6 Sar 30 : 15 Ind Jur 224 (PC), *T. Ramachandra Rau v. Vellayanandan Ponnusami*.

(171) 6 Mad H C R 51 (56, 57) (DB), *Kittappa v. Somanna*. (An express verbal promise by the debtor to pay the amount.)

(102) 1 Low Bur Rul 190 (191), *Kankani v. Maung Po Yin*. (A naked promise to pay what a person is already under an obligation to pay is without consideration, and therefore does not constitute a fresh contract.)

(116) 3 AIR 1916 Mad 774 (775) : 29 Ind Cas 36 (DB), *Ramaswami Patter v. Tirucha Mannadiar*.

(171) 6 Mad H C R 197 (200, 201) (DB), *Hirada Karibasappa v. Muddappa*. (Oral acknowledgment.)

(193) 16 Mad 339 (340, 341) (DB), *Amuthu v. Muthayya*. (Promise being oral cannot save limitation.)

(106) 29 Mad 205 (208) (DB), *Venkataramiah Pantulu v. Ramakrishna Pantulu*.

(167) 7 Suth W R 46 (46, 47) (DB), *Giree Dharee Singh v. Kalika Sookul*.

(198) 8 Mad L Jour 219 (222) (DB), *Rajah of Venkatagiri v. Sheikh Bade Saheb*. (Promise to pay in muchilika amounts to acknowledgment.)

See also the cases cited in foot-note (3) above.

9. (131) 18 AIR 1931 Oudh 97 (98) : 130 Ind Cas 503, *Sheo Govind v. Jai Sri Singh*. (Accounts settled between parties and certain sum acknowledged by defendant as due from him — Entry made in plaintiff's account book that defendant agreed to pay the amount with interest — Held it was not mere acknowledgment but a novation of contract.)

(129) 16 AIR 1929 Lah 263 (263) : 10 Lah 745 : 115 Ind Cas 764 (DB), *Kahan Chand Dularam v. Dayaram Amritlal*. (Account adjusted — Balance struck, accepted and signed — Held it was a novation of contract.)

(109) 4 Ind Cas 38 (41) : 32 Mad 284 (DB), *Seshan Pattar v. Raghava Pattar*.

(123) 10 AIR 1923 Cal 578 (579) : 76 Ind Cas 603 (DB), *Sarifun Mandalin v. Feradaul Khatun*. (Adjustment of account is fresh cause of action. 11 Ind Cas 540 followed.)

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written.¹⁰ Further, under s. 25 (3) of the Contract Act, a promise in writing to pay a time-barred debt is a valid *contract*.

It has been held in certain decisions¹¹ that even in India, a promise to pay which is involved in the acknowledgment of a debt is sufficient to constitute a fresh contract and a new cause of action. These decisions are based on the judgment of the Privy Council in

- (1908) 11 Oudh Cas 152 (153), *Humayun v. Wajid Ali*. (Acknowledgment containing the words "and shall be paid" — Held that these words evidence a fresh contract furnishing an independent cause of action.)
- (1923) 10 AIR 1923 Cal 71 (72) : 72 Ind Cas 692 (DB), *Guljar Mandal v. Sriman Manadalini*. (Promise to pay old loan along with new gives rise to a new agreement.)
- (1923) 10 AIR 1923 Cal 659 (660) : 79 Ind Cas 77 (DB), *Prasanna Kumar Pal v. Panaulla Miji*.
- (1934) 21 AIR 1934 Lah 789 (790) : 154 Ind Cas 668, *Sada Ram v. Sahazada Ram*. (Where a creditor releases his debtor and accepts a new debtor in his place, the release of the original debtor furnishes a good consideration for the new contract.)
- (1928) 15 AIR 1928 Nag 124 (125) : 106 Ind Cas 661, *Fadalilal v. Roochand*. (Acknowledgment of previous debts implies promise to pay and can be a basis of fresh contract after limitation.)
10. (1921) 8 AIR 1921 Cal 67 (69) : 48 Cal 817 : 66 Ind Cas 209, *Narendra Lal Khan v. Tarubala Dassi*.
- (1924) 11 AIR 1924 Cal 388 (389) : 50 Cal 974 : 70 Ind Cas 489 (DB), *Ibrahim Mallick v. Lalit Mohan Roy*.
11. (1932) 19 AIR 1932 All 199 (201, 202, 205) : 53 All 963 : 137 Ind Cas 243 (DB), *Abdul Rafiq v. Bhajan*. (Per Niamatullah J.)
- (1929) 16 AIR 1929 All 980 (981, 983) : 52 All 169 : 121 Ind Cas 108 (DB), *Govind Singh v. Bijay Bahadur*.
- (1922) 9 AIR 1922 Bom 183 (184) : 46 Bom 24 : 63 Ind Cas 923 (DB), *Chunni Lal Ratanchanda v. Laxman Govind*.
- (1933) 20 AIR 1933 Lah 47 (47) : 141 Ind Cas 425, *Punjab Ram v. Jowaya*.
- (1932) 19 AIR 1932 Lah 400 (400) : 137 Ind Cas 155, *Baru Mal v. Daulat Ram*.
- (1931) 18 AIR 1931 Lah 233 (235) : 131 Ind Cas 292 (DB), *Milhi Ram v. Rupchand*.
- (1931) 130 Ind Cas 570 (570) (DB) (Lah), *Jesa Ram Diwan Chand v. Lachman Das*.
- (1929) 16 AIR 1929 Lah 591 (591) : 123 Ind Cas 90 (DB), *Hannu Ram v. Jhanda*.
- (1929) 16 AIR 1929 Lah 421 (422) : 116 Ind Cas 464 (DB), *Dalip Singh v. Jowahar*.
- (1929) 16 AIR 1929 Lah 264 (264) : 10 Lah 748 : 115 Ind Cas 853 (DB), *Fateh Mahomed v. Ganga Singh*.
- (1930) 124 Ind Cas 624 (624) (Nag), *Gopal Das v. Ramnath*.
- (1925) 12 AIR 1925 Nag 9 (11) : 78 Ind Cas 234, *Sitaram v. Nandram*.
[See (1926) 13 AIR 1926 Lah 472 (472) : 97 Ind Cas 800, *Jalla Ram v. Labhu*. (Acknowledgment, if can be basis of suit, is doubtful.)]
- [See also (1944) 31 AIR 1944 Bom 19 (20, 21) : 211 Ind Cas 155 (DB), *Bai Shanta v. Trikamlal*. (An agreement in which the debtor admits certain amount to be due and provides a contingent security for that amount involves an implied promise to pay the amount acknowledged to be due and the creditor can recover the amount by a suit on the agreement.)]
- (1939) 26 AIR 1939 Lah 31 (34) : 182 Ind Cas 330 (DB), *Sri Chand Sheo Parshad Firm v. Lajjia Ram*. (In this case it is assumed that a suit can be based on an unconditional acknowledgment of liability.)
- (1916) 3 AIR 1916 Pat 39 (41) : 38 Ind Cas 85 : 2 Pat L Jour 24 (DB), *Baluk Chand v. Nathuni Singh*.
- (1924) 11 AIR 1924 Lah 684 (684) : 78 Ind Cas 163, *Firm Nanak Chand Kishori Lal v. Firm Ram Sarup Gujar Mal*.]

Maniram Seth v. Seth Rupchand,¹² in the course of which their Lordships of the Privy Council observed as follows :

"An unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference, if nothing is said to the contrary. It is what every honest man would mean to do."

But these decisions have overlooked the fact that their Lordships of the Privy Council have not said that the promise to pay, implied in an unconditional acknowledgment, would necessarily constitute a new *contract* between the parties. Hence, the above decisions must be regarded as not being in accordance with sound principles.

8a. Acknowledgment, if operates as fresh cause of action. — See Note 8 above.

8b. Acknowledgment if good evidence of debt.—An acknowledgment, express or implied that A owes money to B is about as good evidence as could be had that A owes B that money.¹

9. Distinction between this section and Section 25, clause 3, Contract Act. — Under this section, an acknowledgment of liability in respect of a debt must be made before the expiry of the period of limitation, in order to give a fresh start of limitation in respect of such debt. But, by virtue of s. 25, cl. (3) of the Contract Act, a fresh period of limitation for a debt can be obtained even after the expiry of the original period, if there is a *promise* in writing to pay such debt.¹ Reading the two sections together, it would appear that

12. ('06) 33 Cal 1047 (1058) : 33 Ind App 165 : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 16 Mad L Jour 300 : 1 Mad L Tim 199 : 3 All L Jour 525 : 2 Nag L R 130 (PC).

Section 19 — Note 8b

1. ('41) 28 AIR 1941 Rang 244 (245) : 198 Ind Cas 516, *Bhawani Sankar v. Ganga Prasad*.

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1. ('38) 25 AIR 1938 Rang 134 (135) : 1938 Rang L R 6 : 177 Ind Cas 63 (DB), *Smith v. Heptonstall*. (Equitable mortgage — Promissory note executed for the mortgage debt when the personal remedy has barred — Held that though the promissory note could not operate as a valid acknowledgment, it could be sued upon under S. 25 (3), Contract Act.)

('37) 24 AIR 1937 Lah 642 (644) : 174 Ind Cas 258 (DB), *Shanti Parkash v. Harnam Das*. (Reversed in ('38) AIR 1938 Lah 234 (FB), *Shanti Parkash v. Harnam Das*, on another point.)

('09) 2 Ind Cas 379 (380) : 31 All 495 (DB), *Mohammad Abdullah Khan v. Bank Instalment Co. Ltd.*

('81) 1881 All W N 95 (95) (DB), *Karan Mal v. Bal Kishen*.

('13) 20 Ind Cas 809 (809) (DB) (Cal), *Matu Sheikh v. Baikantha Nath Kar*, (The promise need not be made with the consciousness that the debt is barred.)

('13) 21 Ind Cas 254 (255) (DB) (Cal), *Bhawani Misser v. Peari Jha*. (Do.)

('78) 4 Cal 500 (508) : 3 Cal L R 554 (DB), *Heera Lall Mookhopadhyaya v. Dhunpat Singh Bahadur*.

('06) 1906 Pun L R No. 22, p. 78 (80) : 1905 Pun Re No. 102 : 1905 Pun W R No. 134, (DB), *Mahbub Jan v. Nuruddin*.

('99) 23 Mad 94 (97, 98) : 9 Mad L Jour 330 (DB), *Appa Rao v. Surya Prakasa Rao*. (It is not necessary that the promisor should be aware of the debt having been barred.)

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the expression "promise" is used in S. 25, cl. (3) of the Contract Act as contradistinguished from an acknowledgment and does not include a promise which is merely implied in an acknowledgment of liability.²

('83) 6 Mad 293 (294) : 7 Ind Jur 357 (DB), *Narayanasami v. Samidas*. (Plaintiff sued the defendant, a Hindu, to recover the amount secured by a promissory note executed by the latter's deceased father, in consideration of a debt for which the plaintiff sued the father and which had been declared barred by limitation — Held that the defendant was bound to pay the debt from any assets of his father received by him.)

See also Section 29 Note 2.

2. ('49) 36 AIR 1949 Oudh 48 (51) : 23 Luck 47 (DB), *Suraiya Begam v. Hamid Ali Khan*.

('41) 28 AIR 1941 Nag 100 (101) : ILR (1941) Nag 144 (DB), *Shivjiram v. Gulabchand*. (An acknowledgment to the effect that after taking old accounts into consideration there remains to be paid a balance of Rs. 3200 is not a promise to pay within the scope of Section 25 (3), Contract Act.)

('38) 25 AIR 1938 Lah 234 (240) : ILR (1938) Lah 193 : 174 Ind Cas 277 (FB), *Shanti Parkash v. Harnam Das*. (('37) AIR 1937 Lah 642 (DB), *Shanti Parkash v. Harnam Das* reversed on another point.)

('38) 25 AIR 1938 Lah 264 (266) : 178 Ind Cas 259 (DB), *Basheshar Nath v. Baij Nath*. (Mere acknowledgment of liability without any express promise to pay or without any reference to the future liability to pay does not fall within the meaning of Section 25 (3), Contract Act.)

('38) 25 AIR 1938 Nag 180 (181) : ILR (1940) Nag 441 : 174 Ind Cas 374, *Ramprasad Jagbandhoo v. Anandi Brindawan*.

('32) 19 AIR 1932 All 461 (464) : 54 All 506 : 140 Ind Cas 783 (DB), *Girdarilal v. Bishun Chand*. (Reversed in ('34) AIR 1934 P C 147 (PC), *Bishun Chand v. Girdhari Lal* on another point.)

('35) 22 AIR 1935 All 129 (131, 132) : 152 Ind Cas 370 : 57 All 434 (DB), *Ghulam Murtaza v. Mt. Fasiunnissa Bibi*.

('31) 18 AIR 1931 All 160 (162) : 130 Ind Cas 702 (DB), *Allah Bakhsh v. Hamid*.

('08) 30 All 268 (270) : 5 All L Jour 274 : 1908 All W N 129 (DB), *Gobind Das v. Sarju Das*.

('01) 23 All 502 (504) : 1901 All W N 150 (DB), *Ganga Prasad v. Ram Dayal*.

('28) 15 AIR 1928 Bom 319 (321, 322, 323) : 112 Ind Cas 24 : 52 Bom 521 (DB), *Maganlal Harjibhai v. Amichand Gulabji*.

('12) 17 Ind Cas 722 (726) (Bom), *Jethibai v. Putlibai*.

('33) 20 AIR 1933 Cal 658 (659, 660) : 60 Cal 714 : 146 Ind Cas 834, *Satyakel Dutt v. Romesh Chunder*.

('29) 16 AIR 1929 Cal 444 (444) : 121 Ind Cas 412 : 57 Cal 394 (DB), *Sasi Kanta v. Sonaulla Munshi*.

('22) 67 Ind Cas 298 (299) (DB) (Cal), *Panchanan Poddar v. Khitish Chandra*.

('15) 2 AIR 1915 Cal 186 (187) : 25 Ind Cas 89 (DB), *Debi Prosad v. Ram Ghulam*.

('36) 23 AIR 1936 Lah 164 (165) : 161 Ind Cas 703, *Baru Mal v. Daulat Ram*.

('33) 20 AIR 1933 Lah 209 (209) : 141 Ind Cas 617, *Mukhi Lal Chand v. Gul Mahomed*.

('30) 17 AIR 1930 Lah 985 (990) : 12 Lah 239 : 129 Ind Cas 281 (DB), *Davindar Singh v. Mt. Lachhmi Devi*.

('08) 1908 Pun W R No. 206, p. 766 : 1908 Pun Re No. 119, *Pala Mal v. Tulla Ram*.

('07) 1907 Pun W R No. 173, p. 740 : 1907 Pun Re No. 132, *Gulzari Mal v. Kishen Chand*.

('86) 1886 Pun Re No. 36, *Pandit Harkishen Das v. Pir Baksh*.

('10) 7 Ind Cas 901 (901) (Mad), *Ramaswami Pillai v. Kuppuswami*.

('30) 17 AIR 1930 Nag 236 (237) : 124 Ind Cas 243, *Babulal v. Badridas Jainarayan*.

('32) 19 AIR 1932 Oudh 49 (51) : 7 Luck 313 : 135 Ind Cas 390 (DB), *Mt. Janaka v. Sheo Charan*.

To hold otherwise would be to nullify, so far as debts are concerned, the provisions of this section according to which an acknowledgment of liability would furnish a fresh starting point of limitation only if such acknowledgment is made before the expiry of the period of limitation.^{2a} No doubt, s. 29, sub-s. (1) provides that nothing in this Act shall affect s. 25 of the Contract Act. But it is submitted that s. 29 does not preclude s. 25 of the Contract Act from being construed in such a way as not to conflict with the provisions of this Act. At the same time, a promise under section 25, clause (3) of the Contract Act need not be *express*. It may be implied; only, it must be implied otherwise than by a mere acknowledgment of liability. It is a matter of construction of each document whether it amounts to a mere acknowledgment of liability or contains a promise within the meaning of s. 25, cl. (3) of the Contract Act.³ The view has often been expressed

('30) 17 AIR 1930 Oudh 287 (289) : 128 Ind Cas 276 : 6 Luck 7 (DB), *Lalji v. Ghashi Ram*. (Promise referred to in s. 25 (3) of Contract Act is a promise constituting a novation of contract.)

('30) 17 AIR 1930 Pat 604 (605) : 129 Ind Cas 95, *Kanai Lal Marwari v. Babulal Muchi*.

('29) 16 AIR 1929 Pat 258 (260, 261, 262) : 8 Pat 706 : 120 Ind Cas 470 (DB), *Deoraj Tewari v. Indrasan Tewari*. (If an acknowledgment contains express promise, such as fixing the date of payment and so on then it not only serves as an acknowledgment but also a promise under s. 25 (3) of Contract Act.)

('21) 8 AIR 1921 Pat 29 (30) : 60 Ind Cas 514 : 6 Pat L Jour 121 (DB), *Ram Bahadur Singh v. Damodar Prasad Singh*.

See also Article 64 Note 3.

2a. ('49) 36 AIR 1949 Nag 229 (234) : ILR(1948) Nag 639(DB), *Tulsiram v. Zaboo*.

('38) 25 AIR 1938 Nag 180 (181) : ILR (1940) Nag 441 : 174 Ind Cas 374, *Ram Prasad Jagbandhoo v. Anandi Brindawan*.

('08) 30 All 268 (270) : 5 All L Jour 274 (DB), *Gobind Das v. Sarju Das*.

3. ('49) 36 AIR 1949 Oudh 48 (51) : 23 Luck 47 (DB), *Suraiya Begam v. Hamid Ali Khan*. (An endorsement on back of promote after expiry of limitation that on accounting a certain sum is due up to date on account of principal and interest and that a certain sum is paid on that date constitutes merely an acknowledgment implying a promise to pay and not 'a promise to pay' within s. 25 (3).)

('43) 30 AIR 1943 Bom 447 (449) : 211 Ind Case 421, *Kasturchand v. Manekchand*. (Khata not referring to existing debt but reciting receipt of cash and liability to pay same—Not mere acknowledgment but a fresh promise.)

('38) 25 AIR 1938 Lah 505 (507) : 181 Ind Cas 115, *Punjab Zamindars Bank Ltd. Lyallpur v. Babu Mohammad Shaffi*. (A letter of acknowledgment admitting a certain sum as due under a promissory note and promising to pay it on a certain date can be the basis of suit although the promissory note is inadmissible.)

('38) 25 AIR 1938 Lah 757 (757, 758) : 178 Ind Cas 754, *Kishen Lal v. Gohli*. (Usual acknowledgment of balance due in plaintiff's *bahi* is treated in the Punjab as promise to pay.)

('78) 1878 Pun Re No. 3 (FB), *Ratta Ram v. Mt. Nano*. (Whether a statement of account amounts to a fresh contract must depend to a great extent on the nature of the accounts, the mode in which the statement is made and other circumstances of each particular case.)

('23) 10 AIR 1923 Cal 71 (72) : 72 Ind Cas 692 (DB), *Guljar Mandal v. Sariman Mandalini*. (Where old loan is acknowledged along with new, the transaction amounts to an agreement.)

('08) 1908 Pun W R No. 164, p. 579 : 1908 Pun Re No. 102, *Shankar Das v. Jasodhan*. (Held, that the entries were mere balances struck and acknowledgment of an existing debt, and at the utmost they amounted to an acknowledgment of the amounts found to be due at the time, and that they could not be

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construed as a new agreement between the parties within the meaning of S. 25 (3) of the Contract Act.)

('29) 16 AIR 1929 Pat 258 (261, 262) : 8 Pat 706 : 120 Ind Cas 470 (DB), *Deoraj Tewari v. Indrasan Tewari*. (Acknowledgment not mere admission of existing debt but words being such from which a clear promise to pay is made out, such as fixing the date of payment and so on — Such acknowledgment would come under S. 25 (3), Contract Act.)

('82) 6 Bom 683 (685) (DB), *Ramji v. Dharma*.

('84) 8 Bom 405 (407) (DB), *Ranchhoddas Nathubhai v. Jeychand Khushalchand*.

('25) 12 AIR 1925 Cal 338 (338) : 78 Ind Cas 139 (DB), *Kshitish Chandra Das v. Umed Mondal*.

('32) 19 AIR 1932 All 38 (40) : 132 Ind Cas 420, *Mihin Lal Jwala Prasad v. Marguerite Butter Dairy Farm*.

('86) 1886 Pun Re No. 36, *Pandit Har Kishen Das v. Pir Bakhsh*.

('04) 1904 Pun L R No. 123, p. 436 : 1904 Pun Re No. 68 (DB), *Ganpat v. Daulat Ram*.

('38) 25 AIR 1938 Mad 683 (684) : 177 Ind Cas 759, *Pattabhiramayya v. Krishna Rao*. (A record was made on the suit promissory note and the words used were "paid ten rupees towards the debt in this pronote" — The payee did not even say "my debt" or "what I owe under the pronote" — Held that the expression "debt in this pronote" did not amount to fresh promise.)

In the following cases it was held that an acknowledgment, fixing rate of interest to be paid, is not a mere acknowledgment and hence, the promise implied in such a case is sufficient for Section 25, Clause 3, Contract Act :

('49) 36 AIR 1949 Nag 229 (235) : ILR (1949) Nag 639 (DB), *Tulsiram v. Zaboo*. (A letter of acknowledgment promising to pay certain rate of interest on the sum admitted to be due comes within S. 25 (3), Contract Act.)

('38) 25 AIR 1938 Lah 234 (237) : I L R (1938) Lah 193 : 174 Ind Cas 277 (FB), *Shanti Parkash v. Harnam Das*. (Balance struck and interest fixed — This amounts to promise to pay—('37) A I R 1937 Lah 642 (DB), *Shanti Parkash v. Harnam Das*, reversed.)

('15) 2 AIR 1915 Lah 402 (402) : 1915 Pun Re No. 42 : 30 Ind Cas 84 (DB), *Makhan Lal v. Ganeshi Lal*.

('17) 4 AIR 1917 Lah 432 (434) : 1917 Pun Re No. 66 : 41 Ind Cas 915 (DB), *Bhagwan Singh v. Munshi Ram*.

('10) 8 Ind Cas 575 (575, 576) (Lah), *Bhola Ram v. Nanak Chand*.

('79) 1879 Pun Re No. 72, *Ladhu Shah v. Fazl Dad*.

('81) 1881 Bom P J 112 (DB), *Bai Kasiba v. Revabhai*.

('10) 8 Ind Cas 811 (812) (DB) (Lah), *Tirkha v. Rizak Ram*.

('29) 16 A I R 1929 Lah 511 (512) : 117 Ind Cas 377 (DB), *Om Parkash Wishwa Mitter v. Abdul Rahim & Sons*.

('29) 16 AIR 1929 Lah 695 (696, 697) : 122 Ind Cas 238, *Gopi v. Singh Ram*.

('07) 32 Bom 37 (45) : 9 Bom L R 1164 (DB), *Ganesh Narayan v. Vishnu Ram-chandra*.

(1900) 25 Bom 373 (375) : 2 Bom L R 1132 (DB), *Laxmibai v. Ganesh*.

('10) 5 Ind Cas 418 (419) (DB) (All), *Muhammad Abid Hussain Khan v. Bhagwan Das*. (Sarkhat executed in lieu of debt, partly barred and partly new — Held, there was new contract.)

('28) 15 AIR 1928 Nag 124 (125) : 106 Ind Cas 661, *Fadalilal v. Roachand*.

('23) 10 AIR 1923 Cal 659 (660, 661) : 79 Ind Cas 77 (DB), *Prasanna Kumar Pal v. Panaulla Miji*. (Where the balance operates to acknowledge a debt, a statement of future interest to be paid at a certain rate imports a promise to pay the debt as well.)

('82) 1882 Pun Re No. 33, *Jya Ram v. Sada Ram*. (It was only a fair and reasonable construction that a memorandum, signed by a debtor in the book of creditor, which acknowledges that one specified sum is to be received by the creditor with interest and another specified sum is to be received on a fixed date, contains a promise though in an indirect form, that he will pay the sum specified.)

that the promise under section 25 (3) of the Contract Act must be an *express* one as otherwise it will not be a promise made in writing.⁴ It is submitted that this view is not sound. A promise may be made expressly or impliedly in writing. By analogy, reference may be made to the words "acknowledgment made in writing" which occur in s. 19 of the Limitation Act. It is well established that these words will include an implied acknowledgment. (See Note 18.)

10. Acknowledgment and accounts stated—Distinction between. —
See Note 3 under Article 64.

11. Section to be liberally construed. — It is a general principle of the interpretation of statutes of limitation that such statutes being in derogation of the right to sue, exceptions to the statutes must be construed liberally. (See Preamble Note 10.) Hence, this section which contains an exception to the bar of limitation must be construed *liberally*.¹ In other words, the section must not be held to require an acknowledgment in any *particular form* or an *express* acknowledgment. Even a statement which, if *literally* construed, does not amount to an acknowledgment may be held to be sufficient for the purposes of this section, if it *implies* an admission of liability. (See Note 18.)

12. "Before the expiration of the period prescribed for a suit or application." — An acknowledgment of liability under this section must be made before the expiry of the period of limitation prescribed for the suit or application.¹ The expression "period pres-

4. ('38) 25 AIR 1938 Cal 861 (862) : 182 Ind Cas 368 (DB), *Satis Chandra v. Rampada Chattapadhyaya*. (Promise implied in an acknowledgment of liability is not enough as s. 25 (3) requires an express promise.)

('41) 28 AIR 1941 Nag 100 (101) : ILR (1941) Nag 144 (DB), *Shivjiram v. Gulabchand*. (Do.)

('38) 25 AIR 1938 Nag 180 (181) : I L R (1940) Nag 441 : 174 Ind Cas 374, *Ramprasad Jagbandhoo v. Anandi Brindawan*. (Do.)

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1. ('25) 12 AIR 1925 Mad 675 (680) : 91 Ind Cas 833, *Achuthan v. Kunnambrath Abdu*. (But in spite of the utmost liberality in construing this section, 'nothing can operate as an acknowledgment of liability, unless it can be brought within its terms'.)

('20) 7 AIR 1920 Lah 447 (448, 449) (DB), *Anantram v. Inayat Ali Khan*. (Acknowledgment of liability to pay interest under mortgage amounts to an acknowledgment.)

('19) 6 AIR 1919 Mad 941 (941, 942) : 46 Ind Cas 973, *Subba Rao v. Parasurama Pattar*. (Plaintiff, the assignee of debt, wrote to the defendant a letter requiring him to credit the amount due under the assignments in a specified manner and to pay him the balance, and the defendant wrote in reply that he could not comply because no assignment deed was shown to him and also because there were counter claimants claiming the amount for themselves — Held that the defendant's letter contained an acknowledgment of liability.)

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1. ('51) 38 A I R 1951 Mad 674 (Pr 8) : 1951-1 M L J 51 (55), *Karuvankandi Unichara v. Raru Nayar*. (Limitation for execution.)

('50) 37 A I R 1950 East Punj 157 (Pr 6) : 52 Pun L R 75, *Mt. Bhart v. Des Raj*. (Admission of existence of mortgage by mortgagee — Admission is of no avail to mortgagor unless within limitation prescribed for redemption suit.)

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- (148) 35 AIR 1948 Bom 125 (128) (DB), *Fakirchand v. Narmadabai*. (Darkhast for execution of mortgage decree for sale by mortgagee *N*—Subsequent money decree against mortgagor in favour of *F* — Execution petition by *F* — *F* applying for permission to bid at sale in execution of his decree stating that he would purchase subject to mortgage liability—Property purchased by *F*—Darkhast by *N*—*F*'s statement in his application for permission to bid, held did not amount to acknowledgment of liability so as to save limitation inasmuch as it could not possibly be said that there was before the period of limitation expired any statement either by the person sued or the person through whom he claimed title that he or his property was liable.— AIR 1943 Bom 461, *Fakirchand v. Narmadabai*, reversed.)
- (147) 34 AIR 1947 All 74 (80) : ILR (1947) All 11 : 229 Ind Cas 583 (FB). *Munshi Lal v. Hira Lal*. (One of prior mortgages time-barred at time of acknowledgment — Acknowledgment held could not support right to priority in respect of that mortgage.)
- (139) 26 AIR 1939 Nag 113 (118) : 184 Ind Cas 139 : I L R (1941) Nag 222 (DB), *Tapi Rai v. Shankarlal*.
- (138) 25 AIR 1938 Cal 861 (862) : 182 Ind Cas 368 (DB), *Satis Chandra v. Rampada Chattapadhya*.
- (138) 25 AIR 1938 Nag 180 (181) : I L R (1940) Nag 441 : 174 Ind Cas 374, *Ramprasad Jagbandhoo v. Anandi Brindrawan*. (Suit however must be based on original cause of action and not on acknowledgment.)
- (138) 25 AIR 1938 Rang 134 (138) : 1938 Rang L R 6 : 177 Ind Cas 63 (DB), *C. R. Smith v. Mrs. Heptonstall*.
- (106) 33 Cal 1047 (1059) : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 1 Mad L Tim 199 : 3 All L Jour 525 : 16 Mad L Jour 300 : 2 Nag L R 130 : 33 Ind App 165 (PC), *Maniram Seth v. Seth Rupchand*.
- (135) 22 AIR 1935 All 129 (131) : 152 Ind Cas 370 : 57 All 434 (DB), *Ghulam Murtaza v. Mt. Fasiunnissa*.
- (130) 17 AIR 1930 All 467 (468) : 123 Ind Cas 820 : 52 All 480 (DB), *Raj Narain Rao v. Ram Sarup*.
- (127) 14 AIR 1927 All 677 (678) : 49 All 496 : 100 Ind Cas 593 (DB), *Pralhad Prasad v. Bhagwan Das*.
- (126) 13 AIR 1926 All 155 (156) : 89 Ind Cas 402, *Reoti Ram v. Lachman Prasad*.
- (120) 7 A I R 1920 All 157 (158) : 42 All 390 : 58 Ind Cas 547, *Mutsaddi Lal v. B. B. & C. I. Ry. Co. & Rohilkhand-Kumaun Ry.*
- (179) 2 All 443 (444) : 4 Ind Jur 580 (DB), *Shib Dat v. Kalka Prasad*.
- (128) 15 AIR 1928 Bom 319 (320, 321) : 52 Bom 521 : 112 Ind Cas 24 (DB), *Magan Lal v. Amichand*. (The period prescribed by the first Schedule and the period within which a suit may be brought are distinct; and the difference is clear from the language of Section 3 of this Act.)
- (110) 7 Ind Cas 134 (138) (DB) (Bom), *Ramdas v. Chabil Das*.
- (183) 7 Bom 414 (417) : 8 Ind Jur 46 (DB), *Nahanibai v. Nathu Bhanu*.
- (182) 6 Bom 683 (685) (DB), *Ramji v. Dharma*.
- (177) 1877 Bom P J 118 (118) (DB), *Balaji v. Bankat*.
- (179) 5 Cal 303 (308) (DB), *Parbuttinath v. Tejomoy Banerji*. (Acknowledgment of liability given at a time when the period prescribed for bringing the suit under Section 30 of Bengal Act VIII of 1869, had already expired.)
- (131) 18 AIR 1931 Lah 691 (694) : 132 Ind Cas 590 : 13 Lah 240 (DB), *Diyalu Mal v. Nandu Shah Dev Raj*.
- (130) 17 AIR 1930 Lah 985 (990) : 129 Ind Cas 281 : 12 Lah 239 (DB), *Davindar Singh v. Mt. Lachhmi Devi*.
- (124) 11 AIR 1924 Lah 484 (485) : 78 I. C. 617, *Piroze Khan v. Kanhaiya Ram*.
- (108) 1908 Pun W R No. 164, p. 579 : 1908 Pun Re No. 102, *Shankar v. Jasodhan*.
- (178) 1878 Pun Re No. 28, *Dyal Singh v. Mangal Mal*.
- (136) 23 AIR 1936 Mad 70 (71) : 59 Mad 312 : 170 Ind Cas 856 (DB), *Sambasiva Ayyar v. Subramania Pillai*.
- (113) 17 AIR 1930 Mad 218 (221) : 122 Ind 504 : 53 Mad 480 (DB), *Rajarama v. Fakruddin Sahib*.

cribed" does not refer exclusively to the period prescribed by the *first schedule* to the Act. The expression will include any period prescribed by the *Act*, whether in the body of the Act or in the first schedule. Thus, an acknowledgment made during the special period of two years under section 31 (now repealed) will be within this section.² Similarly, an acknowledgment made during the additional period of limitation conferred by this section will be sufficient for the purpose of this section.³ So also will be an acknowledgment made before the expiry of the period of limitation as extended by the operation of section 14.⁴

It has also been held that even in cases, where the plaintiff is entitled to a deduction of time under the provisions of some *other Act*, the period will be a "period prescribed" within the meaning of this section. Thus, a period, in computing which time is deducted under S. 78, sub-s. (2) of the Provincial Insolvency Act, will be a "period prescribed" within this section.⁵ Similarly, it has been held by the Oudh Chief Court that the period which is got after deducting a certain time under S. 52 of the U. P. Court of Wards Act is a "period prescribed" within the meaning of this section.⁶ The Allahabad High Court has,

('30) 17 AIR 1930 Mad 65 (66) : 124 Ind Cas 301 (DB), *Ahmad Haji v. Mayan*.

('95) 5 Mad L Jour 241 (243) (DB), *Venkatacharlu v. Venkataramanjulu*.

('28) 15 AIR 1928 Nag 124 (125) : 106 Ind Cas 661, *Fadalilal v. Roohchand*.

('30) 17 AIR 1930 Oudh 287 (288, 289) : 128 Ind Cas 276: 6 Luck 7 (DB), *Lalji v. Ghasi Ram*.

('29) 16 AIR 1929 Oudh 479 (480) : 120 Ind Cas 825 : 5 Luck 510 (DB), *Narain Das v. Chandrawati Kuar*.

('30) 17 AIR 1930 Pat 604 (605) : 129 Ind Cas 95, *Kanailal v. Babulal*.

('29) 16 AIR 1929 Pat 258 (259, 260) : 8 Pat 706 : 120 Ind Cas 470 (DB), *Deoraj v. Indrasan*.

[See ('22) 9 AIR 1922 Bom 168 (169) : 46 Bom 419 : 64 Ind Cas 1002 (DB), *Narayan v. Chapsi*.]

2. ('27) 14 AIR 1927 All 114 (115) : 98 Ind Cas 1005 : 49 All 67 (DB), *Sheo Pratap Singh v. Tajamul Hussain*.

('27) 14 AIR 1927 All 577 (578) : 49 All 726 : 102 Ind Cas 111, *Abdul Ghani v. Chiranji Lal*.

('25) 12 AIR 1925 All 68 (68) : 80 Ind Cas 743 (DB), *Harish Chandra v. Mt. Kastola Kunwar*.

('13) 19 Ind Cas 658 (659) (DB) (All), *Moti Begam v. Har Prosad*.

('35) 22 AIR 1935 Mad 64 (66) : 153 Ind Cas 2 : 58 Mad 270 (FB), *Suryanarayana v. Venkataramaju*.

('30) 17 AIR 1930 Mad 991 (994) : 128 Ind Cas 867 : 54 Mad 445 (DB), *Seshayya Chetty v. Subbadu*.

3. ('87) 11 Bom 282 (283) (DB), *Atmaram v. Govind*.

('81) 6 Cal 340 (354) : 7 Cal L R 121 (DB), *Mohesh Lal v. Busunt Kumaree*.

4. ('30) 17 AIR 1930 Bom 187 (188) : 124 Ind Cas 791 (DB), *Dunichand v. Comptoir National D'Escompte D'paris*.

5. ('38) 25 AIR 1938 Mad 19 (22) : 1 L R (1938) Mad 439 : 176 Ind Cas 321 (DB), *Sambayya v. Pedda Subbayya*.

[See also ('45) 32 AIR 1945 Mad 215 (216) : 1945-1 M L J 298, *Velayudha v. Annamalai*. (Acknowledgment of debt in insolvency schedule — Period under S. 78 (2), Provincial Insolvency Act, can be deducted from fresh period given by acknowledgment.)]

6. ('37) 24 AIR 1937 Oudh 26 (28, 29) : 165 Ind Cas 269 : 12 Luck 531 (DB), *Sukhnandan Prasad Shukla v. Ahmad Ali Khan*. (Section 52 of U. P. Court of Wards Act directing certain period, viz., the period during which an estate is

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however, taken a contrary view,^{6a} on the ground that a period which is required to be excluded in computing the period of limitation is not a "period prescribed."

The extra time which a litigant gets under section 4 is not part of a period prescribed. The reason is that under that section, the period prescribed for a proceeding is not affected at all. The effect of the section is only to permit the proceeding to be instituted notwithstanding the expiry of the prescribed period. Hence an acknowledgment made after the expiry of the limitation but during the vacation will not save limitation under this section.⁷

In a few decisions⁸ it has been held that the expression "period prescribed" refers only to the period prescribed by the first schedule and that, therefore, the extra period to which a suitor is entitled under section 4 cannot be included within the expression. Though the *decision* in such cases must be held to be correct in view of what is said above, the *reasoning* is not correct. The true reason for holding that the extra period under section 4 does not form part of the period

under the management of the Court of Wards, to be excluded in computing the period of limitation for suits against the ward - Acknowledgment made before the expiry of the period computed thus, i. e., after excluding the period mentioned in the above provision, is acknowledgment made within the period of limitation "prescribed.")

6a ('47) 34 AIR 1947 All 199 (201): I L R (1946) All 532 : 226 Ind Cas 440 (DB), *Sheo Shanker v. Motilal*. (The words in S. 19 are "before the expiration of the period prescribed." This must mean prescribed by the Act, read by itself and without reference to any other enactment. Section 19, therefore, cannot apply to an acknowledgment made after the expiry of limitation prescribed but during the period excluded by S. 9 (5) of the U. P. Encumbered Estates Act.)

('38) 25 AIR 1938 All 217 (220) : I L R (1938) All 363 : 175 Ind Cas 556 (FB), *Shankar Lal v. Rana Lal Singh*.

7. ('47) 34 AIR 1947 Oudh 3 (4): 21 Luck 447: 225 Ind Cas 497, *Ram Manorath v. Ram Bhulawan*.

('41) 28 AIR 1941 Nag 100 (101) : I L R (1941) Nag 144 (DB), *Shivjiram v. Gulabchand*. (('28) AIR 1928 Nag 192, *Jhanaklal v. Gulabchand*, held no longer good law.)

('38) 25 AIR 1938 Lah 234 (236) : I L R (1938) Lah 193 : 174 Ind Cas 277 (FB), *Shanti Parkash v. Harnam Das*. (AIR 1937 Lah 162, *Kishan Singh v. Sardar Ali*, overruled.)

('02) 26 Bom 782 (784) : 4 Bom L R 608 (DB), *Hemkore v. Masamali*.

('29) 16 AIR 1929 Cal 68 (68, 69) : 114 Ind Cas 483 : 55 Cal 1210, *Debendranath Roy v. Kartic Prasad Das*.

('37) 24 AIR 1937 Mad 367 (368) : 169 Ind Cas 653, *Chidambaram Chettiar v. Venkatasubba Naik*.

('37) 24 AIR 1937 Lah 642 (643, 644) : 174 Ind Cas 258, *Shanti Parkash v. Harnam Das*. (Reversed in AIR 1938 Lah 234 (FB) on another point.)

[See ('38) 25 AIR 1938 All 217 (219) : I L R (1938) All 363 : 175 Ind Cas 556 (FB), *Shankar Lal v. Rana Lal Singh*. (('27) AIR 1927 All 577, *Abdul Ghani v. Chiranji Lal*, impliedly overruled.)]

[But see ('13) 19 Ind Cas 820 (821) (Bom), *Visram v. Tabaji*.]

See also Section 4 Note 8 and Section 20 Note 10.

8. ('31) 18 AIR 1931 Cal 785 (786) : 58 Cal 1148 : 134 Ind Cas 1132, *Anisuddin Ahmed v. Kalipada Roy*.

('29) 16 AIR 1929 Cal 68 (68) : 55 Cal 1210 : 114 Ind Cas 483, *Debendranath Roy v. Kartic Prasad Das*.

('22) 9 AIR 1922 Nag 250 (252) : 65 Ind Cas 716 : 19 Nag L R 135, *Nandram v. Ranchhodas*.

prescribed for a suit, is, as already said, that under that section the period prescribed is not affected at all but the litigant is allowed to file his proceeding *after* the expiry of the prescribed period.^{8a}

In the undermentioned case⁹ the Bombay High Court also held that the expression "period prescribed" only refers to the period prescribed by the first schedule and that the extra period to which a person is entitled under section 6 is not a part of a period prescribed within the meaning of this section. But a contrary view is taken in a recent decision of the same High Court.¹⁰ The former view, it is submitted, is not correct in view of the above discussion. (See also Notes 13 to 15 below and Note 41 to section 6.)

13. Acknowledgment made under prior Act — Meaning of expression "period prescribed," with respect to such acknowledgment. — There is a conflict of decisions as to whether in the case of an acknowledgment of liability made while a prior Act was in force, the expression "period prescribed" must be understood as referring to the period prescribed by the prior Act or by the Act in force at the time of the institution of the suit. One view is that the above expression must be taken to refer to the period prescribed by the Act in force at the time of the acknowledgment.¹ The other view is that the expression must be taken to refer to the period prescribed by the Act in force at the time of the institution of the suit.² It is submitted that the latter view is correct on principle inasmuch as it is settled law that the period of limitation for a suit must be determined with reference to the Act in force at the time of the institution of the suit. (See Preamble Note 15.)

14. Applicability of section to period prescribed by special or local law. — Section 29, sub-s. (2), cl. (b) provides *inter alia* that this section does not apply to periods of limitation prescribed by special or local laws.^{1a} Hence, the view expressed in the undermentioned

8a. See ('35) 22 AIR 1935 P C 85 (87) : 62 Ind App. 80 : 57 All 242 : 155 Ind Cas 205 (PC), *Maqbul Ahmad v. Onkar Pratap*. (S. 4 does not alter the prescribed period — Not a case under S. 19.)

9. ('28) 15 AIR 1928 Bom 319 (320, 321) : 52 Bom 521 : 112 Ind Cas 24 (DB), *Magan Lall v. Amichand*. (The period prescribed by the first schedule and the period within which a suit by minor may be brought are distinct.)

10. ('50) 37 AIR 1950 Bom 94 (Para 13) : I L R (1949) Bom 741 (DB), *Udhavji Anandji v. Bapudas Ramdas*. (Observations to contrary in AIR 1928 Bom 319 : 52 Bom 521, *Maganlal v. Amichand*, held to be obiter and not followed.)

Section 19 — Note 13

1. ('33) 20 AIR 1933 Lah 47 (48) : 141 Ind Cas 425, *Punjab Ram v. Jowaya*.

('77) 1 All 425 (427) . 2 Ind Jur 115 (DB), *Daia Chand v. Sarfraz Ali*.

('94) 1894 All W N 87 (87) (DB), *Jamna Prasad v. Gokla*.

2. ('81) 5 Bom 688 (689) (DB), *Luvar Chunilal Ichharam v. Luvar Tribhovan Laldas*.

('82) 5 Mad 182 (184) (DB), *Mukkunni v. Manan Bhatta*.

('82) 12 Cal L R 277 (279) (DB), *Mongola Koiburte v. Annodaram*.

Section 19 — Note 14

1a. ('45) 32 AIR 1945 Bom 200 (205, 206) : ILR (1945) Bom 167 : 220 Ind Cas 67 (FB), *Janardan Eknath v. Ganesh Sadashiv*. (Suit under S. 72, Dekkhan Agriculturists' Relief Act — Section 19 does not apply — Overruling AIR 1944 Bom 89 : LR (1944) Bom 71, *Kishorelal Stores v. Jagannath*.)

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cases¹ that this section applies also to periods of limitation prescribed by special or local laws is not correct. But, the particular special or local law in question may itself expressly provide that this section shall apply to the periods prescribed by it. In such cases, this section will apply to such periods.²

As to the meaning of the expression "special or local law," see Note 6 under section 29.

15. Applicability of section to period of twelve years under Section 48 of the Civil Procedure Code. — It has been held that this section does not apply to the twelve years' period under S. 48 of the Civil Procedure Code.¹ For a full discussion of the question whether the twelve years' period under S. 48 of the Civil Procedure Code is a "period prescribed" within the Act, see Note 6 under S. 29.

See also Note 10 to section 20.

16. "Suit or application in respect of any property or right." — As pointed out in Note 1, the corresponding section in the Act of 1871 only applied to acknowledgments in respect of *debts or legacies*. The scope of the section was enlarged in the later Acts. It now applies to "suit or application in respect of any property or right."¹ Thus, the section applies not only to suits for debts or legacies

1. ('25) 12 AIR 1925 All 68 (68) : 80 Ind Cas 743 (DB), *Harish Chandra v. Mt. Kastola Kunwar*. (Obiter — Period prescribed by Agra Tenancy Act will be a "period prescribed.")

('30) 17 AIR 1930 Lah 978 (979) : 129 Ind Cas 125, *Buta Singh v. Bhan Singh*. (The period of two years within which a suit can be filed under Section 5, Punjab Act 3 of 1923, is the "period prescribed for the suit.")

2. ('44) 31 AIR 1944 Pat 310 (311):23 Pat 437 (DB), *Ramendra Kumar v. Brajamohan*. (By virtue of S. 239 (2), Orissa Tenancy Act, Ss. 19 & 20 apply to periods prescribed by Sch. III to that Act.)

('41) 22 Pat L T 416 (418) (DB), *Lachmi Narain v. Brahmdeo Narain*. (Section 19 of the Limitation Act applies and gives a fresh start of limitation in cases in which limitation is provided by Sch. 3 of the Bihar Tenancy Act by virtue of S. 185 (2) of that Act.)

('30) 17 AIR 1930 Pat 301 (304) : 9 Pat 747 : 126 Ind Cas 299 (DB), *Hasan Imam v. Brahmdeo Singh*. (By virtue of S. 185 (2), Bengal Tenancy Act, this section applies to periods prescribed by Schedule III of that Act.)

('29) 16 AIR 1929 Lah 124 (124, 125) : 114 Ind Cas 702, *Balak Ram Meher Chand v. Dev Raj*. (Period prescribed by Punjab Loans Limitation Act, 1904.)

('33) 20 AIR 1933 Cal 90 (92) : 141 Ind Cas 716 (DB), *Wazed Ali v. Brojendra Kumar*. (Period prescribed by Bengal Tenancy Act, Schedule 3.)

('22) 9 AIR 1922 Cal 187 (188, 189):64 Ind Cas 993 (DB), *Paresh Nath Pal Choudhury v. Ismail Sardar*. (Do.)

('05) 9 C W N 1025 (1926) (DB), *Harihar Lal v. Gunendar Pershad*. (By virtue of S. 185 (2), Bengal Tenancy Act, this section applies to periods prescribed by Schedule 3 of that Act.)

Section 19 — Note 15

1. ('17) 4 AIR 1917 Pat 485 (486) : 34 Ind Cas 27 : 1 Pat L Jour 214 (DB), *Krishna Dayal Gir v. Sankina Bibi*.

('08) 11 Oudh Cas 220 (223) (DB), *Bhikari v. Gauri Shankar*.

Section 19 — Note 16

1. ('28) 15 AIR 1928 Sind 45 (45) : 104 Ind Cas 572 : 22 Sind L R 117 (DB), *Hukumat Singh v. Nenumal Rejhumal*.

but also to suits for recovery of immovable property. Therefore, a suit for redemption of mortgage being a suit in respect of a property will be within the scope of the section.²

The expression "suit or application in respect of any property or right" read in the light of the words "against whom such property or right is claimed" which occur in the same clause, shows that it means a suit or application in which any property or right is *claimed*.

See also Notes 17 and 63.

17. "Application" — This section applies not only to suits but also to applications. Hence, an application for final decree in a mortgage suit can be saved from the bar of limitation by means of an acknowledgment under this section.¹

See also Note 63.

18. "Acknowledgment of liability" — Essentials. — The word "acknowledgment" is not a word of art and must be construed in its plain, literal sense.¹ Hence, an acknowledgment of liability under this section simply means an admission of the truth of one's liability.² The admission may be in any form³ and may be express or implied.⁴ In other words, a document alleged to contain an acknow-

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2. ('30) 17 AIR 1930 Bom 466 (475) : 54 Bom 625 : 128 Ind Cas 417 (FB), *Motilal Jadav v. Samal Bechar*.

[See also ('10) 5 Ind Cas 992 (993) : 1910 Pun Re No. 39, *Ganga Ram v. Pokhar Das*. (Johnstone, J., gives it as his personal view that it is doubtful whether the section was intended to apply to cases of acknowledgment of the continued existence of a mortgage and of the right of redemption.)]

Section 19 — Note 17

1. ('27) 14 AIR 1927 All 159 (160) : 49 All 147 : 98 Ind Cas 818 (DB), *Daldeo Sahai v. Jafar Husain*.

('19) 6 AIR 1919 Mad 709 (710) : 42 Mad 52 : 48 Ind Cas 298 (DB), *Subbalakshmiammal v. Ramalinga Chetty*.

Section 19 — Note 18

1. ('06) 33 Cal 1047 (1057, 1058, 1059) : 33 Ind App 165:4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874:16 Mad L Jour 300:1 Mad L Tim 199 : 3 All L Jour 525 : 2 Nag L R 130 (PC), *Maniram Seth v. Seth Rupchand*. (An acknowledgment of liability, should the balance turn out to be against the person making it, is a sufficient acknowledgment.)

('26) 13 AIR 1926 Sind 264 (268) : 96 Ind Cas 79 : 21 Sind L R 336, *Gordhandas v. Firm of Gokal Khalao*. (Acknowledgement need not contain an admission that a precise sum is owing; but an acknowledgment that something is or may be due is sufficient.)

2. ('39) 26 AIR 1939 All 483 (486) : ILR (1939) All 728 : 183 Ind Cas 685 (DB), *Risal Singh v. Lal Singh*.

See Concise Oxford Dictionary.

3. ('39) 26 AIR 1939 All 483 (486) : I L R (1939) All 728 : 183 Ind Cas 685 (DB), *Risal Singh v. Lal Singh*.

('97) 20 Mad 239 (242) : 6 Mad L Jour 266 (DB), *Periavenkan Udaya Tevar v. Subramaniam Chetti*.

('93) 16 Mad 220 (222) : 3 Mad L Jour 35 (DB), *Venkata v. Parthasaradhi*.

('77) 1877 Bom P J 133 (DB), *Small Cause Court Reference No. 28 of 1877*.

('73) 1873 Pun Re No. 79, *Ruttan Ram v. Hakim*.

4. ('51) 38 AIR 1951 Bom 255 (Pr 3) : ILR (1951) Bom 57 (DB), *Jainab Bibi v. Shankar Sakharan*.

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- ledgment of liability must be *liberally* construed.⁵ That is to say, in
- (44) 31 AIR 1944 Lah 88 (90):ILR (1944) Lah 528 : 213 Ind Cas 253 (DB), *Dial Singh v. Mohammad Ali*. (Acknowledgment of liability may be made impliedly as long as the implication is clear that the debtor or the person who was the debtor at the time did intend to acknowledge his liability.)
- (42) 29 AIR 1942 Pat 170 (173, 174):199 Ind Cas 657 (DB), *Ramdin v. Ramparichan*. (The admission of liability or acknowledgment must be one which can be implied from the facts and surrounding circumstances and is not one which is implied as a matter of law.)
- (39) 26 AIR 1939 All 483 (485) : ILR (1939) All 728 : 183 Ind Cas 685 (DB), *Risal Singh v. Lal Singh*.
- (38) 25 AIR 1938 Rang 84 (85) : 1937 Rang L R 421:175 Ind Cas 550, *Kasiviswanathan Chettyar v. Lakhmanan Chettyar*. (Endorsement of payment on back of promissory note.)
- (31) 18 AIR 1931 All 560 (561, 562):134 Ind Cas 254 (DB), *Salig Ram v. Radhay Shiam*.
- (07) 9 Bom L R 715 (718) (DB), *Gopalrao v. Harilal*. (Acknowledgment must relate to the liability in dispute and not *any* liability.)
- (10) 8 Ind Cas 81 (84) (DB) (Cal), *Hingu Miya v. Hiramba Chandra*. (Do.)
- (19) 6 AIR 1919 Lah 25 (25) : 1919 Pun Re No. 131:53 Ind Cas 425, *Arur Singh v. Partab Singh*. (Where a bond, executed by defendant, made mention of a separate bond for a certain sum executed by him in favour of plaintiff *held*, this statement implied that money was due to the plaintiff separately on the other bond and therefore amounted to an acknowledgment.)
- (36) 23 AIR 1936 Mad 70 (72) : 59 Mad 312 : 170 Ind Cas 856 (DB), *Sambasiva Ayyar v. Subramania Pillai*.
- (27) 14 AIR 1927 Mad 349 (349), *Arokiam Asary v. Vavana Rowthan*.
- (22) 9 AIR 1922 Mad 104 (104) : 45 Mad 443 : 70 Ind Cas 576 (DB), *Kondasami Reddi v. Suppammal*.
- (19) 6 AIR 1919 Mad 941 (941, 942):46 Ind Cas 973, *Subba Row v. Parasurama Pattar*. (Letter implying that the debt is due but that the defendant is unable to pay it because of the circumstances mentioned by him in the letter.)
- (93) 16 Mad 220 (223) : 3 Mad L Jour 35 (DB), *Venkata v. Parthasaradhi*.
- (1865) 2 Mad H C R 307 (309) (DB), *Kristna Row v. Hachapa Sugapa*.
- (30) 17 AIR 1930 Oudh 67 (68) : 5 Luck 446:124 Ind Cas 425 (DB), *Balbhaddar Singh v. Sheo Peary Lal*.
- (28) 15 AIR 1928 Sind 45 (45):104 Ind Cas 572:22 Sind L R 117 (DB), *Hukumat Singh v. Nenumal Rejhmal*. (The implication must be a necessary implication.)
- (25) 12 AIR 1925 Sind 181 (183) : 17 Sind L R 324 : 79 Ind Cas 914 (DB), *Ralliram Shewaram v. Bhudhram Parmanand*. (Do.)
- (19) 6 AIR 1919 Sind 33 (34) : 13 Sind L R 183 : 55 Ind Cas 822 (DB), *Fillip & Co. v. Mahomedalli Essaji*. (Do.)
- (16) 3 AIR 1916 Sind 47 (48) : 32 Ind Cas 548 : 9 Sind L R 143 (DB), *Bibi Saheb Zadi v. Mir Mohamad Shah*. (Do.)
- [But see (67) 8 Suth W R 334 (335, 336) (DB), *Gorachand Dutt v. Lokenath*. (Memoranda of payments made, endorsed on the bond and signed by the defendant are not acknowledgments within the meaning of S. 4 of Act of 1859.)
- (70) 1870 Pun Re No. 45, *Nuger Mull v. Osman*. (Acknowledgment within the meaning of S. 4 of Act of 1859, must be one distinctly stated in writing.)]
5. (19) 6 AIR 1919 Mad 941 (941, 942) : 46 Ind Cas 973, *Subba Row v. Parasurama Pattar*. (Plaintiff, the assignee of a debt, wrote to the defendant a letter requiring him to credit the amount due under the assignments in a specified manner and to pay him the balance and the defendant wrote in reply that he could not comply because no assignment deed was shown to him and also because there were counter-claimants claiming the amount for themselves — *Held* that the defendant's letter contained an acknowledgment of liability.)
- (20) 7 AIR 1920 Lah 447 (448, 449) (DB), *Anantram v. Inayat Ali Khan*. (Acknowledgment of liability to pay interest under mortgage amounts to an acknowledgment.)

construing such document, regard must be had to the *meaning* of the writer, judging from the document read as a *whole*⁶ and such surrounding circumstances as the Court can take into consideration in construing the document, rather than to the *literal* meaning of the words used.⁷

But the section requires a *definite* acknowledgment of liability.⁸ In other words, the document alleged to contain an acknowledgment of liability must *clearly contain within itself* the meaning that the

(‘25) 12 AIR 1925 Mad 675 (680): 91 Ind Cas 833, *Achuthan v. Abdu*. (But in spite of the utmost liberality in construing this section, ‘nothing can operate as an acknowledgment of liability, unless it can be brought within its terms.’)

6. (‘30) 17 AIR 1930 Lah 985 (989): 129 Ind Cas 281: 12 Lah 239 (DB), *Davindar Singh v. Mt. Lachhmi Devi*.

(‘36) 23 AIR 1936 Lah 629 (637, 638): 165 Ind Cas 723: 17 Lah 737 (DB), *Municipal Committee, Amritsar v. Ralia Ram*.

7. (‘31) 18 AIR 1931 All 560 (561, 562): 134 Ind Cas 254 (DB), *Salig Ram v. Radhay Shiam*. (Terms of contract to be found in older note—Renewed promissory note inadmissible in evidence as being insufficiently stamped—Plaintiff fall back on old note and the subsequent pronote can be used as acknowledgment.) [See also (1856) 6 Moo Ind App 393 (411): 18 Suth W R 81 foot-note: 2 Suther 29: 1 Sar 552 (PC), *Hunooman Persaud Panday v. Mt. Babooee Munraj Koonweree*. (Meaning of liberal construction of documents.)]

8. (‘51) 38 AIR 1951 Bom 255 (Pr. 3): ILR (1951) Bom 57 (DB), *Jainab Bibi v. Shankar Sakharam*. (The acknowledgment must be something positive—A mere absence of denial, in answer to a demand, cannot operate as an admission of liability.)

(‘39) 26 AIR 1939 All 483 (485): ILR (1939) All 728: 183 Ind Cas 685 (DB), *Risal Singh v. Lal Singh*.

(‘39) 26 AIR 1939 Cal 488 (488): 183 Ind Cas 473 (DB), *Corporation of Calcutta v. Monjoor Ahmed*.

(‘06) 33 Cal 1047 (1059): 33 Ind App 165: 4 Cal L Jour 94: 8 Bom L R 501: 10 Cal W N 874: 16 Mad L Jour 300: 1 Mad L Tim 199: 3 All L Jour 525: 2 Nag L R 130 (PC), *Maniram Seth v. Seth Rupchand*.

(‘36) 23 AIR 1936 All 522 (525): 163 Ind Cas 872 (DB), *Kamal Debi v. Khudadad*. (Admission that instalment of rent was due but *not clear* if the admission referred to the instalment claimed in the suit—No sufficient acknowledgment.)

(‘35) 22 AIR 1935 All 129 (131): 57 All 434: 152 Ind Cas 370 (DB), *Ghulam Murtaza v. Mt. Fasiunnissa Bibi*.

(‘17) 4 AIR 1917 All 304 (305): 39 All 357: 38 Ind Cas 105, *Lachman Das v. Ahmad Hasan*. (Objection to execution by arrest on ground of being poor—Mere absence of statement that debt had been discharged is not enough for acknowledgment.)

(‘07) 9 Bom L R 715 (718) (DB), *Gopalrao v. Harilal*.

(‘35) 22 AIR 1935 Rang 152 (155): 156 Ind Cas 783 (DB), *Maung Po Gyi v. R. K. Banerjee*. (Affidavit by defendant specifying his creditors with the amounts due to or claimed by them—Plaintiff included as one of the creditors but not clear whether the suit amount was put under the category of debt *due* or simply that of debt *claimed*—Held, no clear acknowledgment.)

(‘12) 15 Ind Cas 363 (365) (Low Bur), *A. P. S. V. Firm v. Shree Safatulla*.

(‘28) 15 AIR 1928 Sind 45 (45): 104 Ind Cas 572: 22 Sind L R 117 (DB), *Hukumat Singh Kundan Mal v. Nenumal Rejhumal*.

[See also (‘51) 38 AIR 1951 Nag 255 (Pr 18): ILR (1950) Nag 562 (DB), *Kashinath v. New Akot Ginning & Pressing Co. Ltd.* (The mere signing of a balance sheet by a director does not operate to save limitation because the director in drawing up a balance-sheet does not do so with the intention of acknowledging liability but under a duty where he is bound to set out, among other things, the claims made on the company.)]

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party is admitting his liability. Where the document is ambiguous and is equally capable of meaning either that the party is admitting a liability or that he is not doing so, the document is not sufficient for the purposes of this section.

Illustration.

A document stated that on accounts being made up between the parties a certain sum was found due to the plaintiff from the defendant and that a usufructuary mortgage was executed by the defendant. It was not clear whether the usufructuary mortgage was in lieu of the *whole* of the sum said to be found due or whether it was in lieu of only a *portion* of such sum so that the balance after deducting such portion was to be recoverable from the defendant. It was held that the document did not amount to an acknowledgment of liability in regard to such balance.⁹

An acknowledgment of liability necessarily implies a *knowledge* on the part of the person alleged to make the acknowledgment that he is admitting something. In other words, the section requires a *conscious* acknowledgment of liability.¹⁰ Hence, in considering whether

9. ('26) 13 AIR 1926 All 75 (76) : 89 Ind Cas 617 (DB), *Meharban Singh v. Panna Lal*.

10. ('43) 30 AIR 1943 Oudh 453 (456) : 19 Luck 279 : 209 Ind Cas 129 (DB), *Durga Prasad v. Kunj Behari Lal*. (The question whether an apparent acknowledgment contained in a document is a conscious acknowledgment of liability or not is of some difficulty, unless it is clearly and expressly acknowledged that the liability still exists.)

('43) 30 AIR 1943 Oudh 425 (429) : 209 Ind Cas 604, *Nanak Prasad v. Suraj Bakhsh Singh*. (Do.)

('29) 26 AIR 1939 All 483 (485) : ILR (1939) All 728 : 183 Ind Cas 685 (DB), *Risal Singh v. Lal Singh*.

('29) 16 AIR 1929 All 242 (242, 243) : 115 Ind Cas 627, *Chheda Lal v. Ghulam Abbas*. (Admission by defendant that he is mortgagee in possession is conscious admission of liability.)

('16) 3 AIR 1916 All 201 (204, 205) : 38 All 540 : 36 Ind Cas 452 (DB), *Khiali Ram v. Taik Ram*.

('25) 12 AIR 1925 All 353 (355) : 85 Ind Cas 584, *Mt. Sham Devi v. Bhagwat Dayal*. (Statement by A that he purchased certain mortgagee rights held to mean only that he purchased property which had come into the hands of the vendor as mortgagee and not that there was a subsisting mortgage with reference to the property.)

('08) 10 Bom LR 385 (387, 388) (DB), *Sheikh Mahomed v. Jamaluddin Mahamed*. (Mortgagor narrating the relationship of mortgagor and mortgagee — Latter admitting its correctness by signature — It is conscious admission.)

('12) 13 Ind Cas 702 (704) (DB) (Cal), *Chandra Kumar Dhar v. Ramdin Poddar*. (Decree-holder applying for execution for smaller sum than awarded by decree, by mistake — Judgment-debtor acknowledging liability for such smaller sum — Limitation saved only to the extent of such smaller sum — Acknowledgment imports knowledge of the burden one assents to bear.)

('31) 18 AIR 1931 Lah 122 (123) : 131 Ind Cas 349 (DB), *Haji Abdulla v. Bhoja Mal*. (X signing statement as scribe of Y does not admit the thing stated.)

('35) 22 AIR 1935 Mad 287 (288) : 159 Ind Cas 486, *Muthu Chettiar v. Venkatachalam Chetty*. (Where defendant purported to say 'no doubt there is a contract into which we entered, but no money is liable to be paid, because I am prepared to see the contract through' — Held no acknowledgment.)

certain words amount to an acknowledgment of liability, it must be seen whether, at the time of writing them, the writer had in his mind the question as to his liability (or other matter from which such liability is inferred), or whether he was thinking of and referring to some other matter.

Illustration.

A, a mortgagee who was entitled as such to possession of the mortgaged property, sued and obtained a decree for such possession. He obtained delivery of possession of the property under the decree and in token of his having received such delivery, gave a receipt acknowledging that he had received delivery of possession of the property *as directed by the decree*. The decree set forth the fact that the claim of the decree-holder was based on a mortgage. It was held that the reference to the decree was merely intended for the purpose of *defining* the thing delivered and at the time when the words containing such reference were written, the writer had no idea of saying anything about the *grounds* on which the decree was based. Hence, the receipt did not contain any acknowledgment of liability with respect to the mortgage so as to save limitation for a suit for redemption of the mortgage.¹¹

From the above, it is clear that the question whether a document contains an acknowledgment of liability depends purely on the terms of the document and their construction by the Court.¹² Where on a

(28) 15 AIR 1928 Sind 45 (45) : 104 Ind Cas 572 : 22 Sind L R 117 (DB), *Hukumat Singh Kundan Mal v. Nenuimal Rejhumal*.

[See (43) 30 AIR 1943 All 393 (399, 401) : ILR (1944) All 76 : 212 Ind Cas 238 (FB), *Gur Saran v. Shib Singh*.]

[See also (42) 29 AIR 1942 Pat 170 (174) : 199 Ind Cas 657 (DB), *Ramdin Singh v. Ram Parichan Singh*. (The intention of the law is to make an admission in writing of an existing jural relation equivalent for the purposes of limitation to a new contract, but for this purpose, the consciousness and intention must be as clear as they would be in a contract itself.)

(10) 27 Cal 1004 (1011, 1012) : 27 Ind App 103 : 4 Cal W N 565 : 7 Sar 718 (PC), *Fatimunnissa Begum v. Soonder Dass*. (Application for mutation of names not sufficient acknowledgment.)]

11. (84) 8 Bom 99 (102) : 8 Ind Jur 261, *Dharma Vithal v. Govind Sadvalkar*.

12. (39) 26 AIR 1939 All 177 (179) : I L R (1939) All 200 : 180 Ind Cas 535 (DB), *Ishri Prasad v. Chandrabhan Prasad*. (The Court cannot go beyond the words used in the document.)

(39) 25 AIR 1939 All 483 (485) : I L R (1939) All 728 : 183 Ind Cas 685 (DB), *Risal Singh v. Lal Singh*.

(26) 13 AIR 1926 All 75 (76, 77) : 89 Ind Cas 617 (DB), *Meharban Singh v. Panna Lal*.

(34) 21 AIR 1934 Bom 186 (188, 189) : 151 Ind Cas 376 (DB), *Chhaganlal v. Bonderbai*. (Admission of execution of promissory notes coupled with denial of liability is not acknowledgment.)

(31) 18 AIR 1931 Bom 74 (75) : 128 Ind Cas 911, *Velchand v. Bhagwandas*.

(35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai & Bros. v. R. D. Mehta & Co.* (Letter denying and repudiating liability is not sufficient acknowledgment.)

(21) 8 AIR 1921 Cal 331 (332) : 48 Cal 1046 : 64 Ind Cas 988 (DB), *Prasanna Kumar Ray v. Niranjana Ray*. (No useful purpose can be served by a meticulous

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reasonable construction of a document, it contains an express or implied admission by the author of the document of a subsisting liability, the document will operate as an acknowledgment of liability under this section.¹³ Where the document does not contain such admission, it

examination of other endorsements made under different circumstances and expressed in different phraseology.)

('19) 6 AIR 1919 Cal 48 (49, 50) : 53 Ind Cas 898 (DB), *Janardan Shaha Poddar v. Radha Bullav.* (Statement in *abichalnama* that accounts are remaining unadjusted, which arbitrators are to adjust, amounts to acknowledgment.)

('18) 5 AIR 1918 Cal 294 (298, 301) : 43 Ind Cas 893 (DB), *Kali Das v. Danapadi Sundara Dasse.* (Liability to account partly acknowledged—This section does not operate to save entire right.)

('11) 12 Ind Cas 378 (380) : 36 Mad 68 (DB), *Annappa Chetty v. Devrajulu Naidu.* (Unless the language of the document be identically the same, a decision upon the construction of one document is not of much assistance to the Court in construing another.)

('30) 17 AIR 1930 Oudh 67 (68, 69) : 5 Luck 446 : 124 Ind Cas 425 (DB), *Balbhadar Singh v. Sheo Peary Lal.*

('20) 7 AIR 1920 Oudh 236 (239) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh v. Bir Ram.*

13. Acknowledgments relating to mortgage.

('47) 34 AIR 1947 All 214 (223) : I L R (1946) All 375 : 222 Ind Cas 632 (DB), *Ram Narain Singh v. Nawab Singh.* (A mortgage of 1916 was replaced by a mortgage of 1922 which was invalid owing to defect in registration. The references to the 1916 mortgage in the 1922 mortgage instrument were these : In para 8 it was expressed that the Ghaziabad property "already stands pledged and hypothecated to the creditors under the document of 1916 in respect of the amount whereof this document has been executed". By para. 11 of the same document it was said that it "has been executed in place of the previous document, therefore the creditors shall have all the usual rights to the property hypothecated under this document which they had under the document of 1916." And by para. 13 it was said "that the creditors shall always have the power to realise their money jointly and severally whenever and in whatever way they like, by enforcement of the prior hypothecation lien." *Held*, that the above passage constituted an admission of liability under the 1916 mortgage.)

('45) 32 AIR 1945 Nag 212 (213) : I L R (1945) Nag 728, *Shriram v. Maroti.* (Endorsement on back of mortgage that debt was separately due on a particular previous mortgage is an acknowledgment of liability with respect to previous mortgage.)

('43) 30 AIR 1943 Oudh 164 (168, 169) : 18 Luck 601 : 204 Ind Cas 444 (DB), *Sheo Prasad v. Parkash Ram.* (Where a subsequent mortgagee who is impleaded in a suit on the prior mortgage produces the mortgage in his favour and its genuineness is admitted by the plaintiff, the prior mortgagee, and it is recorded and signed it amounts to an acknowledgment of liability.)

('39) 26 AIR 1939 Pat 427 (428) : 180 Ind Cas 795 (DB), *Bachu Lal v. Jang Bahadur Rai.* (Recitation by mortgagee while creating a sub mortgage of his rights and liabilities under the original mortgage amounts to acknowledgment for the purpose of saving limitation for a redemption suit by original mortgagor.)

('38) 25 AIR 1938 Mad 865 (875) : 181 Ind Cas 827 (DB), *Ramanathan Chettiar v. Dowlat Singjee.* (A letter written by the debtor (mortgagor) to a third person, in which the debtor agrees to give him a lien over certain properties "now with the creditor mortgagor as collateral security" (the title deeds having been deposited with the creditor as equitable mortgage previously) is an acknowledgment of the existence of the equitable mortgage.)

('13) 18 Ind Cas 909 (910) : 37 Bom 326 : 40 Ind App 68 (PC), *Hira Lal v. Narsi Lal.* (A *desai* mortgaged with possession certain *desaigiri dastur*. The Govern-

- ment resolved on paying a money allowance to the *desai* from the treasury instead of allowing him to collect from *raiya*s. The persons in whom the mortgagee rights were vested received the payments from the Government. The payment was entered in the Collector's books, the recipients being described as the mortgagees of the *desai*. To confirm this entry, the mortgagees signed a receipt as mortgagees. *Held* that the receipt amounted to an acknowledgment.)
- ('33) 20 AIR 1933 All 99 (100) : 142 Ind Cas 784 (DB), *Mahomed Rafi v. Kripa Ramji*. (Where the acknowledgment was not addressed to the mortgagors directly but was contained in a *dakhnama* which was filed in Court in an execution proceeding against the mortgagors and it appeared that the document after describing the property stated that it did not include an area which was in their possession as mortgagee, *held* that the document contained a valid acknowledgment in respect of the mortgage.)
- ('25) 12 AIR 1925 All 174 (175) : 85 Ind Cas 330 (DB), *Sanwal Das v. Ali Madhi*. (A statement made by the sub-mortgagees in a sale proclamation relating to the mortgaged properties wherein they had stated that the sub-mortgage was subject to the original mortgage, *held* was an acknowledgment.)
- ('24) 11 AIR 1924 All 458 (458, 459) : 89 Ind Cas 118 (DB), *Sidhari Ram v. Gargi Din*. (Sale of mortgagee rights — Sale deed containing statement by mortgagee that he was mortgagee of A and he purported to sell his mortgagee rights to defendant — *Held* that statement was sufficient acknowledgment of the subsisting mortgage.)
- ('09) 1 Ind Cas 510 (511) (All), *Genda Mal v. Ilahi Baksh*. (In sub-mortgage the mortgagees stated "that they held the property under the two mortgages of the 4th September 1839 and the 21st September 1839." *Held* that this statement constituted an acknowledgment.)
- ('30) 17 AIR 1930 Bom 466 (474) : 54 Bom 625 : 128 Ind Cas 417 (FB), *Motilal Jadav v. Samal Bechar*. (A sub-mortgage amounts to a valid acknowledgment that the property at that date was still held in mortgage by mortgagee.)
- ('28) 15 AIR 1928 Bom 264 (265) : 111 Ind Cas 881 (DB), *Ishram Govind v. Trimbak Ganpat*. (Award providing for instalment payment of mortgage amount — Suit on mortgage — Mortgagor pleading that mortgage had merged in award — Admission of liability under award involved in such plea amounts to acknowledgment of liability under award.)
- ('14) 1 AIR 1914 Bom 141 (142) : 38 Bom 177 : 23 Ind Cas 353 (DB), *Dinkar Hari v. Chhaganlal*. (Reference to previous mortgage debt in subsequent promissory note passed for another debt by same mortgagor is acknowledgment.)
- ('14) 1 AIR 1914 Bom 288 (289, 290) : 38 Bom 47 : 21 Ind Cas 407 (DB), *Bacharaj Nyahalchand v. Babaji Tulharam*. (An application by the plaintiff mortgagor was made to the Court for certifying certain payments in satisfaction of the decree, the decree being referred to therein as an outstanding decree and the payments being mentioned as payments made on account of the decree. The application was signed by the plaintiff and was consented to by the defendant. *Held* that the application clearly contained an acknowledgment.)
- ('33) 20 AIR 1933 Lah 33 (33, 34) : 140 Ind Cas 177, *Ralla Ram v. Bhana Mal*. (Mortgagee re-mortgaging property mortgaged to him — Recital in deed that property is mortgaged to mortgagee, is acknowledgment of existence of mortgage.)
- ('11) 11 Ind Cas 377 (377) (Lah), *Hari Chand v. Phiraya Ram*. (*Held*, that a statement contained in a plaint in a case filed by the grandfather of the mortgagee of immovable property, to the effect that it is mortgaged to him, amounts to an acknowledgment of liability in respect of the mortgagor's right to redeem.)
- ('84) 1884 Pun Re No. 97, *Ram Rakha v. Karam Chand*. (Agreement to refer to arbitration — Suit described as one "to redeem a one-storied house" and in the body of the agreement the house mentioned as the "mortgaged house." *Held*, that the above document contained a sufficient acknowledgment.)
- Acknowledgments of debts.*
- ('50) 3 Sau L R 124 (126) (DB), *Haridas v. Mathuradas*. (Acknowledgment stating that amount due includes interest — It amounts to acknowledgment of liability to pay interest and therefore Court can grant interest.)

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- ('45) 32 A I R 1945 Mad 407 (409) : 1945-2 M L J 17, *Somu Achari v. Singara Achari*. (A decree was obtained by plaintiff against his brother; and a charge was kept on defendants' property. Plaintiff then assigned the decree to a stranger who sought the arrest of judgment-debtor in the execution proceedings of the decree. The judgment-debtor wrote the following letter to his brother : "When you have the security of the property why should you send me to jail unnecessarily ? Realise the amount by proceeding against the property" : *Held*, that the letter amounted to an acknowledgment of subsisting liability.)
- ('44) 31 A I R 1944 Lah 65 (67) : 215 Ind Cas 30 (DB), *Baldeo Singh v. Harbans Singh*. (Letters by debtor to creditor asking to send accounts or further particulars of debts and net amount due with interest charged thereon held amounted to acknowledgments.)
- ('42) 29 AIR 1942 Mad 680 (681) : I L R (1942) Mad 927 : 205 Ind Cas 583 (DB), *Narayana Sooru v. Rama Rao*. (Pro-note executed by father and son — Statement of family liabilities including pro-note prepared by son on behalf of himself and his father and initialled by father on behalf of himself and as agent of son, as acknowledgment of its correctness — Pro-note subsequently endorsed by payee to plaintiff — Suit by plaintiff on pro-note against son on death of father : *Held* that the statement of liabilities amounted to an acknowledgment of liability.)
- ('39) 26 AIR 1939 All 179 (180) : 180 Ind Cas 542 (DB), *Ram Chander v. Firm Seth Kishen Lal Babulal*. (Debtor's letter to creditor informing him that he had asked his debtor to dispatch money to creditor and that he was also sending money to creditor amounts to acknowledgment.)
- ('33) 20 AIR 1933 All 352 (353) : 144 Ind Cas 903, *Raghubar Dayal v. Banwari Lal*. (Defendant admitting existence of promissory note but pleading that there was an agreement by which the plaintiff had agreed to take certain amount and that only a certain sum remained due under it — *Held* that it was a sufficient acknowledgment.)
- ('84) 7 Mad 392 (396) (DB), *Raman v. Vairavan*. (Letter by drawer of hundi to the drawee asking him to pay the amount covered by the hundi to the person in whose favour it is drawn, is sufficient acknowledgment.)
- ('08) 32 Bom 296 (299) : 10 Bom L R 374 (DB), *Srinivas Krishna Shiralkar v. Narhar Khando Khanvilkar*. (Statement by the defendant that he has asked creditor to take away the sum from a third party with whom he was deposited it is sufficient acknowledgment.)
- ('06) 3 All L Jour 800 (801, 802) : 1906 All W N 185 (DB), *Bholanath v. Net Ram*. (Where the defendants had money-dealings with the plaintiff and borrowed money from time to time and on several occasions — N as manager of the family acknowledged the amount remaining due by striking the balance and signing in plaintiff's account book, *held*, that the plaintiff was entitled to recover the balance due inasmuch as the acknowledgment is an acknowledgment of the accuracy of details of the account as appearing in the plaintiff's account book.)
- ('19) 6 A I R 1919 Cal 83 (84) : 46 Cal 746 : 53 Ind Cas 854 (DB), *Mahendranath Chaterji v. Lalit Mohan Datta*. (Hatchitta executed in lieu of old one amounts to acknowledgment.)
- ('25) 12 AIR 1925 Cal 338 (338) : 78 Ind Cas 139 (DB), *Kshitish Chandra Das v. Umed Mondal*. (Mablakbandi is good acknowledgment so as to preserve any debt due and not barred at the time when it was made.)
- ('74) 6 N W P H C R 150 (152) (DB), *Mullins v. Beddy*. (On the construction of the letter written by the maker of pronotes to the agent of the holder thereof previous to suit acknowledging his debt under the pronotes but praying for time to pay them up, *held*, that the letter was a sufficient acknowledgment to take the claim under the notes out of the statute of limitation.)
- ('35) 22 AIR 1935 Oudh 170 (175) : 153 Ind Cas 987, *Shah Muhammad Khan v. Ahmad Ali Khan*. (In answer to a letter by the creditor to the debtor stating the amount due to him, the debtor's secretary sent a letter by post reciting that he had been directed to intimate to the creditor by the debtor that all the arrears of accounts would be paid in a particular month — *Held*, that it was a sufficient acknowledgment of the debt.)

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- ('29) 16 AIR 1929 Cal 714 (715) : 56 Cal 556 : 121 Ind Cas 741, *Bengal National Bank Ltd. v. Jatindra Nath*. (Banker and Customer — Letter forwarding bills against overdraft — *Held*, sufficient acknowledgment.)
- ('20) 7 AIR 1920 Mad 488 (489) : 58 Ind Cas 446 (DB), *Perumal Goundan v. Jananukoola Dana Sekhara Sankanidhi*. (The cash-keeper of a fund wrote to the manager a letter clearly meaning thus : "I admit my liability to the *nidhi* and I am ready to pay the amount that is due from me as soon as I know from you or the higher authorities" — *Held*, that this was not a conditional acknowledgment of liability by the cash keeper but was sufficient to keep the liability alive as against him.)
- ('37) 24 AIR 1937 Rang 503 (504) : 173 Ind Cas 1006 (DB), *Shree Ramulu v. A. K. Chatterjee*. (Endorsement on policy of life assurance—Endorsement referring to assignment of policy in consideration of loan advanced on promissory note — Endorsement held acknowledgment of liability on promissory note.)
- Acknowledgments of liability pertaining to execution proceedings, etc. :*
- ('48) 35 AIR 1948 Nag 308 (310) : ILR (1947) Nag 683, *Bajya Hari v. Tarachand*. (Compromise decree passed on award — Decree providing for instalments with default clause — On default, decree-holder applying for final decree—Judgment-debtor in answer applying for instalments admitting liability under decree — It was held an acknowledgment of liability under S. 19 and as it was consciously made, a fresh period would start from date of acknowledgment for execution of decree.)
- ('45) 32 A I R 1945 Pat 280 (281) : 220 Ind Cas 378 (DB), *Satrughana Patro v. Ignesh Mohapatra*. (Application under O. 21, R. 2, C. P. Code by both parties — Prayer that payment be recorded "in part satisfaction"—Saves limitation.)
- ('39) 26 AIR 1939 All 483 (486) : ILR (1939) All 728 : 183 Ind Cas 685 (DB), *Risal Singh v. Lal Singh*. (Statement of judgment-debtor in reply to decree-holder's application for injunction, acknowledging existence of decree against him amounts to acknowledgment to save limitation.)
- ('39) 26 AIR 1939 Cal 399 (402) : ILR (1939) 2 Cal 33 : 187 Ind Cas 831 (DB), *Gumti Debi v. Jugal Kishore*. (Personal decree against A and his minor sons — Before decree, decree-holder applying for attachment before judgment — Properties disposed by A before their attachment—Suit by decree holder against A's sons for declaring dispositions as void — Mother as guardian ad litem of minor sons admitting decree to be unsatisfied but contending that other properties left by A are sufficient to satisfy decree — This amounts to acknowledgment.)
- ('24) 11 AIR 1924 Nag 147 (148) : 79 Ind Cas 66, *Daji Mahar v. Mahadev Kunbi*. (An unqualified admission of liability under a decree coupled with a declaration as regards the arrangement proposed for its satisfaction is an acknowledgment.)
- ('09) 2 Ind Cas 102 (105) : 1909 Pun Re No. 52, *Peachey v. Punjab Banking Company Ltd., Lahore*. (Letter to one decree-holder asking him to take steps for stay of sale under decree of another decree-holder acknowledges former's right.)
- ('17) 4 AIR 1917 Cal 422 (423) : 37 Ind Cas 738 (DB), *Jogendra Prosad Mittra v. Asutosh Goswami*. (Application for adjournment of execution sale — Judgment-debtor stating that on failure to pay decretal money on date of sale, he would not object to validity of sale—Application held to contain acknowledgment.)
- ('22) 9 AIR 1922 Cal 187 (189) : 64 Ind Cas 993 (DB), *Paresh Nath v. Ismail Sardar*. (Where the judgment-debtor expressly admitted that there was an instalment decree in favour of the decree-holder, that several instalments had already been paid, that the instalment for Pous remained unpaid but as it had not become due, the decree-holder could not proceed with the execution — *Held*, that was a sufficient acknowledgment.)
- ('33) 20 AIR 1933 All 364 (366) : 55 All 393 : 146 Ind Cas 836 (DB), *Adya Prasad Singh v. Lal Girish Bahadur Pal*. (An application made by the judgment debtor alleging that the matter had been settled, that in consequence of a part payment the decree-holder had agreed in his letter not to take out execution before the end of the next year and praying that the original letter of the decree-holder may be placed on the record was *held* in the circumstances to be an acknowledgment.)

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will not amount to an acknowledgment under the section.¹⁴

Miscellaneous.

('32) 19 AIR 1932 P C 55 (56) : 59 Ind App 130 : 11 Pat 272 : 136 Ind Cas 798 (PO), *Bhageshwari Charan v. Jagarnath Kuari*. (Estate which had been under management of manager appointed under Chota Nagpur Encumbered Estates Act restored to owner — Section 12 of that Act providing that the owner on such restoration shall not be competent to alienate any part of such estate without previous sanction of the Commissioner — Owner making gift to wife — Petition by wife to Commissioner praying that the gift must be sanctioned or that a fresh grant must be ordered on same terms — *Held*, that the petition contained clear acknowledgment that unless one of the two things was done, she had no title at all or that she recognized that the title was in the donor — ('29) AIR 1929 Pat 117 (DB), *Bageswari v. Jagarnath*, reversed.)

('99) 22 Mad 32 (37, 38) (DB), *Venkatagiri Rajah v. Sheikh Bade Saheb*. (A mu-chalka given by a tenant at the end of fasli, containing an undertaking to pay instalments of rent at dates then passed, amounts to an acknowledgment of liability.)

('17) 4 AIR 1917 Oudh 193 (194) : 20 Oudh Cas 13 : 38 Ind Cas 582, *Kubra Bibi v. Khudaija Bibi*. (During a pre-emption suit, by an inferior pre-emptor, the vendee entered into an agreement to sell the property, the subject matter of the suit, to a superior pre-emptor, on the ground of his preferential right — *Held*, the agreement was an acknowledgment of the right, but was not enforceable as it offended against rule of *lis pendens*.)

14. Acknowledgments relating to mortgage.

('43) 30 AIR 1943 Oudh 453 (456) : 19 Luck 279 : 209 Ind Cas 129 (DB), *Durga Prasad v. Kunj Behari Lal*. (A statement that in view of the fact that all mortgaged property has not yet been sold, the application for the preparation of a personal decree under O. XXXIV, R. 6, Civil P. C. is premature does not amount to an acknowledgment.)

('39) 26 AIR 1939 Mad 678 (681) : 189 Ind Cas 200, *Krishna Aiyar v. Subba Reddiar*. (Mortgage debt merged into decree — Acknowledgment of existence of decree is not acknowledgment of subsistence of mortgage debt.)

('67) 2 Agra 227 (227) (DB), *Chujjoo Singh v. Nazir Hossein*. (*Held*, on the construction of an entry in a *wajib-ul arz*, that it did not amount to an admission of a subsisting liability to be redeemed.)

('32) 19 AIR 1932 All 62 (63) : 136 Ind Cas 624 (DB), *Nait Ram v. Roshan Lal*. (The plaintiff sued on a first mortgage — In a prior suit on a second mortgage, the decree-holder had filed a statement under O. 21, R. 66, C. P. C., wherein he had informed the Court that upon an examination in the registration office he had found that there was a mortgage deed of the property — *Held*, that the statement did not amount to an acknowledgment.)

('25) 12 AIR 1925 All 353 (355) : 85 Ind Cas 584, *Mt. Sham Devi v. Bhagwat Dayal*. (Admission of purchase of mortgagee rights — No acknowledgment of liability to be redeemed.)

('16) 3 AIR 1916 All 201 (204, 205) : 36 Ind Cas 452 : 38 All 540 (DB), *Khiali Ram v. Taik Ram*. (Dakhalnama containing a description of property as mortgaged property is not acknowledgment.)

('36) 23 AIR 1936 Mad 70 (71, 72) : 59 Mad 312 : 170 Ind Cas 856 (DB), *Sambasiva Ayyar v. Subramania Pillai*. (The auction-purchaser was buying property which was described in the sale proclamation and sale certificate as subject to a mortgage and acknowledged that he had purchased property so described — *Held*, that this was not sufficient acknowledgment of liability under the mortgage.)

Letters repudiating liability.

('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai & Brothers v. R. D. Mehta & Co., Asansol*. (Letter denying and repudiating liability to pay is not sufficient acknowledgment.)

('34) 21 AIR 1934 Lah 475 (476) : 155 Ind Cas 238 (DB), *Sita Ram v. Mt. Mahmudi Begam*. (A letter stating that nothing is due but offering to pay as a matter of grace and for the sake of recommendation of a third person does not amount to an acknowledgment of liability but amounts to repudiation of liability.)

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- (19) 6 AIR 1919 Sind 33 (34, 35) : 13 Sind L R 183 : 55 Ind Cas 822 (DB), *Fillip & Co. v. Mahomed Ali Essaji*. ("Please note, no interest is to be charged as you know us, a century old, dealing with you." This does not convey an admission of liability to pay interest as it amounts to repudiation.)
- (23) 10 AIR 1923 Pat 298 (299) : 71 Ind Cas 565, *Rameshwar Dass Mali Ram v. East Indian Railway Company Ltd.* (A letter expressly repudiating liability does not amount to acknowledgment.)
- (25) 89 Ind Cas 376 (378) (Sind), *Sind Typewriting Co. v. Karachi Port Trust and British India Steam Navigation Co., Ltd.* (Do.)
- Suit for damages against Railway Company:*
- (07) 1907 Pun L R No. 2, p. 4 (8): 1906 Pun Re No. 108 (FB), *Moti Ram v. E.I. Ry. Co.* (Suit against Railway Company for compensation for non-delivery of goods—Letter from the Railway Company, which says "in regard to your claim for compensation, I regret the Railway is in no way responsible in this case," cannot be construed as an acknowledgment of liability, but, on the contrary, must be taken as a distinct repudiation of liability.)
- (18) 5 AIR 1918 Sind 6 (9) : 13 Sind L R 11 : 51 Ind Cas 570, *Ludhomal Purto-mal & Co. v. Secretary of State*. (Suit against Railway Administration—Goods delivered to a third person under an indemnity bond by the Railway—Letter from Railway informing that delivery of goods was perfectly correct—No acknowledgment of liability to plaintiff.)
- Miscellaneous :*
- (48) 35 A I R 1948 East Punj 36 (37) : 50 Pun L R 85, *Lukshmi Shud Khadi Bhandar v. Bhagat Singh*. (Letter by defendant stating that plaintiff owed something to defendant—Statement of account showing a balance due to defendant also accompanying letter—It is not acknowledgment of defendant's liability.)
- (39) 26 AIR 1939 All 177 (179): ILR (1939) All 200: 180 Ind Cas 535 (DB), *Ishri Prasad v. Chandrabhan Prasad*. (Where an endorsement was in these words: 'Signature of so and so, Rs. 25 paid to the mahajan in respect to (or relating to) this promissory note. Date May 2, 1931 by his own pen;' it was held, that it neither imported nor implied any acknowledgment whatsoever in respect to anything beyond the amount which was then paid—Note : See however Note 5 and the cases cited thereunder.)
- (39) 26 AIR 1939 Cal 488 (488) : 183 Ind Cas 473 (DB), *Corporation of Calcutta v. Monjoor Ahmed*. (Decree passed in respect of charge—Applications by judgment-debtor for adjournment in proceedings for rehearing under O. 9, R. 13, Civil P. C., do not constitute acknowledgment.)
- (71) 3 N W P H C R 129 (132), *Kalai Khan v. Madho Pershad*. (Letter containing a request to a third person to pay the plaintiff his dues is not an acknowledgment of liability.)
- (93) 22 Cal 952n (955n), *Administrator-General of Bengal v. Chunder Kant Moskerjee*. (Where the attorney of a party writes to the attorney of the opposite side in a suit which is coming for trial asking him to consent to a postponement "in order that the parties might settle the suit, and if they would not settle the case would go on," it was held that this was not an acknowledgment of liability in any sense of the term.)
- (33) 20 AIR 1933 Lah 491 (492) : 145 Ind Cas 343, *Mt. Umri v. Kalu*. (Gift by Hindu widow—Declaratory suit by reversioner—Defendant pleading that K was a preferential heir and plaintiff could not sue in her presence—Defendant's plea held not acknowledgment with reference to K's right.)
- (29) 16 AIR 1929 Lah 883 (884) : 123 Ind Cas 878, *Ramjimal Narain Das v. Gulzara Singh*. (The answer given to one of the interrogatories in a previous suit by the firm, merely stated an existing fact, namely, that there was an entry in the firm's account-books credited to the name of a certain person. Held, it was wrong to infer that an acknowledgment of an existing liability was made at the time the answer was given to the interrogatories.)
- (35) 22 AIR 1935 Mad 287 (288) : 159 Ind Cas 486, *Muthu Chettiar v. Venkata-chalam Chetty*. (Where the defendant purported to say "no doubt there is a

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Illustrations.

1. The Court of Wards in charge of an estate gave notice to a creditor of the estate, stating that it had been ascertained that a debt was due to him from the estate and requiring him to appear before the Collector with his account books and papers and informing him that he would then be questioned about the debt. It was held that the notice was an acknowledgment of liability as its opening sentence contained a clear admission of the debt, although the last sentence said that the creditor would be questioned about the debt.¹⁵
2. A letter from the debtor admitting the correctness of the account sent by the creditor and requesting for time for payment is an acknowledgment of liability.¹⁶

contract into which we entered but no money is liable to be paid under the contract because I am prepared to see the contract through" — *Held*, it did not amount to an acknowledgment.)

('26) 13 A I R 1926 Mad 452 (453) : 92 Ind Cas 626 (DB), *Kesavaramayya v. Venkataratnam*. (Resolution by a certain committee (which is debtor) authorizing certain of its members to execute a promissory note to the creditor is not acknowledgment of debt.)

('15) 2 AIR 1915 Mad 1155 (1155) : 28 Ind Cas 864 (DB), *Subramania Pillai v. Sankaralingam Chettiar*. (Acceptance of an award directing the parties to share equally the outstandings and "amounts payable" found in the accounts of the partnership is not an acknowledgment of liability.)

('10) 5 Ind Cas 756 (756) (Mad), *Muthia Nadar v. David Nadar*. (The fact that the defendant signed the account kept by the plaintiff does not necessarily show that he thereby acknowledged that there was debt due. The entry must show that the defendant by his signature acknowledged the debt, otherwise it would only be an acknowledgment of the correctness of the figures entered therein.)

('26) 13 AIR 1926 Nag 57 (59) : 90 Ind Cas 135 (DB), *G. I. P. Ry. Co. v. Radhakishan Jaikisan*. (Defendant suggesting compromise "without prejudice" — Suggestion is not acknowledgment.)

('25) 12 AIR 1925 Pat 473 (474) : 88 Ind Cas 478 (DB), *Imdad Ali v. Nand Kumar Lal*. (An admission that a certain party has purchased the property is not an admission that that party has acquired a good title in the property.)

('34) 21 A I R 1934 Rang 287 (288, 289) : 152 Ind Cas 501, *Talok Theingan v. Sevugan Chettyar*. (Bare signature of debtor on back of promissory note is not acknowledgment of liability.)

('17) 4 AIR 1917 All 304 (305) : 39 All 357 : 38 Ind Cas 105, *Lachman Das v. Ahmad Hasan*. (Objection to execution by arrest on the ground of being poor — Mere absence of statement that debt had been discharged is not admission of liability for it.)

('25) 12 A I R 1925 Sind 181 (183, 184) : 17 Sind L R 324 : 79 Ind Cas 914 (DB), *Ralliram Shewaram v. Budhram Parmanand*. (Statement denying defendant's liability to render an account to the plaintiff cannot be relied on as an acknowledgment.)

15. ('95) 17 All 198 (208, 209) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani v. Collector of Etawah*.

16. ('31) 18 AIR 1931 Bom 74 (75) : 128 Ind Cas 911, *Velchand v. Bhagwandas*. [See ('38) 25 A I R 1938 Pat 139 (139) : 174 Ind Cas 585, *Ramprabha Ojha v. Bishunath Ojha*. (The endorsement made by the debtor acknowledging the correctness of an account which showed him a debtor to the extent stated is a clear acknowledgment of the debt, with the ordinary implication of a promise to pay.)]

3. Where a decree is partly in favour of the plaintiff and partly in favour of the defendant, the plaintiff by merely applying for execution of that portion of the decree which is in his favour does not acknowledge liability in favour of the defendant.¹⁷
4. In a suit by a consignor of goods against a railway company for compensation for non-delivery of the goods, a letter written by the railway company informing the consignor that the goods are lying at a particular place and that the consignor's instructions as to their disposal are awaited, cannot serve as an acknowledgment of liability.¹⁸
5. In a suit for compensation for land compulsorily acquired by the Government, a letter written by the Commissioner of Revenue to the Magistrate of the District, expressing his willingness to recommend to the Government to pay for the land, cannot serve as an acknowledgment of liability.¹⁹
6. A letter was written by the executor of a will informing the plaintiff that his claim against the estate of the testator had been registered and that due notice would be given to him when the assets were to be distributed. It was held, that the letter did not contain any admission of the existence of the debt.²⁰

As to whether an endorsement of payment will operate as an acknowledgment, see Note 5.

Where a document contains an acknowledgment of liability, the fact that the document is not intended to be acted upon will not invalidate the acknowledgment.²¹ It is immaterial, for the purpose of this section, for what purpose the statement, containing the acknowledgment, is made.²² An acknowledgment of liability is sufficient under this section although accompanied by a statement that it is not to be enforced in a particular manner.²³ An acknowledgment of liability coupled with a proposal for its discharge in a particular manner is sufficient.²⁴ But the section requires an admission of *liability* of the

17. ('98) 22 Bom 998 (1000, 1001) (DB), *Jeddi Subraya v. Ramarao*.

18. ('20) 7 AIR 1920 All 157 (158) : 42 All 390 : 58 Ind Cas 547, *Mutsaddi Lal v. B. B. & C. I. Ry. Co. & Rohilkhand Kumaun Ry.*

19. ('69) 11 Suth W R 1 (2) (DB), *James Hills v. Magistrate of Nuddea*.

20. (1864) 2 Mad H C R 84 (87, 88), *Raja Iswar Das v. Richardson*.

21. ('30) 17 AIR 1930 Mad 796 (796, 797) : 125 Ind Cas 68, *Mariappa Goundan v. Palaniappa Goundan*.

22. ('41) 28 A I R 1941 Mad 772 (775) : I L R (1942) Mad 95 : 197 Ind Cas 199 (FB), *Mohana Reddi v. Gangaraju*. (Per Venkataramana Rao, J., in order of reference.)

('08) 10 Bom L R 385 (387) (DB), *Sheikh Mahomed v. Jamaluddin Mahomed*.

23. ('24) 11 AIR 1924 Mad 856 (857) : 82 I.C. 933, *Satyanarayana v. Ramireddy*.

24. ('42) 29 AIR 1942 Pat 170 (174) : 199 Ind Cas 657 (DB), *Ramdin Singh v. Ram-parichhan Singh*. (Writing signed by debtor containing details of account and stating amount due — Recital of handing over to creditor of title-deeds of value of debt — Use of word "*bhuktan*" — Held that the mere fact that the word "*bhuktan*" is used (meaning satisfied in full) would not make the writing anything other than an acknowledgment. In the absence of a formal assignment of the title-deeds in favour of the creditor, there is no novation of a contract

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defendant. Hence, a mere admission of the *title* of the plaintiff without in any way implying that there is any *liability* on the part of the defendant is not sufficient for the purposes of this section.²⁵

19. Conditional acknowledgment of liability. — In *Maniram Seth v. Seth Rupchand*,¹ their Lordships of the Privy Council observed as follows :

‘The Indian Limitation Act, section 19, however, says nothing about a promise to pay and requires only a definite admission of liability, as to which there can be no reason for departing from the English principle that *an unqualified admission and an admission qualified by a condition, which is fulfilled, stand upon precisely the same footing.*’

Hence, this section will apply not only where liability is admitted unconditionally but also where the admission is conditional, provided that the condition is fulfilled.²

Thus, where a person admits the existence of open and unsettled accounts between himself and another, there is impliedly an admission of liability coupled with a qualification of such admission by the condition that the balance is found on investigation to be against the person making the admission.³ Such an admission is sufficient for

within the meaning of S. 62 of the Contract Act, but only an inchoate proposition or arrangement for the liquidation of the debt.)

(‘24) 11 AIR 1924 Nag 147 (148) : 79 Ind Cas 66, *Daji Mahar v. Mahadeo*.

(‘38) 25 A I R 1938 Mad 496 (497) : 179 Ind Cas 236, *Ramaswami Mestrier v. Velayuthan Pillai*. (Admission of liability coupled with declaration as regards the arrangement proposed for its satisfaction is sufficient acknowledgment even if the proposed discharge proves ineffective.)

25. (‘03) 26 Mad 34 (37) : 12 Mad L Jour 101 (DB), *Ittappan Kuthiravattat Nayer v. Nanu Sastry*.

(‘97) 1 Cal W N 569 (572) (DB), *Jagabandhu Bhattacharjee v. Hari Mohan*. (It was observed that in this case the defendant not only admitted the title of the plaintiff to the lands in suit but also that he was in possession of the land.)

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1. (‘06) 33 Cal 1047 (1059, 1060) : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 1 Mad L Tim 199 : 3 All L Jour 525 : 16 Mad L Jour 300 : 2 Nag L R 130 : 33 Ind App 165 (PC).

[See also (‘42) 29 AIR 1942 Pat 170 (173, 174) : 199 Ind Cas 657 (DB), *Ramdin Singh v. Ram Parichan Singh*.]

2. (‘51) 38 AIR 1951 T-C 93 (Pr. 1) : 1950 K L T 640 (DB), *Lekshmi Amma v. Ittiavira Abraham*. (Debtor expressing willingness to pay debt if it is proved amounts to acknowledgment.)

(‘06) 29 Mad 519 (525) : 16 Mad L Jour 563 : 1 Mad L Tim 318 (DB), *Arunachella Row v. Rangiah Appa Row*.

(‘35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghela Bhai & Bros. v. R. D. Mehta & Co.*

See also cases in foot-notes (3) and (7) below.

3. (‘49) 36 AIR 1949 East Punj 219 (220), *Thakar Das v. Sant Ram*. (Mere admission of existence of account without admitting amount due in that account — It is sufficient acknowledgment of liability for amount which may be found due under that account.)

(‘50) 3 Sau L R 124 (126) (DB), *Haridas v. Mathuradas*. (It is not necessary that an acknowledgment should contain an unconditional promise to pay. It is suffi-

cient if there is an acknowledgment that the executant is a debtor to the other party in certain transaction though it is stated accounts of the transaction are still to be taken. The exact amount due may be ascertained on evidence.)

('40) 27 AIR 1940 Bom 172 (174) : ILR (1940) Bom 225 : 188 Ind Cas 805 (DB), *Abdul Latif v. Jawhar State*. (Per Sen, J. — Where a letter written by the defendants' pleader does not admit the balance mentioned in the notice sent to him and requests to take proper accounts and says that if on taking accounts some balance be found due from the defendant, he should be absolved from the dues, it amounts to an acknowledgment.)

('39) 26 AIR 1939 Mad 300 (301) : 184 Ind Cas 108, *Subbaramayya v. Iragam Reddi*. (Admission of existence of open account and expression of willingness to have it settled implies admission of liability for amount which may be found due on settlement.)

('06) 33 Cal 1047 (1059, 1060) : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 8 All L Jour 525 : 16 Mad L Jour 300 : 2 Nag L R 130 : 33 Ind App 165 (PC), *Mani Ram Seth v. Seth Rupchand*.

('30) 17 AIR 1930 All 124 (125) : 124 Ind Cas 24 (DB), *Mahomed Abdullah Khan v. Ford & MacDonald Co., Ltd.* (Even where it is doubtful on which side the balance would lie it is sufficient acknowledgment.)

('25) 12 AIR 1925 All 340 (341) : 87 Ind Cas 985 (DB), *Sant Lal v. Beni Prasad*.

('28) 111 Ind Cas 617 (618) (DB) (Bom), *Pandurang Shivram v. Maruti Niloba*.

('11) 10 Ind Cas 888 (889) : 35 Bom 302, *Ebrahim v. Chunilal*.

('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai & Bros. v. R. D. Mehta & Co.*

('29) 16 AIR 1929 Cal 714 (715) : 121 Ind Cas 741 : 56 Cal 556, *Bengal National Bank, Ltd. v. Jatindranath*.

('19) 6 AIR 1919 Cal 48 (49, 50) : 53 Ind Cas 898 (DB), *Janardan Shaha Poddar v. Radha Bullar*.

('99) 26 Cal 715 (723) : 3 Cal W N 524, *W. R. Fink v. Buldeo Dass*.

('36) 23 AIR 1936 Lah 629 (638, 639) : 165 Ind Cas 723 : 17 Lah 737 (DB), *Municipal Committee, Amritsar v. Ralia Ram*.

('32) 19 AIR 1932 Lah 470 (471) : 137 Ind Cas 840 (DB), *Kanshi Ram Banshi Ram v. Arjan Das*.

('20) 7 AIR 1920 Lah 359 (360) : 58 Ind Cas 787 : 1 Lah 357 (DB), *Ganga Sahai v. Khazan Chand*.

('10) 6 Ind Cas 948 (951, 952) : 1910 Pun Re No. 55 (DB), *Firm of Sherumal Chaina Mal v. Goldstein*.

('25) 12 AIR 1925 Mad 1260 (1262) : 91 Ind Cas 338 (DB), *Arunachellam Chetti v. Sethupathi*. (Letter stating that the arrears have not been paid for the sole reason that the accounts have not been settled is an acknowledgment that the accounts have to be settled and that the arrears found to be due, upon settling accounts, will then be paid up.)

('24) 11 AIR 1924 Mad 619 (619) : 80 Ind Cas 355, *Kumarasami v. M. Narayana Rao*.

('20) 7 AIR 1920 Mad 742 (742) : 59 Ind Cas 898, *Arumuga Chettiar v. Ramadan*.

('11) 12 Ind Cas 410 (410) (DB) (Mad), *Narayana Chetty v. Chidambaram Chetty*.

('87) 10 Mad 259 (264) (DB), *Sitayya v. Ranagareddi*.

('28) 15 AIR 1928 Pat 221 (223, 224) : 7 Pat 238 : 107 Ind Cas 533 (DB), *Joharmal Mathuradas v. Hira Lal Shewchand*.

('26) 13 AIR 1926 Sind 264 (268) : 21 Sind L R 336 : 96 Ind Cas 79, *Gordhandas v. Gokul Khataoo*.

[See ('47) 34 AIR 1947 Nag 145 (149, 150) : ILR (1946) Nag 796 : 226 Ind Cas 568 (DB), *Pachkodi Gulab v. Krishnaji*. (A writing in a sarkat or book of the creditor by the debtor to the effect "for making your account of the sarkat I will come on 22nd November 1936, to your place and will give (make payment)", is an acknowledgment of liability with a promise to pay the amount found due on taking accounts.)

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the purposes of this section provided that the balance is found to be against the person making the admission. In such a case, it is immaterial that the admission is accompanied by an assertion that nothing would be found due from the person making the admission or that the balance would be found to be against the other side.⁴

The admission of the existence of open and unsettled accounts between the parties may itself be express or implied.⁵ Thus, where in reply to a demand for payment by the creditor the debtor calls for accounts, he impliedly admits the existence of an unsettled account.⁶

(1909) 1 Ind Cas 240 (242) : 5 Nag L R 8, *Vithal v. Gopal Rao*.]

[See also (1950) 37 AIR 1950 Bom 94 (Para 13) : 1 L R (1949) Bom 741 (DB), *Udhavji Anandji v. Bapudas Haridas*. (Once an admission is made of subsisting amounts, there is a clear acknowledgment of liability to render accounts and to pay whatever is due.)]

[But see (1904) 31 Cal 195 (200) : 8 Cal W N 168, *Jogeshwar Roy v. Rajnarain Mitter*. (On appeal from (1903) 30 Cal 699, *Benode Behary v. Raj Narain*—Submitted not correct.)]

(1904) 1 All L Jour 58 (Jour). (Submitted not correct.)]

4. (1939) 26 AIR 1939 Mad 300 (301) : 184 Ind Cas 108, *Subbaramayya v. Iragam Reddi*. (A denial of liability for the amount claimed by the creditor based upon certain calculations by him cannot be read as a total denial of liability for any amount, but is only a denial of liability to the extent asserted by the debtor.)

(1987) 10 Mad 259 (265) (DB), *Sitayya v. Rangareddi*.

(1909) 2 Ind Cas 370 (370, 371) : 3 Sind L R 53 (DB), *Jesomal v. Bansimal*. (Such denial is not a denial of the right itself; it is only an assertion that the exercise of the right will be fruitless.)

[See also (1939) 26 AIR 1939 Lah 216 (217), *Mt. Diwanni Widyawati v. Ramji Das & Co.* (A letter of a debtor, who as agent collected rent of and looked after the bungalow of his principal, to the effect that according to his accounts kept correctly only a definite particular amount was due from him, being an admission of existence of an outstanding unsettled account between them amounts to an acknowledgment, as his assertion does not in any way make the unsettled outstanding account into a settled closed account.)]

[But see (1909) 4 Ind Cas 929 (932) (DB) (Lah), *Ram Pershad v. Rattan Chand*. (1987) 1887 Pun Re No. 60, *Murree Brewery Co. v. Hazuramal*.]

5. (1917) 4 AIR 1917 Mad 845 (845) : 36 Ind Cas 593, *Nagendran Chetty v. Kuppusami Aiyen*. (Letter saying, "I have insured and sent Rs. 100. On receipt of it please credit the said sum of Rs. 100 in our accounts" — Held that this letter acknowledges the existence of an account between the parties.)

[See (1940) 27 AIR 1940 Oudh 305 (206, 307) : 15 Luck 537 : 187 Ind Cas 624 (DB), *Deputy Commissioner, Kheri v. Brijendra Bahadur Singh*. (Entry in debtor's account books that payments are made 'alal hisab'—Held that it did not amount to payment in full settlement of account but merely payment towards that account and that the entry constituted an acknowledgment.)]

[See also (1948) 35 AIR 1948 East Punj 36 (37) : 50 Pun L R 85, *Lukshmi Shud Khadi Bhandar v. Bhagat Singh*. (Letter by defendant stating that plaintiff owed something to defendant—Statement of account also accompanying letter—Held, that the letter together with the statement of account did not imply an acknowledgment of open and unsettled account by the defendant within the meaning of S. 19, though the letter contained a request to the plaintiff to join with the defendant in referring the matter to arbitration for the settlement of the dispute, the dispute being with regard to the exact amount due by the plaintiff to the defendant and not by the defendant to the plaintiff.)]

6. (1935) 22 AIR 1935 Oudh 170(175) : 153 Ind Cas 987 (DB), *Shah Muhammad v. Ahmad Ali*.

(1939) 20 AIR 1933 Rang 147 (147, 148) : 144 Ind Cas 996, *Hamida Bi v. Abdul Gaffar*.

An admission of liability coupled with the condition that the liability is found by arbitrators to exist, is sufficient for the purpose of this section, provided that such condition has been fulfilled.⁷

Where a person admits the existence of unsettled accounts between himself and another but the accounts are submitted to arbitrators for settlement, the admission of the *existence* of unsettled accounts is *unconditional* and does not depend on the success of the arbitration proceedings. Hence, such admission will save limitation for a suit for *accounts* under this section, notwithstanding the failure of the arbitration proceedings.⁸

An admission of the *execution* of a promissory note coupled with a denial of liability under it on the ground that no consideration passed is not an acknowledgment of liability subject to proof of consideration.⁹

A statement by a debtor that he is willing to pay as soon as he hears from the creditor full details as to how much is exactly due from him, is an unconditional acknowledgment and not one which is subject to the condition that the debtor hears further from the creditor.¹⁰

('27) 14 AIR 1927 Lah 832 (832) : 101 Ind Cas 544, *Kirpa Ram Kashi Ram v. Devi Dayal Mal Dhan Raj*.

('33) 20 AIR 1933 Cal 90 (93) : 141 Ind Cas 716 (DB), *Wazed Ali Khan v. Brojendra Kumar*.

[But see ('11) 12 Ind Cas 378 (380) : 36 Mad 68 (DB), *Andiappa Chetty v. Devarajulu Naidoo*.]

7. ('27) 14 AIR 1927 All 488 (490) : 102 Ind Cas 181 : 49 All 801 (DB), *Phul Singh v. Bhojraj*.

('19) 6 AIR 1919 Mad 838 (839) : 48 Ind Cas 89 (DB), *Narayanasicami Mudali v. Gangadhara Mudali*. (Reference to arbitration fell through — No acknowledgment.)

('17) 4 AIR 1917 Mad 892 (893, 894) : 35 Ind Cas 575 : 40 Mad 701 (DB), *Ramamurthy v. Gopayya*. (Arbitration failing—No acknowledgment.)

('34) 21 AIR 1934 Lah 973 (974) : 154 Ind Cas 687, *Nanak Chand v. Omkar Nath* (Do.)

('37) 24 AIR 1937 Pat 616 (617) : 171 Ind Cas 946, *Sheo Charan Das v. Chhakovri Sao*. (Do.)

8. ('48) 35 AIR 1948 Nag 334 (339, 340) : 11LR (1947) Nag 477 (DB), *Fatechand Ganeshram v. Wasudeo Shrawan*.

('87) 10 Mad 259 (264, 265) (DB), *Sitayya v. Rangareddi*.

('37) 24 AIR 1937 Mad 38 (39, 40) : 169 Ind Cas 340, *Jankirama v. Narasimha*.

('28) 15 AIR 1928 Sind 45 (45, 47, 48) : 104 Ind Cas 572 : 22 Sind LR 117 (DB), *Hukumatsing v. Nenumal Rajhumal*. (Admission of the existence of an account, which implies a liability to pay the amount found due on a settlement of accounts, and the suggested mode in which the accounts should be settled are two different things.)

[See ('39) 26 AIR 1939 Sind 113 (123) : 11LR (1939) Kar 693 : 181 Ind Cas 596, *Tikamdas Mathradas v. Kalianji Gordhandas*. (Reference to arbitration for ascertaining and determining debts payable by the debtor — Recitals in a reference to arbitration admitting liability to pay a certain debt amount to sufficient acknowledgment even though the reference may prove infructuous.)]

9. ('34) 21 AIR 1934 Bom 186 (188, 189) : 151 Ind Cas 376 (DB), *Chhaganlal v. Bonderbai*.

10. ('20) 7 AIR 1920 Mad 488 (489) : 58 Ind Cas 446 (DB), *Perumal Goundan v. Jananukoola Danasekhara Sanka Nidhi Ltd.*

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Where one cosharer who was in exclusive possession of the whole property wrote a letter to the other cosharer calling upon him to pay up his share of expenses incurred by him for the repair of the property or surrender his interest, it was held that the acknowledgment of the other's right which the letter implied was not *conditional*.¹¹

Where a guardian filed the list of debts due by the estate of the minor in the guardianship Court and at the end of the list added that as the original documents were in the possession of the creditors it was difficult to fix the correct amount of each debt and to admit the correctness of the documents until they had been seen, it was held that the acknowledgment was conditional.¹²

20. Acknowledgment of past liability.— The section requires an acknowledgment of a *subsisting* liability.¹ A mere acknowledgment

11. ('24) 79 Ind Cas 279 (280) (Lah), *Balmokand v. Wazirchand*.

12. ('39) 26 AIR 1939 Lah 31 (34) : 182 Ind Cas 330 (DB), *Sri Chand Sheo Parshad Firm v. Lajjia Ram*.

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1. ('49) 36 AIR 1949 Mad 401 (402) : 1948-2 M L J 454, *Karamadai Naicken v. R. Raju Pillai*.
- ('48) 35 AIR 1948 Bom 125 (128) : ILR (1947) Bom 827 (DB), *Fakirchand v. Narmadabai*. (Acknowledgment must be an admission of some present liability of the person acknowledging corresponding to a present right in some one else.)
- ('48) 35 AIR 1948 East Punj 36 (37) : 50 Pun L R 85, *Lakshmi Shud. Khadi Bhandar v. Bhagat Singh*.
- ('45) 32 AIR 1945 All 224 (225) : I L R (1945) All 120 (DB), *Tulshi Ram v. Nek Ram*. (Acknowledgment of barred debt cannot save limitation.)
- ('41) 28 AIR 1941 Pat 147 (150) : 19 Pat 938 : 189 Ind Cas 855 (DB), *Mukhnarain v. Ram Lochan*.
- ('25) 12 AIR 1925 All 353 (355) : 85 Ind Cas 584, *Sham Devi v. Bhagwat Dayal*.
- ('20) 7 AIR 1920 All 92 (94, 95, 96) : 42 All 575 : 56 Ind Cas 986 (FB), *Anup Singh v. Fatehchand*.
- ('96) 18 All 384 (385) : 1896 All W N 101 (DB), *Hingan Lal v. Mansa Ram*. (A mere statement of a fact that a decree was passed against a party on a certain date for a certain amount is not an acknowledgment that there is a present liability under the decree.)
- ('99) 1899 All W N 222 (223) (DB), *Tirloki Nath v. Bhagwat Das*.
- ('82) 9 Cal 616 (618) : 12 Cal L R 284 (DB), *Ram Das v. Brijnundun Das*.
- ('16) 3 AIR 1916 Lah 234 (235) : 32 Ind Cas 497 : 1916 Pun Re No. 41 (DB), *Kalu v. Mehru Lal*.
- ('06) 1906 Pun L R No. 155, p. 508 (511) (DB), *Hari Charan v. C. Brooke*.
- ('22) 9 AIR 1922 Mad 104 (104) : 45 Mad 443 : 70 Ind Cas 576 (DB), *Kandaswami Reddi v. Suppammal*.
- ('19) 6 AIR 1919 Mad 317 (319) : 42 Mad 637 : 50 Ind Cas 380 (DB), *Rangasami Chetti v. Thengavalu Chetti*.
- ('02) 25 Mad 220 (232) (FB), *Narayana Ayyar v. Venkataramana Ayyar*.
- ('97) 20 Mad 239 (242, 243) : 6 Mad L Jour 266 (DB), *Udaya Tevar v. Subrahmaniam Chetti*.
- ('93) 16 Mad 220 (223) : 3 Mad L Jour 35 (DB), *Venkata v. Parthasaradhi*. (An intention to continue a subsisting relation of debtor and creditor until it is lawfully determined must also be evident.)
- ('32) 19 AIR 1932 Oudh 154 (155, 156) : 134 Ind Cas 1022, *Baij Nath Prasad v. Sheo Dularey*. (Mere statement of fact of decree having been passed is not sufficient acknowledgment of liability under it.)
- ('28) 15 AIR 1928 Sind 45 (45) : 104 Ind Cas 572 : 22 Sind L R 117 (DB), *Hukumat Singh v. Nenumal Rejhumal*.

of a *past* liability is not sufficient. Hence, a statement that a liability originally existed but that it has since been discharged is not an acknowledgment of liability within this section.²

An admission of a past liability, unaccompanied by a denial of the continuance of the liability, does not *necessarily* imply that such liability continues and that the admission is one of a subsisting liability.³ Doubts have, however, been felt about the question conse-

2. ('49) 36 AIR 1949 Mad 401 (402): 1948-2 MLJ 454, *Karamadai Naicken v. R. Raju Pillai*. (Document admitting mortgage debt but stating that it has been discharged in a particular mode—No acknowledgment.)

('48) 35 AIR 1948 East Punj 36 (37): 50 Pun L R 85, *Lakshmi Shud Khadi Bhandar v. Bhagat Singh*. (A letter written by the defendant to the plaintiff along with a statement of account to the effect that according to the account it is the plaintiff who owed something to the defendant, cannot amount to an acknowledgment of liability by the defendant—Fact that the account referred to the amount payable by the defendant to the plaintiff merely showed that some amount was due to plaintiff at one time and involved acknowledgment of past liability.)

('32) 19 AIR 1932 Oudh 154 (156): 134 Ind Cas 1022, *Baij Nath Prasad v. Sheo Dulary*.

('13) 20 Ind Cas 10 (11) (DB) (All), *Badri Dass v. Manohar Dass*. (Post-card stating, "we owe nothing to the shop styled *Moti Ram Bhojraj* because we have paid the amount of a *hundi* for Rs. 1200 on account of *Ghanshyamdas* proprietor of the shop aforesaid Nothing is now due by us"—*Held*, this was not acknowledgment but was a direct and express repudiation of the debt giving details of the manner in which it has been discharged.)

('06) 1906 Pun L R No. 155, p. 508 (511, 512) (DB), *Hari Charan v. C. Brook*.

('19) 6 AIR 1919 Mad 317 (319): 42 Mad 637: 50 Ind Cas 380 (DB), *Rangasami Chetti v. Thangavelu Chetti*.

('13) 21 Ind Cas 30 (31) (DB) (Mad), *Shaik Meera Sahib & Co. v. Nainar Lubbay*. (A plea of accord and satisfaction of a debt by reason of an agreement said to have been entered into between the parties at an earlier date, cannot be said to operate as an acknowledgment of specific liability at the time the plea was put in.)

('33) 20 AIR 1933 Nag 13 (14): 28 Nag L R 348: 141 Ind Cas 34, *Hira Lal v. Kripal Singh*.

('24) 11 AIR 1924 Pat 806 (807): 78 Ind Cas 919 (DB), *Chhaterdhari Mahto v. Nasib Singh*. (Where there was an acknowledgment that there was a mortgage but there was no express statement that it was discharged, but there was a statement that in order to pay it off a sale was effected and since the date of the sale the vendees had been in possession of the property, it was held that the writing did not constitute acknowledgment.)

('12) 15 Ind Cas 263 (365) (Low Bur), *A. P. S. V. Firm v. Shree Safatulla*. (Liability repudiated on the ground that plaintiff agreed to take 8 as. 6 ps. in full discharge of his claim without any reservation.)

See also Note 44.

3. ('35) 22 AIR 1935 Mad 371 (373): 157 Ind Cas 259, *Appasami Pillai v. Moran-gam Muthirian*. (Overruled in ('40) AIR 1940 P C 63 (PC), *Rama v. Lal Chand* on another point)

('33) 20 AIR 1933 Mad 565 (565): 143 Ind Cas 681, *Sakala Rattam v. Musalayya*.

('25) 12 AIR 1925 Mad 675 (676, 677): 91 Ind Cas 833, *Achuthan v. Abdu*.

('24) 11 AIR 1924 Mad 856 (857): 82 Ind Cas 933, *Satyanarayanamoorthy v. Ramireddi*.

('87) 1887 Pun Re No. 20, *Balmokand v. Ramji Lal*.

('31) 18 AIR 1931 Oudh 295 (296): 132 Ind Cas 542 (DB), *Ram Bilas v. Lachmi Narain*.

('30) 17 AIR 1930 Oudh 67 (68, 69): 5 Luck 446: 124 Ind Cas 425 (DB), *Bal-bhaddar Singh v. Sheo Pearey Lal*.

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quent on the judgment of the Privy Council in *Maniram Seth v. Seth Rupchand*.⁴ In that case, R and M had money dealings between each other. M died leaving a will under which R was one of the executors. R applied for probate of the will. To this, objection was taken on the ground that he was indebted to the estate and hence, was not entitled to apply for probate. R replied by a statement which ran as follows : "The applicant R is a big mahajan of Burhanpur paying Rupees 106 as income-tax. For the last five years he had open and current accounts with the deceased. The alleged indebtedness does not affect his right to apply for probate." The Privy Council held that this was a clear admission that there were unsettled accounts between the parties at the time of the death of M and that if nothing further was alleged, the natural presumption was that they continued unsettled at the time the statement was made. Hence, it was held by the Privy Council that there was an implied admission of liability by R, conditional upon the balance being found, on investigation, to be against him.

The above judgment of the Privy Council has been taken by the undermentioned decision⁵ to lay down that an admission of a past liability unaccompanied by any statement that it has been discharged, necessarily implies that the liability is subsisting at the time the admission is made. But, this view has not been generally accepted. The general view is that the Privy Council decision merely means that even a statement that a liability existed *may*, in the particular context in which it appears and in the circumstances, in the light of which it has to be interpreted, imply an admission of a subsisting liability.⁶ See also Notes 21 and 22 below.

[See ('30) 17 AIR 1930 Mad 65 (66) : 124 Ind Cas 301 (DB), *Ahmed Haji v. Mayan*. (In the circumstances of this case, it was held that the statement implied the admission of a subsisting liability.)]

4. ('06) 33 Cal 1047 (1056, to 1060) : 16 Mad L Jour 300 : 3 All L Jour 525 : 33 Ind App 165 : 2 Nag L R 130 : 1 Mad L Tim 199 : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 (PC).

5. ('09) 2 Ind Cas 522 (523) (Mad), *Ranganayakalu Aiyar v. Subbayan*.

[See also ('45) 32 AIR 1945 All 224 (225) : ILR (1945) All 120 (DB), *Tulsi Ram v. Nek Ram*. (In the absence of anything to the contrary when a debtor makes an acknowledgment of his liability to pay a debt it would ordinarily mean that he was admitting a subsisting liability to pay.)]

6. ('25) 12 AIR 1925 All 353 (355) : 85 Ind Cas 584, *Mt. Sham Devi v. Bhagwat Dayal*.

('22) 9 AIR 1922 Mad 104 (105) : 45 Mad 443 : 70 Ind Cas 576 (DB), *Kandasami Reddi v. Suppammal*.

('23) 10 AIR 1923 Mad 634 (635) : 73 Ind Cas 952 (DB), *Muthukumara Mudaliar v. Chokalinga Mudaliar*.

('27) 14 AIR 1927 Mad 219 (222 to 224) : 50 Mad 548 : 100 Ind Cas 10 (DB), *Swaminatha Odayar v. Subbarama Ayyar*. (When the admission of past liability is made in a deposition given in Court, the Court must be particularly careful to consider whether the witness had an opportunity of denying the continuance of the liability.)

('24) 11 AIR 1924 Mad 286 (288, 291) : 77 Ind Cas 740 (DB), *Official Assignee of Madras v. Subramania Aiyar*.

[See also ('21) 8 AIR 1921 Mad 464 (466, 467) : 70 Ind Cas 593 (DB), *Subramania Iyer v. Veerabadra Pillai*.]

21. **Admission of execution of document, whether implies admission of liability under it.** — The admission of the execution of a document does not necessarily imply an admission of a subsisting *liability* under it.¹ But such admission *may*, in the particular context in which it appears and the circumstances in the light of which it has to be construed, imply an admission of a present liability.² See also Note 20.

22. **Admission of execution of document before Sub-Registrar.** — In the undermentioned cases¹ it was held that the admission of the execution of a document, before the Sub-Registrar before whom it was presented for registration, was an acknowledgment of liability under the document. (See Note 21 above.)

23. **Submission to arbitration, if can be acknowledgment.** — See Note 19.

24. **Admission of existence of open and unsettled accounts, whether acknowledgment.** — See Note 19.

25. **Acknowledgment, if may be made by a person who is not liable at the time of the acknowledgment.** — There is a conflict of decisions on the question whether an acknowledgment under this section may be made by a person who is not under any liability with regard to the matter acknowledged *at the time of the alleged acknowledgment*. One view is that an acknowledgment of liability necessarily implies an acknowledgment by a person who, *at the time*, is under a liability in regard to the matter in question. Hence, according to this view, a so-called acknowledgment by a person, who is not under any liability in regard to the matter in question *at the time of the acknowledgment*, is not an acknowledgment at all under this section.¹ The other view is that it is not necessary

Section 19 — Note 21

1. ('24) 11 AIR 1924 All 70 (71) : 74 Ind Cas 353 : 45 All 679, *Lallu Mal v. Reoti Ram*.

('34) 21 AIR 1934 Bom 186 (188, 189) : 151 Ind Cas 376 (DB), *Chhaganlal v. Bonderbri*. (Admission of execution of note — Liability denied for want of consideration — There is no acknowledgment.)

('35) 22 AIR 1935 Cal 721 (722) : 63 Cal 512 : 159 Ind Cas 618, *Sagoremal Gopalka v. A. C. Banerjee & Co.*

(1865) 2 Bom H C R 330 (332), *Narbadashankar v. Raghunath Ishwarji*.

2. ('27) 14 AIR 1927 Mad 219 (222 to 224) : 100 Ind Cas 10 : 50 Mad 548 (DB), *Swaminatha Odayar v. Subbarama Aiyar*.

('35) 22 AIR 1935 Cal 721 (722, 723) : 63 Cal 512 : 159 Ind Cas 618, *Sagoremal Gopalka v. A. C. Banerjee & Co.*

Section 19 — Note 22

1. ('33) 20 AIR 1933 Mad 713 (714, 715) : 145 Ind Cas 654 : 57 Mad 43 (DB), *Rosayya v. Pitchayya*.

('23) 10 AIR 1923 Lah 369 (370) : 76 Ind Cas 751 (DB), *Labha Mal v. Iman Din*. [See also ('38) 25 AIR 1938 Mad 429 (432) : 182 Ind Cas 355, *Balasubramania Chettiar v. Manickam*. (Recital in sale deed as to liability under a mortgage — Admission of execution of deed before Registrar amounts to an acknowledgment as to mortgage saving limitation.)]

Section 19 — Note 25

1. ('51) 88 AIR 1951 Nag 240 (Para 5) : 1951 N L J 26, *Jiwanlal v. Ramrao*. (An admission by a decree-holder purchaser made in the course of execution of

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to constitute an acknowledgment that the person acknowledging must be under liability in regard to the matter in question *at the time of*

his decree that the property sought to be sold by him is subject to a mortgage is not an acknowledgment of liability in respect of the mortgage inasmuch as the admission is made at a time when he had no interest in the mortgaged property.)

('48) 35 AIR 1948 Bom 125 (128) : I L R (1947) Bom 827 (DB), *Fakirchand v. Narmadabai*. (An acknowledgment under S. 19, Limitation Act, must be an admission of some present liability of the person acknowledging corresponding to a present right in some one else. The person making an acknowledgment must, if he is not personally liable, be interested in some property which was liable for the debt in respect of which the acknowledgment is made : ('43) 30 AIR 1943 Bom 461 : I L R (1943) Bom 701, *Fakirchand v. Narmadabai*, Reversed.)

('41) 28 AIR 1941 Pat 147 (150) : 19 Pat 938 : 189 Ind Cas 855 (DB), *Mukhnarain v. Ram Lochan*. (One co-mortgagor redeeming entire mortgage and being subrogated to the original mortgage — Subsequent statement by the original mortgagee as to the existence of the mortgage is not an acknowledgment so as to save limitation for a suit for redemption of his share by another co-mortgagor against the redeeming co-mortgagor.)

('37) 24 AIR 1937 Lah 507 (511, 512) : I L R (1937) Lah 171 : 170 Ind Cas 245 (DB), *R. H. Skinner v. Bank of Upper India Ltd.* (Acknowledgment by person not himself liable will not have the 'legal quality' of acknowledgment — A mortgagor who though he has parted with the equity of redemption is still personally liable and can acknowledge so as to bind the transferee.)

('19) 6 AIR 1919 All 242 (242) : 51 Ind Cas 829 (DB), *Arbindakeb Rai v. Jageshar Rai*. (Acknowledgment by mortgagor when he is no longer liable is not binding on transferee of equity of redemption.)

'32) 19 AIR 1932 Oudh 1 (5) : 138 Ind Cas 800 : 7 Luck 270, *Amir Mirza Beg v. Lachhmi Narain*. (Do.)

('20) 7 AIR 1920 Mad 1026 (1033) : 62 Ind Cas 833 (DB), *Lakshmanan Chetty v. Muthaya Chetty*. (In order to bind puisne mortgagee, the mortgagor must have retained some substantial right in the property at the date of the acknowledgment in favour of first mortgagee.)

('32) 19 AIR 1932 Bom 531 (532) : 139 Ind Cas 218, *Amarchand v. Narayan*. (Acknowledgment by mortgagee before he gets the mortgage right cannot bind transferee of such right from him.)

('71) 3 N W P H C R 129 (132) (DB), *Kalai Khan v. Madho Pershad*. (In order to entitle creditor to fresh period of limitation there should be a distinct acknowledgment of the debt as due by the person who makes the acknowledgment — Statement which is consistent with the suggestion that other persons and not the person making the statement are liable is not acknowledgment of liability.)

[See also ('40) 27 AIR 1940 Mad 470 (473) : I L R (1940) Mad 872 : 188 Ind Cas 603 (FB), *Pavayi v. Palanivela Goundan*. (Mortgage by A to B in 1913 — Sale of equity of redemption to C in 1919 — Acknowledgment in 1920 by A is not binding on C — ('35) 22 AIR 1935 Mad 899 (DB), *Narayana v. Venkataramanna* and ('32) 19 AIR 1932 Mad 516 (DB), *Muthu v. Muthuswami* overruled — ('25) 12 AIR 1925 Mad 1108 (DB), *Yagnarayana v. Venkata* and ('05) 1 Cal L Jour 337 (DB), *Surjiram v. Barhamdeo*, approved — *Bolding v. Lane*, (1863) 1 De G J & S 122 and *Newbould v. Smith*, (1883) 33 Ch D 127 applied — Note. — It is not quite clear whether the ground of decision is that in such a case, there is no acknowledgment at all or it is that an acknowledgment binds only persons deriving title after it is made; but from the trend of the decision, the latter seems to be the ground — The decision specially points out that even where only some of the mortgaged items are transferred and the mortgagor retains his interest in the others, an acknowledgment by the mortgagor after the transfer will not bind the transferee.)]

*the acknowledgment.*² The balance of authority is in favour of the former view. It is submitted that it is the correct one.

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Notes 25-26

The above question has arisen in regard to the following three matters under this section:

- (1) Whether a statement by a person made at a time when he was not in any way liable in regard to the matter alleged to be acknowledged can be used against him as an acknowledgment when subsequently he becomes liable in some way in regard to that matter.
- (2) Whether an acknowledgment of mortgage by a mortgagor, after he has parted with his entire interest in the equity of redemption and when he is also not under any personal liability in regard to the mortgage money, can be used against a transferee of the equity of redemption as an acknowledgment by a person through whom the transferee derives his liability.
- (3) Whether an admission of the existence of a mortgage made by a person on whom the mortgage right devolves subsequently can be used as an acknowledgment against a transferee of the right from such person, as an acknowledgment by a person through whom the transferee derives his title.

The above questions have been fully discussed in Notes 33 to 35.

26. Acknowledgment must be in respect of the particular property or right claimed in the suit or application. — An acknowledgment of liability under this section must be in respect of the particular property or right claimed in the suit.¹ In other words,

2. ('06) 29 All 90 (91, 92) : 3 All L Jour 680 : 1906 All W N 286 (DB), *Jugal Kishore v. Fakruddin*. (Acknowledgment need not be by person who has an interest in the property concerned at the time of the acknowledgment.)

('28) 15 AIR 1928 All 387 (388) : 110 Ind Cas 561 (DB), *Gaya Prasad v. Babu Ram*. (Acknowledgment by person not liable at the time of the acknowledgment, but becoming liable subsequently—Acknowledgment sufficient.)

('25) 12 AIR 1925 Mad 134 (135):80 I. C. 940, *Krishnayya v. Venkatapayya*. (Do.)

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1. ('39) 26 AIR 1939 Mad 300 (301) : 184 Ind Cas 108, *Subbaramayya v. Iragam Reddi*. (Where the suit is in respect of a certain sum as due on the basis of certain accounts, a letter which acknowledges the right of the plaintiff to have a settlement of accounts and to recover what is due on that settlement is in respect of the same right as is claimed in the suit even though a certain sum is claimed to be due.)

('39) 26 AIR 1939 Mad 678 (681) : 189 Ind Cas 200, *Krishna Aiyar v. Subba Reddiar*. (Mortgage debt merged into decree — Acknowledgment of existence of decree is not acknowledgment of subsistence of mortgage debt.)

('33) 20 AIR 1933 All 348 (349, 350) : 144 Ind Cas 1029, *F. D. R. Footwear v. N. W. Ry.* (Letter from Railway Company informing the consignee that in the absence of instructions from him the consignment had been sold at lost-property office and a certain sum, namely, the balance of the sale proceeds of the property was payable to him on certain conditions cannot be taken as an acknowledgment of any liability for the price of the goods or compensation for any wrongful detention or compensation for non-delivery.)

('22) 9 AIR 1922 Bom 356. (356, 357, 358) : 46 Bom 1000 : 70 Ind Cas 906 (DB), *Bhagwan v. Madhav*. (Acknowledgment of the sub-mortgage did not constitute acknowledgment of a liability to be redeemed by the original mortgagor.)

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unless it is shown that the right acknowledged is identical with the right claimed in the suit, the section will not apply. Thus, where the defendant acknowledges his liability in respect of a debt, but there are several debts owing by the defendant to the plaintiff and it is not possible to identify the debt acknowledged with the one claimed in the suit, the acknowledgment will be ineffective under this section.² But,

(21) 8 AIR 1921 Bom 291 (292, 293, 294) : 45 Bom 934 : 61 Ind Cas 406 (DB), *Pranjiwandas Parshottamdas v. Bai Mani*.

(07) 9 Bom L R 715 (718) (DB), *Gopalrao v. Harilal*.

(70) 7 Bom H C R A C 125 (129), *Narayanappa v. Bhaskar Parmaya*. (Admission of liability in regard to two instalments is not admission that the entire amount has fallen due.)

(77) 1877 Bom P J 133 (DB), *Small Cause Court Reference No. 28 of 1877*.

(14) 1 AIR 1914 Cal 487 (488) : 23 Ind Cas 587 (DB), *Bhairo Prasad v. Gajadhar Prasad*. (Letter merely saying that the writer after looking into the account will sign it, is acknowledgment of liability on an open account and not on an account stated.)

(37) 24 AIR 1937 Mad 826 (828) : 176 Ind Cas 939, *Madapayya v. Mahabala Rao*. (Acknowledgment of decree debt is not acknowledgment of the debt on which the decree is based.)

(13) 21 Ind Cas 30 (31) (DB) (Mad), *Shail Meera Sahib & Co. v. Shail Nainar Lubbay*. (Statement that defendant and plaintiff had entered into a compromise in regard to an original liability and that under such compromise, he was bound to pay only a fourth of the original liability is not an acknowledgment in respect of the original liability but only one with reference to the liability under the compromise.)

(83) 6 Mad 182 (184) (DB), *Venkataramana v. Srinivasa*. (Claim to rent as a chalgaini tenant—Acknowledgment of liability to pay rent as a mulgaini tenant is not sufficient.)

(20) 7 AIR 1920 Oudh 236 (238) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh v. Bir Ram*. (Acknowledgment contained in document making no definite reference to debt in suit—No other debt is existing—Presumption is that debt acknowledged is debt under consideration.)

(28) 15 AIR 1928 Sind 45 (45) : 104 Ind Cas 572 : 22 Sind L R 117 (DB), *Hukumat Singh v. Nenumal Rejhmal*. (Suit for the settlement of partnership accounts—Subject-matter of the suit being the taking of accounts of a dissolved partnership, all that the plaintiff must prove is that the defendant has admitted the existence of the partnership accounts between the parties and his obligation to settle such accounts—It is not necessary that he should go further and state that he was bound to pay any particular sum or such sum as may be found due by him.)

(19) 6 AIR 1919 Sind 33 (34, 35) : 13 Sind L R 183 : 55 Ind Cas 822 (DB), *Fillip & Co. v. Mahomed Ali Essaji*. (Acknowledgment about principal is not good for interest.)

2. (41) 28 AIR 1941 Mad 892 (893) : 198 Ind Cas 611 (DB), *Official Assignee, Madras v. S. Natesa*. (Acknowledgment contained in mortgage in respect of debt due to plaintiff—No evidence to identify suit mortgages to debts referred to in acknowledgment—Acknowledgment not sufficient.)

(39) 43 Cal W N 943 (945) (DB), *Himangshu Kumari v. Radha Madan Mohan*. (A letter written by the guardian of a succeeding shebait promising to pay any debt incurred for legal necessity by the previous shebait, does not constitute an acknowledgment of any particular debt.)

(95) 17 All 198 (209) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani v. The Collector of Etawah*.

(10) 8 Ind Cas 81 (84) (DB) (Cal), *Hingu Miya v. Heramba Chandra*.

(18) 5 AIR 1918 Lah 248 (249) : 1918 Pun Re No. 34 : 45 Ind Cas 99, *Kapur Chand v. Narinjan Lal*.

the acknowledgment need not be in respect of the particular *relief* claimed in the suit.³

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The section uses the words "where,, an acknowledgment of liability *in respect of such property or right has been made in writing.*" Hence, it is necessary under this section that the document which contains an admission of liability must also *indicate* that such admission is in respect of the right sued on. In other words, it is not enough under this section that there is a written admission of liability and that such admission is proved to be *intended* to refer to the right claimed in the suit. The fact that the admission is intended to refer to the right claimed in the suit must be *indicated* in the document containing the admission.⁴ But this does not mean that the indication must be complete in itself so as to enable the Court to hold entirely on the basis of the writing that the right acknowledged and the right sued on are one and the same. The reason is that, as will be seen in Note 32, external evidence is admissible under the *law of evidence* to identify the things and persons referred to in a document and hence, the right indicated in a document may be identified with the right sued on, with the help of external evidence. Hence, it is sufficient for the purpose of the section, if the right is indicated in such a way that with the help of external evidence it can be identified with the right claimed in the suit.⁵ (See Note 32.)

Thus, an acknowledgment of a debt need not specify any precise sum as due.⁶ Similarly, where the right acknowledged is indicated to

[See also ('13) 20 Ind Cas 27 (27) : 35 All 437, *Meghraj v. Mathura Das*.

('97-01) 2 Upp Bur Rul 448 (450), *W. A. Russac v. Peer Mahomed & Son*.]

[See however ('39) 26 AIR 1939 All 179 (180) : 180 Ind Cas 542 (DB), *Ram-chander v. Firm Seth Kirshanlal Babulal*. (Suit for balance found due on taking accounts—Acknowledgment need not be in respect of each item—Acknowledgment of total liability is enough.)]

3. ('20) 7 AIR 1920 Oudh 236 (238, 239) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh v. Bir Ram*.

4. ('07) 9 Bom L R 715 (718) (DB). *Gopalrao v. Harilal*.

('10) 8 Ind Cas 81 (84) (DB) (Cal), *Hingu Miya v. Heramba Chandra*.

('21) 8 AIR 1921 Bom 291 (292, 293, 294) : 45 Bom 934 : 61 Ind Cas 406 (DB). *Pranjiwandas Farshottamdas v. Bai Mani*.

('22) 9 AIR 1922 Bom 356 (356, 357, 358) : 46 Bom 1000 : 70 Ind Cas 906 (DB). *Bhagwan Ganpat v. Madhav Shankar*.

('77) 1877 Bom P J 133 (DB), *Small Cause Court Reference No. 28 of 1877*.

('19) 6 AIR 1919 Sind 33 (34, 35) : 13 Sind L R 183 : 55 Ind Cas 822 (DB), *Fillip & Co. v. Mahomed Ali Esaji*.

[See also ('87) 14 Cal 801 (808) : 14 Ind App 168 : 5 Sar 50 : 11 Ind Jur 397 (PC), *Vyapoory Moodaliar v. Yeo Kay*.

('95) 17 All 198 (209) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani v. Collector of Etawah*.]

5. ('69) 12 Suth W R O C 2 (2, 3) : 5 Beng L R 633n (DB), *Umesh Chandra Mookerjee v. E. Sageman*.

('70) 5 Beng L R 619 (638) (DB), *Shearman v. Fleming*.

6. ('50) 3 Sau L R 124 (126) (DB), *Haridas v. Bapudas Kamdas*. (It is sufficient if there is an acknowledgment that the executant is a debtor to other party in certain transaction though it is stated that accounts of the transaction are still to be taken. The exact amount due may be ascertained on evidence.)

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be a right to a debt, the fact that at the date of the acknowledgment there was no other debt due from the defendant to the plaintiff may be proved for establishing the identity between the right acknowledged and that sued on.⁷ On the same principle a mere admission that there is a mortgage on one's property may be sufficient although there is nothing in the statement itself to identify the mortgage with the mortgage in suit.⁸ So also, an acknowledgment of liability with reference to a mortgage is not bad merely because the date of the mortgage is given wrongly, the reason being, that notwithstanding

('45) 32 AIR 1945 Bom 200 (201) : I L R (1945) Bom 167 (FB), *Janardan Eknath v. Ganesh Sadashiv*. (Per Locur J. in order of reference.)

('30) 17 AIR 1930 All 461 (462) : 127 Ind Cas 424, *Bans Gopal v. Mewa Ram*. (But where a definite sum has been acknowledged, the acknowledgment can be used to save limitation only with reference to sum acknowledged.)

('11) 10 Ind Cas 888 (889) : 35 Bom 302 (DB), *Ebrahim Haji Yakub v. Chunilal Lal Chand*.

('72) 9 Beng L R App 43 (43), *Harrison v. Hope*. (A letter from defendant, asking for time is sufficient acknowledgment.)

('70) 5 Beng L R 619 (638) (DB), *Shearman v. Fleming*.

('36) 23 A I R 1936 Lah 276 (278) : 162 Ind Cas 306, *Shanti Lal v. Lyallpur Bank Ltd.*

('10) 6 Ind Cas 948 (951, 952) : 1910 Pun Re No. 55 (DB), *Firm of Sheru Mal Chama Mal v. Von Goldstein*. (An admission that there was open and current account between the parties is valid acknowledgment.)

('09) 4 Ind Cas 902 (906) : 1910 Pun Re No. 43 (DB), *Abdul Ali v. Von Goldstein*. (Letter admitting that the plaintiff has a good and subsisting claim is enough for this section.)

('67) 3 Mad H C R 308 (310) (DB), *John Young v. Mangalapilly Ramaiya*.

('09) 1 Ind Cas 240 (242) : 5 Nag L R 8, *Vithal v. Gopal Rao*.

[See ('26) 13 A I R 1926 Sind 264 (268) : 96 Ind Cas 79 : 21 Sind L R 336, *Gordhandas v. Firm of Gokal Khataoo*.]

[But see ('28) 15 AIR 1928 Cal 850 (852) : 115 Ind Cas 263, *Manikya Bewa v. Pushpa Charan*. (Acknowledgment not stating amount of liability acknowledged is not proper acknowledgment.)

('66) 5 Suth W R S C C Ref 3 (4) (DB), *Nobin Chunder Moozoomdar v. T. J. Kenny*. (Letter merely admitting that something was due, was held not sufficient acknowledgment.)]

7. ('95) 17 All 198 (209) : 22 Ind App 31 : 6 Sar 551 (P C), *Beti Maharani v. Collector of Etawah*.

('20) 7 A I R 1920 Oudh 236 (238) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jogeshar Singh v. Bir Ram*.

('96) 1896 Bom P J 621 (DB), *Balaram v. Govinda*.

('37) 24 A I R 1937 Lah 827 (828) : 169 Ind Cas 973, *Gumani Shah v. Hukam Chand*.

('09) 3 Ind Cas 407 (408) (DB) (Mad), *Arunachalam Chettiar v. Subramania Iyer*. (Signature in account book containing computation of interest — Entry not expressly referring to suit pronote — Held sufficient.)

8. ('02) 25 Mad 220 (221, 232) (FB), *Narayana Ayyar v. Venkataramana*.

('24) 11 AIR 1924 Mad 286 (287) : 77 Ind Cas 740 (DB), *The Official Assignee of Madras v. Sabramania Iyer*.

('93) 16 Mad 366 (368) : 3 Mad L Jour 191 (DB), *Uppi Haji v. Mammavan*. (Suit for redemption of *kanom* — Acknowledgment by mortgagee — Name of mortgagor or date of mortgage not necessary.)

('69) 5 Mad H C R 320 (323) (DB), *Padmanabhan v. Kunhi Kolendan*.

[But see ('86) 1886 Bom P J 317 (DB), *Bhikshet v. Balaji*. (Document where the fact of mortgage is stated without mentioning the name of the mortgagor cannot be regarded as valid acknowledgment.)]

such mistake it may be possible to identify the mortgage acknowledged with the one to which the suit relates.⁹ Similarly, it has been held that where a letter containing an acknowledgment of a debt has been addressed to one Mrs. W as being the creditor, parol evidence is admissible to show that Mrs. S was known as Mrs. W and that this letter was given to her.¹⁰

Although an acknowledgment under this section must indicate the property or right in respect of which the admission of liability is made, yet, according to explanation I to the section, such acknowledgment need not specify the *exact nature* of the property or right.¹¹ According to some decisions, the reason why external evidence is admissible for the purpose of identifying the property or right referred to in an acknowledgment of liability is contained in the above provision.¹² It is submitted that this view is not correct as the expression "the *nature*" of a property or right is not synonymous with the particulars necessary for identifying such property or right. As

9. ('04) 26 All 313 (316) : 1 All L Jour 1 : 1904 All W N 38 (DB), *Dip Singh v. Girand Singh*.

('13) 18 Ind Cas 95 (96) (All), *Har Narain v. Sheo Prasad*.

10. ('69) 12 Suth W R O C 2 (2) : 5 Beng L R 633n (DB), *Umesh Chunder Mukerjee v. Sageman*.

[See also ('31) 18 AIR 1931 Oudh 54 (55) : 130 Ind Cas 347 (DB), *Aijaz Husain v. Ram Sarup*. (Parol evidence is admissible to prove that the name of the creditor was through mistake put down as K instead of R in the acknowledgment.)]

11. ('40) 27 A I R 1940 Bom 172 (174) : I L R (1940) Bom 225 : 188 Ind Cas 805 (DB), *Abdul Latif v. Jawhar State*. (Per Sen, J., in the lower Court's judgment.)

('26) 13 AIR 1926 All 75 (76) : 89 I. C. 617 (DB), *Meharban Singh v. Panna Lal*.

('32) 19 A I R 1932 Bom 531 (534) : 139 Ind Cas 218, *Amarchand Rajaram v. Narayan Vishnu*.

('07) 6 Cal L Jour 544 (546) (DB), *Ram Khelawan Mahto v. Nanhoo Singh*.

('85) 1885 Pun Re No. 28, *Bhagatram v. Chint Ram*.

('03) 26 Mad 34 (37) : 12 Mad L Jour 101 (DB), *Ittappan Kuthiravattat Nayar v. Nanu Sastry*.

('20) 7 AIR 1920 Oudh 236 (238, 239) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh v. Bir Ram*.

[See ('39) 26 A I R 1939 All 179 (180) : 180 Ind Cas 542 (DB), *Ramchander v. Firm Seth Krishan Lal Babu Lal*. (Where certain monies are due in respect of transactions between the parties and the defendant acknowledges that money is due from him to the plaintiff, it is unnecessary to specify any particular item and the acknowledgment can be treated as being in respect of the total liability of the defendant to the plaintiff.)]

12. ('33) 20 A I R 1933 All 352 (353) : 144 Ind Cas 903, *Raghubar Dayal v. Banwari Lal*.

('30) 17 AIR 1930 All 461 (462) : 127 Ind Cas 424, *Bans Gopal v. Mewa Ram*.

('30) 17 AIR 1930 All 368 (369) : 126 Ind Cas 353 (DB), *Jagannath v. Girwar*.

('34) 21 AIR 1934 Lah 835 (837) : 16 Lah 258 : 155 Ind Cas 1074 (DB), *Nihalu Ram Chela Ram v. Radhu Ram Hukmi Ram*.

('24) 11 A I R 1924 Mad 286 (287) : 77 Ind Cas 740 (DB), *Official Assignee of Madras v. Subramania Ayyar*.

[See ('01) 25 Bom 330 (331) : 2 Bom L R 1086 (DB), *Kalian Das v. Lotu*. (Under S. 19, Expl. 1, it is open to the plaintiff by reference to the accounts or otherwise to establish a connexion between two *khatas* and show that the second was an acknowledgment of the debt due under the first.)]

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will be seen in Note 32, the true reason for holding that external evidence is admissible for the above purpose is that such evidence is rendered admissible by the law of evidence. The reason does not depend on the above provision of this section.

27. Acknowledgment of anything includes acknowledgment of its legal consequences. — An acknowledgment of liability under this section can only be relied on if it is in respect of the particular property or right claimed in the suit. But, it is enough if the right claimed in the suit is a legal consequence of the matter which has been admitted.¹ The acknowledgment need not *directly* refer to

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1. ('98) 25 Cal 844 (851) : 25 Ind App 95 : 2 Cal W N 402 : 7 Sar 294 (PC), *Sukhamoni Chowdhurani v. Ishan Chunder Roy*. (Acknowledgment need not specify every legal consequence of the thing acknowledged.)
- ('28) 15 AIR 1928 Sind 45 (45, 46) : 22 Sind L R 117 : 104 Ind Cas 572 (DB), *Hukumat Singh v. Nenumal Rejhu Mal*. (Suit for accounts of dissolved partnership — Proof of admission by defendant of existence of partnership accounts between the parties and his obligation to settle such account is sufficient acknowledgment — Admission of liability to pay a definite amount is not necessary.)
- ('88) 10 All 93 (96) : 1888 All W N 13 (DB), *The Uncovenanted Service Bank Ltd. v. Grant*. (In a suit upon a bond brought against the defendant as a principal debtor, *an acknowledgment of liability as a surety only* is sufficient.)
- ('02) 26 Bom 562 (569, 570) : 4 Bom L R 447 (DB), *Hajee Ajam Goodam Hoosein v. Bombay and Persia Steam Navigation Co.* (Suit against carrier for compensation for non-delivery of goods consigned — Admission that goods were not delivered is acknowledgment of liability for non-delivery.)
- ('08) 10 Bom L R 385 (387) (DB), *Sheikh Mahomed v. Jamaluddin Mahamed*. (Admission of mortgage by mortgagee implies admission of liability to be redeemed.)
- ('15) 2 AIR 1915 Mad 962 (963, 965) : 28 Ind Cas 69 (DB), *Kallianiamma v. Narayanan Nambiar*. (Do.)
- ('14) 1 AIR 1914 Cal 795 (797) : 22 Ind Cas 650 (DB), *Guru Charan Saha v. Surendra Krishna Rai*. (Where person admits that land, of which he is in possession at the time, is the property of another, he admits that he is liable to be made to restore it to that other.)
- ('09) 3 Ind Cas 34 (38) (DB) (Cal), *Kamal Krishna v. Rai Kedar Nath Bahadur*. (Acknowledgment of liability for rent sufficient to save limitation in regard to special remedy under Tenancy Act.)
- ('28) 15 AIR 1928 Mad 713 (719) : 109 Ind Cas 872 (FB), *Rajaha of Kalahasti v. Venkatappa Nayanam*. (Where liability to pay a debt is admitted, it is immaterial that the right to enforce the liability in any particular *manner* is not admitted.)
- ('19) 6 AIR 1919 Mad 709 (710) : 42 Mad 52 : 48 Ind Cas 298 (DB), *Sabbalakshmi Ammal v. Ramalinga Chetty*. (Acknowledgment by a judgment-debtor of the amount due by him under a mortgage decree saves limitation for application for a final decree for sale.)
- ('09) 3 Ind Cas 19 (20) (DB) (Mad), *Kadri Pakirappa v. Manki Husan Sahib*. (Suit for value of goods sold — Defendant's acknowledgment of delivery of goods sufficient to save limitation.)
- ('10) 7 Ind Cas 797 (797) (Mad), *Narayana Iyengar v. Balasubramania Iyer*. (Do.) [See also ('20) 7 AIR 1920 Oudh 236 (238, 239) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh v. Bir Ram*. (Acknowledgment need not be in respect of the relief sought in the suit.)]
- [But see ('14) 1 AIR 1914 Cal 253 (254) : 21 Ind Cas 926, *Jogendra Nath Sarkar v. Prokhat Nath Chatterjee*. (Application by decree-holder stating that he had received a certain sum under the decree and had agreed to give the

the liability sought to be enforced in the suit. Thus, where A is liable to contribute to B for a joint debt which the latter has discharged, but merely admits that the debt is a joint debt, his admission is sufficient acknowledgment of liability with reference to a suit for *contribution* by B against him. The reason is that A's liability to contribute is incidental to his position as joint debtor with B, and is merely a consequence of such position.² Similarly, where A admits a mortgage he thereby admits all the legal incidents of the mortgage, including the mortgagee's right to the possession of the mortgaged property under the terms of the mortgage.³

28. Acknowledgment of liability with reference to portion of claim made by plaintiff—Effect.—This section will only apply to a case if it is shown that the acknowledgment of liability relied on relates to the right claimed in the suit. Hence, where an acknowledgment of liability is made only with reference to a portion of the claim put forward by the plaintiff, such acknowledgment will save limitation only with regard to such portion and not with regard to the entire claim of the plaintiff.¹ But it has been held that an acknowledgment

judgment-debtor further time to pay the balance and praying for the dismissal of the execution does not amount to an acknowledgment of the judgment-debtor's right to have the adjustment recorded as certified.)]

2. ('98) 25 Cal 844 (851) : 25 Ind App 95 : 2 Cal W N 402 : 7 Sar 294 (PC), *Sukhamoni Chowdhurani v. Ishan Chunder Roy*.

[But see ('19) 6 AIR 1919 Mad 332 (333) : 52 Ind Cas 243, *Marudai Muthirian v. Chinnakanu Muthirian*. (Submitted not correct.)]

3. ('22) 68 Ind Cas 185 (186, 187) (DB) (Lah), *Anant Ram v. Inayat Ali Khan*. (Admission of liability to pay interest due on a mortgage deed amounts to an acknowledgment of liability under the mortgage, including liability to give possession to the mortgagee.)

('22) 9 AIR 1922 Oudh 135 (136, 137) : 25 Oudh Cas 89 : 68 Ind Cas 196, *Ram Autar v. Beni Singh*.

('20) 7 AIR 1920 Oudh 236 (239) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh v. Bir Ram*.

('19) 6 AIR 1919 Oudh 217 (224) : 51 Ind Cas 985 (DB), *Basant Singh v. Ram Lal Singh*.

[But see ('18) 5 AIR 1918 Oudh 293 (294, 295) : 21 Oudh Cas 151 : 46 Ind Cas 813, *Beni Madho v. Bir Bal Singh*. (Recital in sale deed that a sum is left with vendee to pay off mortgage does not amount to acknowledgment of mortgagee's right to possession.)

('96) 1896 Bom P J 621 (DB), *Balaram v. Gorinda*. (Acknowledgment of mortgage debt without reference to possession is not sufficient for mortgagee's right to possession.)]

Section 19 — Note 28

1. ('30) 17 AIR 1930 All 461 (462) : 127 Ind Cas 424, *Bans Gopal v. Mewa Ram*. ('91) 1891 All W N 126 (127) (DB), *Mathuradasa v. Bhawani*. (Acknowledgment with reference to principal and interest under bond up to due date is not sufficient acknowledgment of liability for *post diem* interest.)

('99) 23 Bom 177 (179, 180, 181) (DB), *Madhavray v. Gulabbhai*.

('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai & Bros. v. R. D. Mehta & Co.*

('18) 5 AIR 1918 Cal 294 (298, 301) : 43 Ind Cas 893 (DB), *Kali Das Chaudhuri v. Danapadi Sundari Dassee*. (Suit for taking partnership accounts up to the year 1910 — Plaintiff relied on a letter by defendant admitting liability to account up to the year 1904 — Held that the admission is sufficient only to save plaintiff's claim up to the year 1904 and not further.)

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that interest is due implies that there is some principal due upon which the interest is assessed, and therefore such an acknowledgment can be taken not only as an acknowledgment as to interest but also as to principal.²

29. Acknowledgment of liability in respect of promissory note, whether available in respect of original cause of action. — Where a promissory note is given in respect of a pre-existing debt, and an acknowledgment of liability is made in respect of such note, the question arises whether such acknowledgment can be relied on in a suit on the *original cause of action*. The answer to this question depends on the *intention* with which the promissory note is given. If the intention is to *substitute a new contract* in the place of the old one, the original debt is replaced by the new debt and no longer exists. Hence, in such cases, the acknowledgment of liability in respect of the promissory note can only refer to the new debt substituted by the note and cannot be availed of in a suit for the original debt, where such debt revives by reason of the unenforceability of the promissory note.¹

But, where the intention is to give a promissory note in *conditional payment* of the original debt, the note does not extinguish such debt, but is only given on the terms that if it is paid when it falls due, this must be equivalent to a payment of the original debt.² In

('12) 14 Ind Cas 1 (2) (DB) (Cal), *Nand Lal Marwari v. Rampal Singh*.

('12) 13 Ind Cas 702 (704, 705) (DB) (Cal), *Chandra Kumar Dhar v. Ramdin*.

('26) 13 AIR 1926 Sind 264 (270) : 96 Ind Cas 79 : 21 Sind L R 336, *Gordhandas v. Gokal Khataoo*.

('25) 12 AIR 1925 Sind 8 (8, 9) : 86 Ind Cas 228 (DB), *Secretary of State v. Kotumal Maghanmal*. (Suit against Railway for loss of goods.)

('19) 6 AIR 1919 Sind 33 (34, 35) : 55 Ind Cas 822 : 13 Sind L R 183 (DB), *Fillip & Co. v. Mohammad Ali Essaji*. (Acknowledgment of the liability in respect of the sum due as principal does not involve an admission as to interest.)

The following decisions appear to be incorrect from this point of view.

('33) 20 AIR 1933 All 352 (353) : 144 Ind Cas 903, *Raghubar Dayal v. Banwari Lal*. (Statement that the plaintiff had agreed to take a certain amount out of which a portion had already been paid and only the balance was due is sufficient to save limitation as regards whole amount due to plaintiff.)

('07) 6 Cal L Jour 141 (142) (DB), *Brojonath Saha v. Gayasundari Dassya*. (Judgment-debtor in acknowledging his liability even for a part of his liability under the decree makes such an acknowledgment as required by this section.)

('30) 17 AIR 1930 Cal 304 (305) : 124 Ind Cas 830 (DB), *Hatimulla v. Sukhamoy Chaudhury*. (Acknowledgment by judgment-debtor of his liability for portion of money by means of an application for adjustment under O 21 R. 2, C. P. C., is sufficient acknowledgment in respect of the entire amount.)

2. ('37) 1937 Mad W N 1312 (1313), *Narayana Iyer v. Narayana Iyer*.

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1. ('35) 22 A I R 1935 All 129 (132) : 152 Ind Cas 370 : 57 All 434 (DB), *Ghulam Murtaza v. Mt. Fasiunnissa Bibi*.

2. Halsbury's "Laws of England," (1909), Vol. 7, page 447.

Leake on "Contracts," Fifth Edition, page 633.

(1803) 7 R R 449 (452, 453) : 3 East 251, *Drake v. Mitchell*.

(1895) 43 W R (Eng) 66 (67, 68) : (1895) L R 1 Q B 108 : 63 L J Q B 728, *Weg Prosser v. Evans*.

('51) 7 Cal 256 (259, 260) : 8 Cal L R 528 (DB), *Sheikh Akbar v. Sheikh Khan*.

other words, in such cases, the promissory note does not create a *substantive* obligation, but is only given as a *mode of payment* of the original debt.³ Hence, the original debt is the only debt in such cases, and although an acknowledgment of liability may profess to be made with reference to the *promissory note*, the *debt* to which it refers can only be the original debt. It follows, therefore, that such an acknowledgment can be relied on whether the suit is on the promissory note or on the original cause of action, the *debt* to be recovered in either case being one and the same, viz., the *original debt*.⁴

Although, as already said, it is a question of the intention of the parties in each case whether a promissory note given in regard to a pre-existing debt is given in conditional payment of such debt or otherwise, it is to be presumed, in the absence of a clear indication of a contrary intention, that the promissory note has been given by way of conditional payment only.⁵

In the undermentioned case^{5a} it has been held that where there is no other loan except that evidenced by a series of renewed promissory notes, the renewed promissory notes will operate as acknowledgments of liability in respect of the original loan so as to save limitation for a suit to recover the debt.

The above principles will also apply to other negotiable instruments.⁶

Where a promissory note is given in lieu of an earlier debt and on the same day the debtor gives a receipt to the creditor acknowledging the receipt of the sum mentioned in the promissory note of that date, it has been held⁷ that the receipt constitutes an acknow-

(1902) 25 Mad 580 (582, 583) (DB), *Dargavarapu Sorrapu v. Rampratap*.

(1912) 17 Ind Cas 721 (722) : 35 Mad 639 (DB), *Subramania Chetti v. Muthia*.

(1905) 29 Mad 111 (112) : 15 Mad L Jour 484 (DB), *Veera Raghavayya v. Ramayya*.

3. (1913) 41 Ind App 142 (147) : 26 Ind Cas 228 : 1914 A C 618 : 83 L J P C 131 (PC), *Saminathan Chetty v. Palaniappa Chetty*.

4. (1917) 4 A I R 1917 Mad 460 (462, 464) : 34 Ind Cas 417 (DB), *Chokkalingam Chetty v. Annamalai Chetty*.

(1984) 7 Mad 392 (396) : 8 Ind Jur 186 (DB), *Raman v. Vairavan*. (Case about hundi.)

5. Halsbury's "Laws of England," (1909), Vol. 7, pages 447, 448.

5a. (1945) 32 A I R 1945 Cal 268 (276) : 49 Cal W N 37 (DB), *Jyoti Prasad v. Jahor Lal*.

6. Halsbury's "Laws of England," (1909), Vol. 7, pages 447, 448.

(1984) 7 Mad 392 (396) : 8 Ind Jur 186 (DB), *Raman v. Vairavan*. (Case about hundi (bill of exchange).)

7. (1942) 29 A I R 1942 Oudh 388 (389) : 18 Luck 191 : 200 Ind Cas 515, *Sundar Lal v. Nanhu*. (Where a pro-note and a receipt executed in lieu of the amount due on previous transactions, are insufficiently stamped, but the necessary penalty is paid in respect of the receipt and thus it becomes admissible in evidence, the creditor is entitled to a decree on the basis of the acknowledgment contained in the receipt.)

(1944) 214 Ind Cas 146 (147) : 1943 Oudh W N 483, *Pirdin v. Ram Charan*.

(1933) 20 AIR 1933 Oudh 80 (81) : 141 Ind Cas 298 : 8 Luck 195 (DB), *Ram Chaube v. Sheo Ha-akh Tewari*.

(1937) 24 A I R 1937 Oudh 387 (388, 389) : 13 Luck 376 : 168 Ind Cas 927 (DB), *Ambika Singh v. Jagdeo Upadhyaya*.

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ledgment in regard to the *earlier* debt and so can be relied on in a suit on the original cause of action where such suit is brought on account of the promissory note being unenforceable. The reason given is that in such cases, the receipt is a document unmeaning with reference to existing facts because it states that a certain sum of money has been received on a certain day while on that day no money is, in fact, received. Hence, according to the above decisions, evidence is admissible under S. 95 of the Evidence Act to prove that the money referred to in the receipt is the money paid at the time of the earlier debt.

In the undermentioned case,⁸ in which also the facts were as stated above, it was held that the receipt constituted an acknowledgment of liability with reference to the new promissory note and although such note was inadmissible in evidence for want of stamp, a suit could be based on the *receipt* as an acknowledgment of liability. It is submitted that the view is not correct, as an acknowledgment of liability does not in itself constitute a fresh cause of action under the Indian law. (See Note 8.)

In the undermentioned cases⁹ a new promissory note was executed in lieu of an earlier one and on the back of the earlier note an endorsement was made to the effect that in lieu of such note a new note was executed and the earlier note thereby became void. As the new note was not sufficiently stamped, a suit was brought on the original note and the above endorsement was relied on as an acknowledgment of liability for the purpose of saving limitation. It was held that though the endorsement stated that the promissory note became *void*, it only meant that a new security had been given for the debt and not that the *debt* itself had come to an end, and that therefore, the endorsement constituted an acknowledgment of liability in regard to the old promissory note.

Where two remedies flow either by operation of law or by agreement of parties out of one and the same transaction, and the remedies are distinct and separate in their scope and in their essential features, an acknowledgment in respect of one of them cannot operate by itself to save the other also. Thus where a vendee of immovable property executes a promissory note to the vendor for the balance of the sale-price, an acknowledgment of liability in respect of the promissory note evidenced by an endorsement on the note cannot operate as an acknow-

(30) 17 AIR 1930 All 368 (368, 369) : 126 Ind Cas 353 (DB), *Jagan Nath v. Girwar*.

[But see (35) 22 AIR 1935 All 129 (132): 152 Ind Cas 370 : 57 All 434, *Ghulam Murtaza v. Mt. Fasiunnissa Bibi*.]

8. (29) 16 A I R 1929 All 980 (981, 983) : 121 Ind Cas 108 : 52 All 169 (DB), *Govind Singh v. Bijay Bahadur Singh*.

9. (39) 26 AIR 1939 Mad 34 (36) : 183 I. C. 882, *Kondamma v. Venkatarayudu*. (Debtor executing fresh promissory note making endorsement of cancellation on old note — Endorsement amounts to valid acknowledgment of liability on date of endorsement.)

(31) 18 AIR 1931 All 560 (561, 562): 134 Ind Cas 254 (DB), *Salig Ram v. Radhay Shiam*.

ledgment in respect of the vendor's lien for the balance of the purchase price so as to save limitation for a suit to enforce that lien.¹⁰

✓ 30. "In writing." — An acknowledgment under this section must be *in writing*. Hence, an *oral* acknowledgment is not sufficient.¹ Similarly, a *mere* payment of a sum of money towards the debt is not sufficient under this section although such payment may be intended as an acknowledgment of the debt.² So also, the mere fact that to secure an old loan the debtor pledges with the creditor certain shares in a company is not sufficient to save limitation under this section, where the pledge has not been recorded in writing.³ See also the undermentioned case.⁴

✓ 31. "Signed." — An acknowledgment of liability under this section must be *signed* by the person making the acknowledgment or by his agent. An acknowledgment not so signed will not be sufficient

10. ('42) 29 AIR 1942 Mad 167 (168, 169) : (1941) 2 M L J 939, *Syed Abdul Huq v. Usman Khan*.

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1. ('39) 26 AIR 1939 Bom 237 (241) : 183 Ind Cas 225 (DB), *Bhalchandra Dattatraya v. Chanbasappa Mallappa*. (Where the agreement containing the acknowledgment is not in writing evidence of the actual agreement is of no avail.)

('26) 13 AIR 1926 All 85 (86) : 89 Ind Cas 161, *Bhagwan Din v. Sri Kishen*. (A note of the Revenue Officer in his report to the effect that a mortgagee made an oral statement of an acknowledgment of the mortgage before him does not help to extend limitation.)

('11) 11 Ind Cas 445 (446) : 1911 Pun Re No. 93, *Ghasita v. Sultan*.

('72) 6 Mad H C R 51 (56, 57) (DB), *Kittappa v. Somanna*.

('23) 10 AIR 1923 Nag 332 (333) : 75 Ind Cas 440, *Kamal Narain v. Bani Ram*.

('67) 3 Mad H C R 378 (380) (DB), *Subbarama v. Eastulu Muttusami*.

(1865) 4 Suth W R S C C Ref 1 (4) (DB), *John Doyel v. Allum Biswas*.

('74) 6 Mad H C R 197 (200) (DB), *Hirada Karibasappah v. Gadigi Muddappa*.

('67) 8 Suth W R 289 (289) (DB), *Wooma Sunduree Dossee v. Biressur Roy*. (Oral evidence cannot be allowed to be let in for the purpose of supplementing the want of a written acknowledgment.)

('67) 7 Suth W R 46 (46, 47) (DB), *Giridhari Singh v. Kalika Sookul*. (Do.)

2. ('36) 23 AIR 1936 All 21 (29) : 58 All 313 : 160 Ind Cas 394 (FB), *Genda Lal v. Hazari Lal*.

('34) 21 AIR 1934 Lah 993 (993, 994) : 156 Ind Cas 42, *Jaimal v. Ram Ratan*.

('19) 6 AIR 1919 Cal 534 (535) : 45 Ind Cas 241 : 46 Cal 168 (DB), *Padma Lochan v. Giris Chandra*. (Mere delivery of hundi or cheque does not constitute acknowledgment.)

[See also ('42) 29 AIR 1942 Mad 581 (582) : I L R (1942) Mad 770 : 202 Ind Cas 629, *Gopal Naicker v. Alagirisami Naicker*. (Late payment of an instalment under a preliminary mortgage decree directing payment of mortgage money by instalments cannot, in any sense, amount to recognition of the right of the decree-holder to apply for a final decree. It is merely a payment under the preliminary decree and is no more an acknowledgment of anything than a prompt payment would have been.)]

3. ('35) 22 AIR 1935 Bom 213 (215) : 156 Ind Cas 531, *Percy F. Fisher v. Ardeshir Hormasji*.

4. ('83) 6 Mad 325 (327) (DB), *Raman Somayajipad v. Krishna Poduval*. (Acceptance of sale certificate by the purchaser of a mortgagee's interest is not acknowledgment of mortgagor's title.)

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for the purposes of this section.¹ Thus, a telegram cannot constitute a sufficient acknowledgment under this section as telegrams are not signed by the parties sending them.² Similarly, where an admission of liability is contained in a plan which is filed with a plaint, the plan cannot be used as an acknowledgment made by the plaintiff under this section, where it is not signed by him.³ The mere fact that the *plaint* is signed is not sufficient. So also mere entries in an account book which are not signed by the defendant are not sufficient for the purpose of this section.⁴

But, the object of the Act is to regard as sufficient what the writer *intends* to be equivalent to his signature, the *form* being

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1. ('50) 37 A I R 1950 P C 15 (Para 8) : 77 Ind App 22 : 29 Pat 272 (PC), *Nagarmal v. Bajranglal*. (A manager of a joint family has general authority to keep alive by acknowledgment a debt which is not yet statute barred. But the acknowledgment must be such as to satisfy the conditions of S. 19. It must be in writing and it must be signed.)
- ('28) 15 AIR 1928 All 310 (310) : 109 Ind Cas 398, *Bhaja v. Ganga Ram*. (Statement made in a criminal Court which did not contain the signature of the party could not be relied upon as a valid acknowledgment.)
- ('16) 3 AIR 1916 All 201 (203) : 36 Ind Cas 452 : 38 All 540 (DB), *Khiali Ram v. Taik Ram*.
- ('07) 29 All 773 (778) : 1907 All W N 263 : 4 All L Jour 628 (DB), *Daram Das v. Ganga Devi*.
- ('68) 3 Agra 81 (81) (DB), *Baboo Ram Narain v. Huree Das*.
- ('32) 19 AIR 1932 Bom 531 (532) : 139 Ind Cas 218, *Amar Chand Raja Ram v. Narayan Vishnu*.
- ('31) 18 AIR 1931 Lah 122 (123) : 131 Ind Cas 349 (DB), *Hrji Abdula v. Bhoja Mal*. (Entry in the *patwari's* register which is not signed by the mortgagee cannot be assumed to be signed by him so as to save limitation.)
- ('25) 12 AIR 1925 Lah 529 (529) : 86 Ind Cas 859 (DB), *Chimanlal v. Ram Rikh*.
- ('24) 11 AIR 1924 Lah 484 (486) : 78 Ind Cas 617, *Piroze Khan v. Kanhaiya Ram*.
- ('18) 5 AIR 1918 Lah 248 (248) : 45 Ind Cas 99 : 1918 Pun Re No. 34, *Kapurchand v. Narinjan Lal*. (Deposition made in previous suit but not signed is not valid acknowledgment.)
- ('14) 1 AIR 1914 Lah 464 (464) : 24 Ind Cas 898, *Wazir Singh v. Jhanda Singh*. (Entry in a settlement record of the mortgagor's right to redeem the land on payment of the mortgage money and not signed by the mortgagee or by anybody on his behalf is not an acknowledgment.)
- ('07) 1907 Pun W R No. 173, p. 790 : 1907 Pun Re No. 132, *Gulzari Mal v. Kishan Chand*.
- ('13) 20 Ind Cas 62 (65) (DB)(Oudh), *Gajraj Singh v. Mahomed Bakerali Khan*.
- ('92-96) 2 Upp Bur Rul 462 (463), *Maung Aung Gyi v. Maung Shwe Kyu*. (Drawing up of document after old Burmese fashion does not amount to signing.)
2. ('06) 1906 Pun L R No. 155, p. 508 (512) (DB), *Hari Charan v. Captain C. Brook*.
3. ('25) 12 AIR 1925 Lah 529 (529) : 86 Ind Cas 859 (DB), *Chiman Lal v. Ram Rikh*.
4. ('30) 17 AIR 1930 All 124 (125) : 124 Ind Cas 24 (DB), *Mohamed Abdullah Khan v. Ford & McDonald Co., Ltd*.
- ('12) 16 Ind Cas 146 (146) : 34 All 464 (DB), *Jaggi Lal v. Sri Ram*.
- ('81) 1881 All W N 87 (88) (DB), *Mahpal Singh v. Mohesh Singh*.
- ('71) 8 Bom H C R A C 6 (8) (DB), *Mul Chand Gulab Chand v. Girdhar Madhav*.
- (1865) 3 Suth W R 94 (94) (DB), *Rutton Monee Debia v. Gunga Monee Debia*.
- ('12) 13 Ind Cas 650 (651) (Lah), *Karam Chand v. Sultan*.
- ('18) 5 AIR 1918 Mad 238 (239) : 41 Mad 446 : 44 Ind Cas 466 (DB), *Palaniappa Chettiar v. Veerappa Chettiar*.

immaterial so long as it verifies the acknowledgment.⁵ In other words, as long as the debtor's name has been affixed to the document in question, either by the debtor or by his duly authorized agent, in such a way as to make it appear that the letter is his and that he is the real author of it, it does not matter what is the *form* of the signature.⁶ Hence, the full signature of the party is not necessary to constitute signing. Initials are enough.⁷ Similarly, the actual *name* of the alleged signatory need not be written. It is enough if any words or letters by which a person usually authenticates documents as being his own are written.⁸

5. ('35) 22 AIR 1935 Rang 160 (161): 13 Rang 322: 156 Ind Cas 589, *Vellayappa Chettiar v. Somasundaram Chettiar*.

('35) 22 AIR 1935 Mad 555 (555): 156 Ind Cas 449: 59 Mad 72, *Tevudu v. Venkataratnam*.

('04) 31 Cal 1043 (1048, 1049): 9 Cal W N 83 (DB), *Sadasook Agarwala v. Baikanta Nath Basunia*.

('89) 1889 Pun Re No. 122, *Ram Ditta v. Ebrahim-ud-din*.

6. ('40) 27 AIR 1940 Pat 6 (7): 18 Pat 715: 186 Ind Cas 225 (DB), *Ramjan Ali v. Khawja Meer Ahmed*. (Name of the debtor whether written or printed is sufficient.)

('35) 22 AIR 1935 Rang 160 (161): 13 Rang 322: 156 Ind Cas 589, *Vellayappa Chettyar v. Somasundaram Chettyar*. (Affixing of rubber stamp containing principal's name is a sufficient signature.)

[See ('40) 27 AIR 1940 Mad 887 (888): 192 Ind Cas 350, *Kanthasami Reddiar v. Pethusami Reddiar*. (Defendant striking balance in plaintiff's account book in his own handwriting but not signing it or in any other way indicating that he accepts it — Defendant's name written by himself at the top of the account at the time of opening of the account — Held there was no statement of account in writing signed by the defendant within the meaning of Art. 64 — ('04) 31 Cal 1043 (DB), *Sadasook v. Baikanta Nath* and ('77) 5 Bom 88 (DB), *Andarji v. Dulabh Jeevan*, distinguished.)]

7. ('42) 29 AIR 1942 Mad 680 (682): ILR (1942) Mad 927: 205 Ind Cas 583 (DB), *Narayana Sooru v. Rama Rao*. (Decision in AIR 1926 Mad 827, *Lakshmanacharyulu v. Venkataramanuja*, held to be wrong.)

('35) 22 AIR 1935 Mad 555 (555, 556): 156 Ind Cas 449: 59 Mad 72, *Tevudu v. Venkataratnam*.

[See ('43) 1943—2 Mad L Jour 12 (N I C) (13).]

[But see ('26) 13 AIR 1926 Mad 827 (828, 829): 96 Ind Cas 700, *Lakshmanacharyulu v. Venkataramanujacharyulu*.]

8. ('94) 18 Bom 586 (590) (DB), *Gangadhar Rao Venkatesh v. Sidramapa Balapa Desai*. (The letters in question contained certain specified words in the handwriting of the defendant at the top and bottom and the evidence in the case showed that among the community to which the defendant belonged (*Desais*), this was the usual mode of signing letters and informal documents with the view of authenticating such documents as the documents of the person so signing — Held, on such evidence, that the writing of the specified words amounted to signing.)

('25) 12 AIR 1925 All 85 (86, 87): 75 Ind Cas 1004 (DB), *Gopal Das v. Goswami Banmali Lal*. (Where the habitual method of a Guru while sending communications to his disciples is to subscribe the communication with the words "Shree Hari Sharanam" and not to affix his signatures, any communication of this form and written by the Guru himself will be regarded as signed by him.)

('15) 2 AIR 1915 Mad 506 (508): 26 Ind Cas 911 (DB), *Chidambaram Chetti v. Ramaswami Chettiar*. (Where it is proved that Nattukottai Chettys in writing their private letters do not usually sign their names, but only write words invoking the help of the family deity, a letter thus signed may be taken as signed by the writer.)

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It was held in a case decided under the Act of 1859 that affixing one's seal to an acknowledgment is not equivalent to signing it.⁹ This view was embodied in the first illustration to S. 20 of the Act of 1871. Accordingly, it was held under that Act that affixing one's seal or stamp to an acknowledgment was not a sufficient signature of such acknowledgment.¹⁰ But the above illustration, along with the others that appeared under S. 20 of the Act of 1871, has been omitted in the later Acts. It has been held under such Acts that affixing the seal or stamp to a document containing an acknowledgment is equivalent to signing such document.¹¹

Under S. 3, clause 52 of the General Clauses Act of 1897, the word "sign" would include, in the case of a person who is unable to write his name, the making of a mark. Hence, where the person making an acknowledgment cannot write his name, a mark made by him will be a sufficient signature.¹² Thus, if he affixes his thumb impression, it will be enough.¹³

A person may authorise another person to sign his (the former's) name on his behalf and in such cases, the signature will be held to be that of the *principal*.¹⁴ (See also Note 50.)

(1904) 31 Cal 1043 (1048, 1049) : 9 Cal W N 83 (DB), *Sadasook Agarwala v. Baikanta Nath Basunia*. (It is necessary in such cases to consider the intention of the parties.)

[See also (1967) 8 Suth W R 395 (397) (DB), *Gunee Biswas v. Shrigopal Paul Chowdry*. (Rajahs, Maharajas and great zamindars often sign without any name.)]

Note:—In this view the definition of the word "sign" in (1935) A I R 1935 Rang 160 (161) Vellayappa v. Somasundaram as meaning "to attest or confirm a document by affixing one's name to it" must be held to be not exhaustive.

9. (1967) 8 Suth W R 513 (514) (DB), *Luchmun Pershad v. Rumzan Ali*.

10. (1877) 1877 Pun Re No. 93, *Deota v. Kesho*. (Acknowledgment under Art. 148 of Act of 1871.)

11. (1883) 1883 Pun Re No. 185, *Gur Sahai Ram v. Sadik Muhammad*.

(1933) 20 AIR 1933 Lah 12 (13) : 140 Ind Cas 187 : 14 Lah 14 (DB), *Dasaundhi Ram v. Moolchand*.

(1935) 22 AIR 1935 Rang 160 (161) : 13 Rang 322 : 156 Ind Cas 589, *Vellayappa Chettyar v. Somasundaram Chettyar*.

12. (1932) 19 AIR 1932 Bom 531 (533) : 139 Ind Cas 218, *Amarchand Rajaram v. Narayan Vishnu*.

(1928) 15 A I R 1928 Bom 417 (418) : 52 Bom 356 : 109 Ind Cas 702 (DB), *Hari Govind v. Gangu Bai Balwant*.

(1975) 7 Mad H C R 358 (358) (DB), *Bheeman Gowda v. Eeranah*.

(1877) 1877 Pun Re No. 93, *Deota v. Kesho*.

(1891) 1891 Pun Re No. 16, *Jeba v. Chaman*.

[See (1935) 22 AIR 1935 All 946 (949) : 58 All 261 : 159 Ind Cas 387 (FB), *Udeypal Singh v. Lakshmi Chand*.]

[But see (1968) 10 Suth W R 293 (294) (DB), *Bengal Indigo Co. v. Koylas Chunder Dass*. (Putting of cross held not equivalent to signature — Case not good law now.)]

13. (1921) 8 AIR 1921 Pat 476 (477) : 62 Ind Cas 644, *Sri Ram Singh v. Kashi Mollah*.

✓ 14. (1940) 27 AIR 1940 Pat 6 (7) : 18 Pat 715 : 186 Ind Cas 225 (DB), *Ramjan Ali v. Khawja Meer Ahmed*. (It is not necessary that the debtor's name should be written by himself — The signature by an agent is enough whether the debtor is literate or illiterate.)

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Where A executes a document but B signs it as a *scribe*, the document cannot operate as an acknowledgment by the *latter*. The reason is that the signature contemplated by this section is one which is affixed with a view to attest or confirm the document. Hence, where a mortgagor signs certain entries in the account book of the mortgagee but the mortgagee also signs the entries as a scribe, the latter does not thereby acknowledge any liability on his part.¹⁵

It is not necessary that the signature must appear in any particular part of the document.¹⁶ It may appear in any part of the document provided it is clear that the intention of the party is to acknowledge the instrument to be his.¹⁷

(78) 1 All 683 (685, 686) (DB), *Mathura Das v. Babu Lal*. (It is however necessary to show that the name was introduced with a view to authenticate it.)

(91) 1891 All W N 126 (127) (DB), *Mathura Das v. Bhawani Ghulam*.

(80) 6 Cal 340 (352, 353, 354) : 7 Cal L R 121 (DB), *Mohesh Lal v. Basant Kumari*.

(09) 3 Ind Cas 725 (727) : 32 All 33 (DB), *Shib Shankar Lal v. Soniram*.

(11) 10 Ind Cas 215 (216) (All), *Maharaj Singh v. Shankar Lal*.

(19) 6 AIR 1919 Mad 952 (952, 953) : 43 Ind Cas 20 (DB), *Muthiah Chettiar v. Kuttayan Chetty*.

(21) 8 AIR 1921 Nag 1 (2, 3) : : 65 Ind Cas 279 : 17 N L R 209, *Onkar Lal v. Raj Mohamed*.

(89) 1889 Pun Re No. 122, *Ram Ditta v. Ebrahim-ud din*.

(35) 22 AIR 1935 Rang 160 (161) : 13 Rang 322 : 156 Ind Cas 589, *Velayappa Chettiar v. Somasundaram Chettiar*.

(96) 6 Mad L Jour 209 (210), *Krishnachar v. Vadichi Goundan*. (Where an illiterate defendant merely touched a pen and asked another person to write his name, this was held to be a sufficient signature.)

(68) 10 Suth W R 293 (294) (DB), *Bengal Indigo Co. v. Koylas Chunder*. (Do.)

(77) 1877 Pun Re No. 93, *Deota v. Kesho*. (Do.)

(02) 24 All 319 (330) : 1902 All W N 127 (FB), *Deo Narain Roy v. Kurer Bind*. (If mortgagor is illiterate, it is a good signature if in the presence and at the request of the mortgagor some other person signs the mortgagor's name on his behalf as executant of the document.)

[See (83) 7 Bom 515 (518), *Hemchand Kuber v. Vohora Raji Haji*. (Balance of account written by person at request of illiterate debtor in the debtor's name, and signed by the writer in his own name —Held this was an acknowledgment by a duly authorized agent.)]

15. (31) 18 AIR 1931 Lah 122 (123) : 131 Ind Cas 349 (DB), *Haji Abdullah v. Bhoja Mal*.

16. (80) 6 Cal 340 (352) : 7 Cal L R 121 (DB), *Mohesh Lal v. Basant Kumaree*.

(78) 1 All 683 (685) (DB), *Mathura Das v. Babu Lal*.

(86) 10 Bom 71 (73) (DB), *Mahlakshmibai v. Firm of Nageshwar Purshottam*.

(21) 8 AIR 1921 Nag 1 (2) : 17 Nag L R 209 : 65 Ind Cas 279, *Onkarlal v. Raj Mahomed*.

(89) 1889 Pun Re No. 122, *Ram Ditta v. Ibrahim-ud-din*.

(1864) 2 Mad H C R 79 (81) (DB), *Khwaja Muhammad Janula v. Venkatarayar*. (The signature need not be formally *subjoined* or *added* to an acknowledgment written by the debtor, unless it appears from the writing that such signature was intended, or unless the writing would be incomplete in itself, as an admission without a signature.)

17. (41) 28 AIR 1941 Oudh 376 (379, 380) : 194 Ind Cas 168 (171, 172) (DB) (Oudh), *Het Ram v. Subhag Chand*. (A letter acknowledging liability for a debt written by a partner of a firm and bearing no other signature than the name of the firm in the heading of the letter is sufficient.)

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32. Admissibility of external evidence for construction of documents alleged to contain acknowledgments of liability. — The construction of documents alleged to contain acknowledgments of liability is governed by the same principles as those that apply to the construction of other documents. The general principle is that the meaning of a document must primarily be ascertained from the language used in it and surrounding circumstances cannot be taken into account except where such language is ambiguous and capable of more than one interpretation.¹ Hence, as a general rule, in determining whether a document contains an admission of liability, it is not open to the Court to take into consideration evidence of external circumstances.^{1a} In other words, the document must

(78) 1 All 683 (685) (DB), *Mathura Das v. Babu Lal*. (A letter containing an acknowledgment headed as addressed by the principal to a creditor and written by an agent, the last portion of the letter being written by the principal, held to be an acknowledgment sufficiently signed.)

(81) 5 Bom 88 (88) (DB), *Andarji Kalyanji v. Dulabh Jiwan*. (Account stated written by the debtor himself with his name at the top was held to be sufficiently signed, the signature being one of the modes of signing most generally practised by natives.)

(81) 5 Bom 89 (91) : 1880 Bom P J 205 (DB), *Jekisan Bapuji v. Bhowar Bhoga Jetha*. (Do.)

(33) 20 AIR 1933 Lah 12 (13) : 140 Ind Cas 187 : 14 Lah 14 (DB), *Dasaundhi Ram v. Mulchand*. (Name of debtor written at top is sufficient.)

(19) 6 AIR 1919 Mad 952 (952) : 43 Ind Cas 20 (DB), *Muthiah Chettiar v. Kuttayan Chetty*. (According to the practice of Nattukottai Chettys who do not sign their letters at the foot but begin by saying that the sender is such and such a firm, the name so written is a sufficient signature.)

(24) 11 AIR 1924 All 855 (855) : 80 Ind Cas 6 : 46 All 892 (DB), *Uma Shankar v. Govind Narain* (Letter acknowledging liability for a debt written by the *munim* of a firm and bearing no other signature than the name of the firm in the heading of the letter is sufficient.)

[See however (92) 15 Mad 380 (381) : 2 Mad L Jour 42 (DB), *Ramasami v. Muthusami*. (Per Weir, J.—Held that as no practice of signing at the beginning was proved in the case, such signing was not sufficient.)]

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1. (24) 11 AIR 1924 P C 162 (174) : 80 Ind Cas 807 : 48 Mad 230 : 52 Ind App 1 (PC), *Subhadrayamma v. Venkatapathi*.

(20) 7 AIR 1920 P C 103 (106, 107) (P C), *Lampson v. City of Quebec*.

(74) 1 Ind App 157 (163) : 13 Beng L R 312 : 3 Sar 354 (PC), *Rani Mewa Kuwar v. Rani Hulas Kuwar*.

(1839) 2 Moo Ind App 311 (328) : 5 Suth W R P C 129 : 1 Suther 93 : 1 Sar 193 (PC), *Raja Gopal Inder Narain Roy v. Jagannath Gurg*.

(27) 14 AIR 1927 P C 272 (274) : 107 Ind Cas 346 (PC), *Royal Bank of Canada v. Joseph Salvatori*.

1a. (39) 26 AIR 1939 All 177 (179) : ILR (1939) All 200 : 180 Ind Cas 535 (DB), *Ishri Prasad v. Chandra Bhan Prasad*. (Court cannot go beyond the words used in order to determine whether the document contains an acknowledgment—An endorsement on the back of the promissory note that a certain amount is paid relating to a promissory note neither imports nor implies any acknowledgment whatsoever in respect of anything beyond the amount which was being paid.)

(71) 6 Beng L R 550 (554), *Rogers v. Montrou*. (To satisfy S. 4 of Act of 1859 which corresponds to S. 19, there must be some principal writing of the particular date, which can be relied on by itself, when properly construed, as constituting an acknowledgment of the debt. Letters written either before or afterwards

contain *within itself* an admission of a subsisting liability and the Court cannot, by treating the document as if it stated matters which are facts but which it does not actually state, come to the conclusion that the document contains an admission of liability.² Thus, where A merely says that B is the owner of certain property, his statement cannot be taken in conjunction with the fact that A is at the time in possession of the property so as to make the statement an admission of *liability* by him in respect of such property.³ Similarly, where a person says that a decree *was* passed against him, his statement cannot be read along with the fact that at the time he makes the statement the decree is in force, so as to prove the statement to be an admission of liability by him.⁴

But, evidence is always admissible for the purpose of showing how the language used in a document is related to existing facts.⁵ In other words, extrinsic evidence of every material fact which will enable the Court to identify the persons and things to which the instrument refers is admissible.⁶ Hence, external evidence is admissible

may be taken with the principal letter in order to ascertain what that letter means.)

(72) 9 Beng L R App 43 (43), *Harrison v. Hope*. (Macpherson, J., held that the defendant's letters taken in connexion with those from the plaintiffs, formed a sufficient acknowledgment to take the case out of the operation of the Limitation Act.)

2. (03) 26 Mad 34 (37) : 12 Mad L Jour 101 (DB), *Ittappan Kuthiravattat Nayer v. Nanu Sastri*.

(32) 19 AIR 1932 Bom 531 (534) : 139 Ind Cas 218, *Amar Chand Rajaram v. Narayan Vishnu*.

(07) 6 Cal L Jour 544 (546) (DB), *Ram Khelawan Mahto v. Nanhoo Singh*.

(25) 12 AIR 1925 Mad 675 (679, 680) : 91 Ind Cas 833, *Achuthan v. Abdu*.

(36) 23 AIR 1935 Lah 629 (637) : 165 Ind Cas 723 : 17 Lah 737 (DB), *Municipal Committee, Amritsar v. Ralia Ram*.

(69) 5 Mad H C R 90 (92) (DB), *Latchumanan v. Mutha Iburaki Marakayar*.

(21) 8 AIR 1921 Nag 1 (2) : 17 Nag L R 209 : 65 Ind Cas 279, *Onkar Lal v. Raj Mohammed*.

(84) 1884 Pun Re No. 2, *Simla Bank v. Ball*.

(70) 5 Beng L R 619 (638) (DB), *Shearman v. Fleming*. (The words "remittance of £40 to old account" are ambiguous, and do not necessarily import that a further sum is admitted to be due.)

3. (03) 26 Mad 34 (37) : 12 Mad L Jour 101 (DB), *Ittappan Kuthiravattat Nayer v. Nanu Sastri*.

4. (25) 12 AIR 1925 Mad 675 (679, 680) : 91 Ind Cas 833, *Achuthan v. Abdu*.

5. See Evidence Act, Section 92 (Proviso 6), 95, 96 and 97.

[See also (1949) 1949.1 All E R 498 (502, 504), *Jones v. Bellegrove Properties Ltd*. (An entry on the balance sheet of a company "Sundry creditors £7,638, 8s., 10d," signed by the chartered accountants and by two of the directors of the company, held was an acknowledgment of a d-bt within the meaning of S. 24 (2), Limitation Act (Eng.) 1939, when it was shown by oral evidence that this figure included the loan in question, to the company.)

(42) 29 AIR 1942 Pat 170 (173) : 199 Ind Cas 657 (DB), *Rimdin Singh v. Ram-parichan Singh*. (Section 19 (2), Lim. Act does not apply where the document itself is available and is being construed to find out its meaning as a question of fact—Evidence is always admissible to prove the surrounding circumstances in which the document came to be executed.)]

6. (1900) 48 W R (Eng.) 591 (593) : 16 T L R 211 : 69 L J P C 23 : L R (1900) A C 182 : 82 L T 102, *Bank of New Zealand v. Simpson*.

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for the purpose of identifying the property or right indicated in a document, as that in regard to which the acknowledgment of liability is made.⁷ But, for the purpose of identifying such right, only evidence of *surrounding circumstances* is admissible. The oral evidence of the person making the acknowledgment, as to his intentions is not admissible.⁸ The reason is that it is an established rule of evidence that declarations of intention by the author of an instrument are inadmissible for the purpose of construing such instrument.⁹

It will be seen from the above, that external evidence is only admissible for the purpose of identifying the right *indicated* in a

7. ('45) 32 AIR 1945 Bom 200 (201): I L R (1945) Bom 167 : 220 Ind Cas 67 (DB), *Janardan Eknath v. Ganesh Sadashiv*. (Oral evidence can be given that acknowledgment refers to debt in suit—(Per Lokur J. in order of reference.)

('41) 28 AIR 1941 Mad 409 (409), *Athmaramayya v. Seshappa Aiyar* (Postcard containing acknowledgment not necessarily referring to suit debt on face of it—Oral evidence to prove that it refers to suit debt is admissible.)

('95) 17 All 198 (209) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani v. Collector of Etawah*.

('17) 4 AIR 1917 Mad 460 (464) : 34 Ind Cas 417 (DB), *Chokkalingam Chetti v. Annamalai Chetty*.

('02) 25 Mad 220 (232) (FB), *Narayana Aiyer v. Venkataramana Ayyar*.

('93) 16 Mad 366 (368) : 3 Mad L Jour 191 (DB), *Uppi Haji v. Mammavan*.

('36) 23 AIR 1936 Lah 629 (637) : 165 Ind Cas 723 : 17 Lah 737 (DB), *Municipal Committee, Amritsar v. Ralia Ram*.

('21) 8 AIR 1921 Nag 1 (2) : 17 Nag L R 209 : 65 Ind Cas 279, *Onkar Lal v. Raj Mohamed*.

('31) 18 AIR 1931 Oudh 54 (55) : 130 Ind Cas 347 (DB), *Aijaz Hussain v. Ram Sarup*. (Mistake as to name of creditor—Oral evidence can be given to prove the mistake—S. 95 of Evidence Act.)

('33) 20 AIR 1933 Oudh 80 (81) : 8 Luck 195 : 141 Ind Cas 298 (DB), *Ram Chaube v. Sheo Harakh*. (Receipt executed and reciting the receipt of money while on that date no money was actually received — Evidence admissible for showing that the reference was to money received on a prior date.)

('01) 25 Bom 330 (331) : 2 Bom L R 1086 (DB), *Kalian Das v. Lotu*. (It is open to the plaintiff by reference to the accounts or otherwise to establish a connexion between two *khata*s and show that the second was an acknowledgment of the debt due under the first.)

8. ('95) 17 All 198 (209) : 22 Ind App 31 : 6 Sar 551 (PC), *Beti Maharani v. Collector of Etawah*.

[See also ('47) 34 AIR 1947 All 74 (80) : ILR (1947) All 11 : 229 Ind Cas 583 (FB), *Munshi Lal v. Hira Lal*. (A document said to constitute an acknowledgment has to be construed in the context in which it is given and where its language is not clear in itself, the context may be examined to see what it is to which the words refer. That is not to say that any equivocation in an acknowledgment can be cured by ascertaining what the probable intention of the acknowledgor was. That is quite a different thing. But where, after examining in the light of the context what it was that the person giving the acknowledgment was actually referring to, the conclusion follows that it is an unequivocal acknowledgment of a right, then that acknowledgment is sufficient to satisfy S. 19.)

('41) 45 Cal W N 208 (210) (DB), *Haiderali Khan v. Brojendra*. (Telegram to the effect "will not raise limitation objection regarding Murapare case"—Held oral evidence of surrounding circumstances could be admitted to explain its meaning.)]

9. See Phipson's "Law of Evidence," Fifth Edition, page 578.

document as admitted. The reason is that, as seen in Note 26 under this section, the document alleged to contain an acknowledgment must not only contain an admission of liability but also *indicate* that such admission relates to the right claimed in the suit. It will not be sufficient merely to show that the *intention* of the defendant was to admit his liability in regard to the right claimed in the suit where such intention is not *indicated* in any way by the document itself. But, while external evidence is admissible for identifying the right indicated in the document as admitted, no such evidence is admissible in regard to the question as to whether the document contains an admission of liability. The reason is that in the latter case, there is no question of *identifying* anything by means of such evidence. Thus the difference in the rule as to the admissibility of external evidence in regard to the two matters referred to above is not due to anything contained in the *section*, but is only based on *rules as to evidence and construction of documents*.

33. "Party against whom such property or right is claimed." — An acknowledgment of liability under this section must be by the person against whom the liability is sought to be enforced. Thus for extending the period of limitation for a suit for redemption, the acknowledgment of liability must be by the mortgagee.^{1a} In *Jugal Kishore v. Fakhruddin*,¹ the Allahabad High Court observed as follows :

"Section 19 does not require that the person making an acknowledgment should have an interest in the property in respect of which the acknowledgment was made at the time when the acknowledgment was given"

In other words, according to the above decision, it is sufficient under this section if the acknowledgment has been made by a person against whom the right is claimed in the suit. It is not necessary that *at the time when the acknowledgment was made*, such person must have had an interest in the property in respect of which the acknowledgment was given. The facts in the above case were these. A and B were co-owners of a certain house. But A was in possession of the whole house to the exclusion of B. C, A's son, who at the time had no interest in the house made a statement that B was a co-owner of the house. Subsequently, A died and his interest in the house became vested in his son, C. B sued C for partition and when the latter pleaded limitation, relied on his previous statement as an acknowledgment of liability. It was held that notwithstanding the fact that at the time when C made the statement he had no interest in the house, the statement could be used against him as an acknowledgment of liability.

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1a. ('51) 38 AIR 1951 All 392 (Pr 24) : 1951 All L Jour 174 (DB), *Mohammad Khan v. Md. Salim*. (An acknowledgment by the mortgagor cannot give a fresh start for the period of limitation.)

1. ('06) 29 All 90 (91, 92) : 3 All L Jour 680 : 1906 All W N 286 (DB).

3 Lim.41.

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A similar view was also taken in another decision of the Allahabad High Court.² In that case, A and B were mortgagees of certain property. A made a statement that the money due on the mortgage remained unpaid. Subsequently, the equity of redemption became vested in A. B then sued A for recovery of his share of the mortgage money. It was held that A's statement could be used as an acknowledgment of liability to save limitation for the suit, although at the time when the statement was made, A was not liable for the mortgage money.

The above view has also been followed by the Madras High Court in the undermentioned decision.³ In that case, A and B were partners in a certain firm. A debt was due to C from the firm. A's son D who had no interest in the firm wrote a letter to C adverting to this debt and promising to pay it. Subsequently, after A's death, D became one of the persons liable for the above debt. In a suit for the recovery of the debt, it was held that his previous statement could be used against him as an acknowledgment of liability, although *at the time when the statement was made* he was not in any way liable for the debt.

Thus, according to all the above decisions, a statement that a certain liability exists may be used as an acknowledgment of liability against the person making the statement, although, *at the time of the statement*, he was not liable in any way in regard to the matter acknowledged.

The above view necessarily implies that an acknowledgment may be made under this section by a person who at the time of the acknowledgment is not himself liable in regard to the matter acknowledged. It is submitted that on the principles discussed in Note 25, the view taken in the cases referred to above cannot be accepted as correct.

34. "Person through whom he derives title or liability."

—Suppose a property is mortgaged to A. During A's lifetime, A's son B who has no interest in the mortgage right admits the mortgage. Subsequently, B inherits in the mortgage right and after him, it passes to C. In a suit for redemption against C, the acknowledgment by B cannot be relied on as an acknowledgment by a person through whom the defendant derives his liability. The reason is that it was made by B before he became liable in regard to the right acknowledged and as such could not be an *acknowledgment* of liability.¹ (See Note 25.)

An auction purchaser derives his title from the judgment-debtor. Hence, if the judgment-debtor makes an acknowledgment of liability in respect of a mortgage on the property, the acknowledgment will be binding on the auction purchaser.² But it has been held by the Cal-

2. ('28) 15 AIR 1928 All 387 (388) : 110 Ind Cas 561 (DB), *Gaya Prasad v. Babu Ram*.

3. ('25) 12 AIR 1925 Mad 134 (135):80 Ind Cas 940, *Krishnayya v. Venkatappaya*.

Section 19 — Note 34

1. ('32) 19 AIR 1932 Bom 531 (532) : 139 Ind Cas 218, *Amarchand v. Narayan*.

2. ('45) 32 AIR 1945 All 224 (225) : ILR (1945) All 120 (DB), *Tulshi Ram v. Nek Ram*.

outta High Court that if such acknowledgment is made after the attachment of the property, the auction purchaser will not be bound by the acknowledgment.³ The reason given is that the auction purchaser is entitled to have the property purchased by him in the condition in which it was at the time of the attachment, while the effect of allowing the acknowledgment would be to give a longer life to the lien, that is, to place a larger burden on the property than it bore at the time of the attachment. It is submitted that this view is not correct. The acknowledgment merely admits a pre-existing liability and does not place any *additional* or *new* liability on the property. The decision of the Allahabad High Court noted below,^{3a} pronounced after the previous edition of this book supports this view and is to the effect that the auction purchaser will be bound even by an acknowledgment made after the attachment.

A mortgages his property first to B. Then, he grants a mortgage with possession (*othi*) of the same property to C. C allows the revenue payable on the land to fall into arrears. The property is sold for arrears of revenue. C himself purchases the property at the revenue sale. Under S. 90 of the Trusts Act, C must hold the property for the benefit of the mortgagor, A, and the first mortgagee, B. In other words, notwithstanding the revenue sale, the first mortgage in favour of B is still binding on the property. As this liability is derived through A, the mortgagor, an acknowledgment of liability made by him in regard to B's mortgage will be binding on C.⁴

A pre-emptor of property does not derive his title to the property through the *vendee*. Hence, an acknowledgment by the vendee of a mortgage on the property will not be binding on the pre-emptor.⁵

See also Note 35 below.

35. Acknowledgment of mortgage by mortgagor, whether binds transferees of the equity of redemption claiming under transfers made prior to acknowledgment. — Where A mortgages his property first to B and then mortgages or sells the same property to C, the latter derives his title to the property and his liability in respect of the mortgage of B, from A, the mortgagor. In such cases, it is clear from the section that an acknowledgment of liability in respect of B's mortgage made by A will bind him as well as C where such

(18) 5 AIR 1918 Cal 978 (979) : 44 I. C. 533 (DB), *Rajeswari v. Benoda*.

3. (18) 5 AIR 1918 Cal 978 (979) : 44 I. C. 533 (DB), *Rajeswari v. Benoda*.

3a. (45) 32 AIR 1945 All 224 (225) : I L R (1945) All 120 (DB), *Tulshi Ram v. Nek Ram*. (N mortgaging property to P in 1916 — C in execution of his money decree against N attaching mortgaged property on 22nd August 1928 — On 5th December 1928, N selling property to third party and acknowledging in sale deed mortgage debt due to P — C in execution of his decree purchasing property at auction sale on 20th June 1929 — C held bound by acknowledgment by N in sale deed.)

4. (27) 14 AIR 1927 Mad 349 (350), *Arokiam Asary v. Vavana Rowthen*.

5. (32) 19 AIR 1932 All 700 (701) : 143 Ind Cas 41 : 54 All 1023 (DB), *Shankar Lal v. Hashami Begam*.

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acknowledgment has been made *before* the sale or mortgage in favour of C. The question has arisen whether such acknowledgment will bind C if it was made *after* the transfer to him. On this question there was a conflict of views before the decision of the Privy Council in *Bank of Upper India v. Robert Hercules*.^{1a} The Privy Council decision and the subsequent decisions based on it^{1b} have now settled the law to the effect that such an acknowledgment will not bind the transferee.

The prior decisions fall into the following three groups :

- (1) In the *first* group of cases, it is held that the acknowledgment will not bind C in *any* case, irrespective of the question whether at the time of the acknowledgment A was himself liable or not.¹

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- 1a. ('42) 29 AIR 1942 P C 67 (69) : ILR (1942) Lah 686 : 69 Ind App 130 : ILR (1942) All 660 : I L R (1942) Kar (P C) 153 : 202 Ind Cas 740 (P C), *Bank of Upper India v. R. H. Skinner*. (Acknowledgments made by mortgagors after they had parted with all their interest to a purchaser do not bind the purchaser)
[See also ('42) ILR (1942) Lah 684 (685) (P C), *R. H. Skinner v. Bank of Upper India*.]
- 1b. ('50) 37 AIR 1950 Mad 553 (Pr 6) : 1950-2 M L J 13 (DB), *Naranappa Naicker v. Ramalingam Pillai*.
('49) 36 AIR 1949 Pat 505 (506) : 28 Pat 303 (DB), *Ram Khelawan v. Ramnandan Prasad*.
('47) 34 AIR 1947 All 214 (225) : ILR (1946) All 375 : 222 Ind Cas 632 (DB), *Ram Narain v. Nawab Singh*. (An acknowledgment of liability by the mortgagor in respect of the first mortgage contained in the third mortgage by the same mortgagor is not effective as an acknowledgment to start a fresh period of limitation in favour of the third mortgagee as against a second mortgagee who derived his title from the mortgagor prior to the acknowledgment given in the third mortgage : ('05) 1 C L J 337, *Surjiram v. Barhandeo* and AIR 1942 P C 67 : 69 Ind App 130 : ILR (1942) All 660 : ILR (1942) Lah 686 : ILR (1942) Kar PC 153 (PC), *Bank of Upper India v. R. H. Skinner*, Rel. on; AIR 1945 All 239 : ILR (1945) All 733, *Munnalal v. Chunnilal* (FB), Disting.)
('47) 34 AIR 1947 All 74 (79) : ILR (1947) All 11 : 229 Ind Cas 583 (FB), *Munshi Lal v. Hira Lal*. (An acknowledgment given by a mortgagor in favour of a prior mortgagee does not preclude an intermediate mortgagee whose title accrued before the acknowledgment was given, from relying on the Limitation Act as a bar. The principle applies no less to a case in which the mortgagor giving the acknowledgment has retained some scintilla of interest in the form of an equity of redemption than to a case in which he has parted with his interest altogether : 1 C L J 337 ; (1863) 2 De G J & S 122, *Re Metcalfe's Trusts* and A I R 1942 P C 67, Rel. on.; A I R 1944 Nag 163 : I L R (1944) Nag 383 (FB), Ref.)
('46) 33 A I R 1946 Mad 88 (88) : 223 Ind Cas 523, *Subbi Setti v. Lakshminarasamma*. (Transfer of part of hypotheca by mortgagor — Subsequent acknowledgment by him does not bind transferee. A I R 1942 P C 67 : I L R (1942) Lah 686 (PC), Foll.)
('45) 32 AIR 1945 All 239 (261) : ILR (1945) All 733 (FB), *Munna Lal v. Chunni Lal*. (AIR 1942 P C 67 : I L R (1942) Lah 686 (PC), Rel. on.)
('44) 31 AIR 1944 Nag 163 (173) : I L R (1944) Nag 383 ; 216 Ind Cas 296 (FB), *Radhakishan Ramlal v. Hazari Lal*. (A subsequent mortgagee is not bound by an acknowledgment in favour of a prior mortgagee made behind his back after he has become a mortgagee. S. A. No. 600 of 1940 dated 4-9-1942 Approved and A I R 1942 P C 67, Rel. on.)
1. ('40) 27 AIR 1940 Mad 470 (473) : ILR (1940) Mad 872 : 188 Ind Cas 603 (FB), *Pavayi v. Palanivela Goundan*. ('12) 17 Ind Cas 619 (DB), *Velayudam v. Vaithyalingham* ; ('32) AIR 1932 Mad 516 (DB), *Muthu v. Muthuswami* and ('35)

The reason given is that, on general principles, where C derives his title from A, C should be bound only by such acts of A as are done *before* the title is derived and not by acts done *afterwards*. Hence, according to this view, though at the time of the acknowledgment A was himself liable in respect of the right acknowledged by him, the acknowledgment would not bind C.

- (2) The *second* group of cases accepts the proposition that under this section an acknowledgment made by A even after the date the title is derived by C will be binding on the latter; but these cases hold that this principle would apply only where A himself was under liability at the time of the acknowledgment. The reason given is that under this section an acknowledgment must be an admission of one's own liability. Otherwise, the alleged acknowledgment would not really be an *acknowledgment* at all.²
- (3) The *third* group of cases also accepts the principle that it is not necessary under this section that the acknowledgment by A must have been made *before* the transfer in favour of C. The question as to whether at the time of the acknowledgment A must himself have been liable is not decided. But the facts of the respective cases show that he was liable at the time of the acknowledgment.³

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- A I R 1935 Mad 899 (DB), *Narayana v. Venkatarmanna*, Overruled and ('37) A I R 1937 Mad 826, *Madappaya v. Mahabala Rao*, impliedly overruled—AIR 1925 Mad 1108 and 1 Cal L Jour 337 approved — *Bolding v. Lane*, (1863) 1 De G J & S 122 and *Newbould v. Smith*, (1886) 33 Ch D 127 applied.)
- ('05) 1 Cal L Jour 337 (344 to 347) (DB), *Surjiram Marwari v. Barhmdeo Persad* (Per Mookerjee J.)
- ('36) 23 AIR 1936 All 636 (638, 639) : 58 All 912 : 164 Ind Cas 725 (DB), *Ram Sarup v. Bhagwati*.
- ('25) 12 A I R 1925 Mad 1108 (1108) : 86 Ind Cas 434 (DB), *Yagnanarayana v. Venkatakrishna Rao*.
2. ('19) 6 AIR 1919 All 242 (242) : 51 Ind Cas 829 (DB), *Arbindakeb v. Jageshar*. (Acknowledgment means a lawful acknowledgment given by a person able to bind himself by the acknowledgment as and when it is given.)
- ('20) 7 AIR 1920 Mad 1026 (1033) : 62 Ind Cas 833 (DB), *Lakshmanan Chetty v. Muthia Chetty*. (The mortgagor must have retained some substantial right in the property at the date of the acknowledgment.)
- ('37) 24 AIR 1937 Lah 507 (511, 512) : 170 Ind Cas 245 : I L R (1937) Lah 171 (DB), *Robert Hercules Skinner v. Bank of Upper India Ltd.* (Mortgagor is personally liable even if he has parted with equity of redemption.)
- ('32) 19 A I R 1932 Oudh 1 (5) : 138 Ind Cas 800 : 7 Luck 270 (DB), *Amir Mirza Beg v. Lachhmi Narain*. (Acknowledgment by person having no interest which can be bound by such acknowledgment lacks the "legal quality" of an acknowledgment.)
- ('05) 32 Cal 1077 (1080, 1081) : 9 Cal W N 868 (DB), *Krishna Chandra Saha Sardar v. Bhairab Chandra Saha Sardar*. (In this case it is not expressly laid down that acknowledgment by person not himself under liability will not be good. But pointed attention is drawn to the fact that in the case before the Court the acknowledgment is by a person who was himself liable in regard to the right acknowledged.)
3. ('27) 14 A I R 1927 Mad 349 (349, 350), *Arokiam Asary v. Vavana Rowthan*. (Othidar of property, subject to mortgage with another, making default in paying Government dues and the land sold for arrears and purchased by the Othi.

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The different views discussed above may be illustrated with reference to the following examples :

- (1) A mortgages his property to B and then to C. *After* the mortgage to C, A states that B's mortgage remains undischarged.
- (2) A mortgages his property to B and then sells a *portion* of the property to C. *After* the sale to C, A states that B's mortgage is undischarged.
- (3) A mortgages his property to B and then sells the *whole* of it to C. But A remains personally liable for the mortgage amount. During the subsistence of this personal liability A states that B's mortgage is undischarged.
- (4) A mortgages his property to B. He then sells the *whole* of the property to C. There is no personal liability under the mortgage. *After* the sale to C, A states that B's mortgage is undischarged.

In illustrations 1 to 3 above, according to the *first* group of cases, A's statement cannot bind C as an acknowledgment at all, notwithstanding the fact that at the time of the acknowledgment, A was himself liable and the acknowledgment would be binding on him. According to the *second* and *third* groups of cases, the acknowledgment will be binding on C, because at the time when it was made A was himself liable for the mortgage debt.

As regards the *fourth* illustration, according to the first group of cases, the acknowledgment of A will not bind C because it is made after C derives his title. According to the *second* group of cases, the acknowledgment will not bind C, as not having the "legal quality" of an acknowledgment, i. e., as not being given by a person who was himself liable.

The view taken in the *first* group of cases has been approved by the Privy Council in the *Bank of Upper India, Ltd. v. Robert Hercules Skinner* and cited above in this note has been followed in the other decisions as mentioned already.

As seen in Note 25 the view that an acknowledgment can be made by a person who himself is under no liability at the time of acknowledgment is not correct on principle.

36. Renewal of first mortgage after second mortgage — Effect. — When a mortgage is renewed, the mortgagee is entitled to

dar himself — Acknowledgment of liability by mortgagor to mortgagee — Acknowledgment is binding on *Othidar*.)

('32) 19 A I R 1932 Oudh 314 (316) : 7 Luck 26 : 139 Ind Cas 626 (DB), *Ram Sahai v. Kunwar Sah*.

('30) 17 A I R 1930 Oudh 56 (56) : 5 Luck 444 : 124 Ind Cas 435 (DB), *Nigah Ali Khan v. Aqilullah Khan*.

[See also ('42) 29 A I R 1942 Pat 166 (168) : 198 Ind Cas 3 (DB), *Ram Lagan Singh v. Ram Bilochan*. (An acknowledgment by the mortgagor of a prior mortgage in a later mortgage executed by him is sufficient to save limitation as against intermediate mortgagees who hold mortgages executed before the acknowledgment.)

a fresh period of limitation from the date fixed for payment under the renewed mortgage. This, however, is not because the renewal implies an *acknowledgment* of liability with reference to the original mortgage. The mortgagee's right to a new period of limitation is based on the fact that the renewal gives him a *fresh cause of action*.¹ See also the undermentioned case.²

Though the renewal of a mortgage furnishes a new cause of action, the mortgagee is entitled to priority over intermediate mortgagees to the extent of the amount of the prior mortgage.³

See also Article 132 Note 15.

37. "Fresh period of limitation shall be computed from the time when the acknowledgment was so signed."— The effect of an acknowledgment under this section is that the plaintiff is entitled to a fresh period of limitation from the time when the acknowledgment is signed.¹ Under the Acts of 1871 and 1859, it was expressly provided that the length of the fresh period of limitation depended on the nature of the original liability. This provision has been omitted in the Acts of 1877 and 1908. But the omission does not mean any change in the law. The fresh period is to be computed from the date when the acknowledgment is *signed*.² But, under S. 12 cl. (1),

Section 19 — Note 36

1. ('25) 12 AIR 1925 Mad 1108 (1109) : 86 Ind Cas 434 (DB), *Yagnanarayana v. Venkata*.
 2. ('39) 26 A I R 1939 Lah 212 (214), *Abdullah v. Ishaq Mohammad*. (Mortgage without possession. Stipulation in mortgage that mortgagee is entitled to take possession on default in payment of annual interest — Mortgagor subsequently mortgaging the equity of redemption in the properties to the mortgagee in lieu of payment of interest defaulted for five and half years — Suit for possession by mortgagee on subsequent default on the basis of original mortgage — Held that the execution of the second mortgage satisfied the cause of action based on the first default and that therefore the starting point for limitation was not the first default but the subsequent default and there was no question of extending the period of limitation by the acknowledgment contained in the second mortgage.)
 3. ('18) 5 A I R 1918 Mad 1327 (1329, 1330) : 38 Ind Cas 240 (DB), *Velayuda Reddi v. Narasimha Reddi*.
- ('25) 12 AIR 1925 Mad 1108 (1109, 1110) : 86 Ind Cas 434 (DB), *Yagnanarayana v. Venkata*.

Section 19 — Note 37

1. ('45) 32 AIR 1945 Mad 10 (11) : ILR (1945) Mad 521 : 219 Ind Cas 231 (DB), *Kalappa Devara v. Krishna Mitter*.
- ('45) I L R (1945) All 35 (36), *Kunjilal v. Dwarka Prasad*.
- ('68) 10 Suth W R 478 (480) (DB), *Runjeet Narain v. Shureefoonissa*. (A mortgage not having legally been put an end to and 60 years not having elapsed since the last recognition of the mortgage by the mortgagee, the mortgagor or his representatives can claim to redeem it.)
2. ('27) 14 AIR 1927 Mad 1200 (1200) : 106 Ind Cas 619, *Somasundaram Ayyar v. Krishna Ayyar*.
- ('22) 9 A I R 1922 Nag 256 (258) (DB), *Waman v. Deorao*. (Where a mortgage document dated 1906 acknowledged the liability under a mortgage dated 1904, a fresh period of limitation can commence only from 1906, the date of the later mortgage, and not from the date fixed for payment of the amount due under that mortgage.)

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in computing the fresh period the day on which the acknowledgment is signed should be omitted.³

Where a debtor acknowledges a certain debt and also promises to pay it within certain period, a fresh period of limitation is to be counted from the date of the acknowledgment and not from the date to which the payment is deferred.^{3a}

The fresh period of limitation computed under this section is period "reckoned" within the meaning of S. 6, and hence, where the plaintiff is under any of the disabilities mentioned in that section at the time of acknowledgment, he is entitled to the benefit of that section also.⁴ See also Note 14 under section 6.

38. Admissibility of oral evidence as to date of acknowledgment—Sub-section (2). — Sub-section (2) of this section provides that where the writing containing an acknowledgment is undated, oral evidence may be given of the time when the acknowledgment was signed. This shows that the date of an acknowledgment need not be mentioned in the writing which contains the acknowledgment.¹

But the express provision that where the writing is *undated* oral evidence as to the date is admissible, implies that where the writing is *dated*, such evidence will not be admissible. But, even in such cases, evidence will be admissible to prove that the date given in the writing

3. ('23) 10 A I R 1923 Nag 143 (143) : 71 Ind Cas 556, *Jainarayan Bapu v. Vithoba*. (Objection was that Section 12 (1) uses word "day" while Section 19 uses "time". Objection overruled.)

('90) 13 Mad 135 (137) (DB), *Venkataramayyar v. Kothandaramayyar*. (Under Section 3, clause 2 of the General Clauses Act, the word "from" is sufficient to exclude the first of a series of days or any other period of time.)

See also Section 12 Note 3.

3a. ('45) 32 AIR 1945 Mad 10 (11) : ILR (1945) Mad 521 : 219 Ind Cas 231 (DB), *Kalappa Devara v. Krishna Mitter*.

('45) I L R (1945) All 35 (36), *Kunjilal v. Dwarka Prasad*.

4. ('42) 29 A I R 1942 Bom 248 (251) : I L R (1942) Bom 574 : 202 Ind Cas 196, *Shantaram Shankar v. Chintamanrao*.

('33) 20 A I R 1933 All 100 (101) : 142 Ind Cas 794 : 54 All 1019 (DB), *Chandrabhan v. Rajkumar*.

('90) 13 Mad 135 (138) (DB), *Venkataramayyar v. Kothandaramayyar*.

('19) 6 AIR 1919 Lah 177 (178) : 52 Ind Cas 115, *Ramji Lal v. Manya*.

('12) 14 Ind Cas 694 (698) (DB) (Cal), *Sarat Chandra Singh v. Sudhan Hari*.

('36) 23 AIR 1936 All 152 (153) : 161 Ind Cas 330, *Rameshchandra v. Bashi Ram Bhajan Lal*. (('09) 6 All L Jour 378 (DB), *Ram Charan v. Ram Dass*, not followed.)

[See ('39) 26 AIR 1939 Bom 237 (239, 244) : 183 Ind Cas 225 (DB), *Bhalchandra Dattatraya v. Chanbasappa Mallappa*.]

[See also ('45) 32 AIR 1945 Mad 149 (149) : (1945) 1 Mad L Jour 3, *Somalinga v. Muthulakshmi*. (Death of mortgagee after amount became due on mortgage—Acknowledgment during minority of mortgagee's son — Son dying during minority — Legal representative's suit within 3 years from minor's death is within time.)]

Section 19 — Note 38

1. ('21) 8 AIR 1921 Nag 1 (2) : 65 Ind Cas 279 : 17 Nag L R 209, *Onkar Lal v. Raj Mohamed*.

is a *mistake* for some other date.² (Compare Evidence Act, section 92 Proviso 1.)

Where the date given in writing containing an acknowledgment of liability is *scored out*, it has been held that in such cases, the document is *undated* and that therefore oral evidence may be given of the date of the document.³ In the undermentioned case,⁴ where an acknowledgment bore a date which had been altered, it was held by the Bombay High Court that it could not be said that the acknowledgment was undated and hence oral evidence to prove the date was held to be inadmissible.

An inference drawn from a document is not *oral* evidence.⁵

39. Oral evidence of contents of acknowledgment — Sub-section (2). — The expression “contents” of a document simply means what is contained in the document. Hence, evidence of contents of a document is evidence given for proving what is contained in the document. Under the Evidence Act, ss. 61, 63, 64 and 65, oral evidence of the contents of a document is not admissible except when such oral evidence constitutes secondary evidence as defined in s. 63 of the same Act and the case falls within one of the categories mentioned in s. 65. The provision in sub-s. (2) that subject to the provisions of the Indian Evidence Act, 1872 oral evidence of the contents of an acknowledgment shall not be received, merely re-enacts with reference to an acknowledgment of liability the provisions of the Evidence Act on this point.

In the Act of 1859, there was no provision corresponding to sub-s. (2) of this section. But cl. (c) of s. 20 of the Act of 1871 ran as follows : “When the writing containing the promise or acknowledgment is undated, oral evidence may be given of the time when it was signed. But when it is alleged to have been destroyed or lost, oral evidence of its contents shall not be received.” It must be remembered that at the time of the passing of the Act of 1871, the Evidence Act of 1872 had not been passed. Nevertheless, under general principles of evidence, oral evidence of the contents of documents would have been admissible as secondary evidence where, *inter alia*, the document had been lost or destroyed. The effect of the express provision in the above clause was to make such evidence inadmissible where the document was alleged to have been lost or destroyed. In other cases in which secondary evidence would have been admissible under the general law of evidence, oral evidence of the contents of documents embodying acknowledgments of liability would also have been admissible.¹

2. ('77) 1877 Bom P J 238 (DB), *Amratlal v. Jamnadas*.

3. ('33) 20 AIR 1933 Mad 104 (105) : 140 Ind Cas 774, *Peramanayagan Pillai v. Raman Chettiar*.

4. ('02) 26 Bom 128 (130, 131) : 3 Bom L R 574 (DB), *Gulam Ali v. Miyabhai*. (See the criticism of this decision in 12 Mad L Jour 142 (Jour.))

5. ('33) 20 AIR 1933 Mad 104 (105) : 140 Ind Cas 774, *Permanayagan Pillai v. Raman Chettiar*.

Section 19 — Note 39

1. ('86) 12 Cal 267 (268, 269) (DB), *Shambhu Nath Nath v. Ram Chandra Shahz*.

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In S. 19 of the Act of 1877, the clause was amended and re-enacted as follows : "When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed ; but oral evidence of its contents shall not be received." It will be noted that there were two points of difference between the amended clause and the old clause :

- (1) The full stop after the word "signed" was converted into a semicolon.
- (2) The words "when it is alleged to have been destroyed or lost" in the second part of the clause were omitted.

Under these circumstances, there was a conflict of decisions as to the interpretation of the clause. According to the Bombay High Court² the effect of the amendment was to make oral evidence of the contents of an acknowledgment inadmissible in *all* cases, and not only where the document was alleged to have been destroyed or lost, as under the previous Act. Thus, according to this view, oral evidence of the contents of an acknowledgment could not be given even where the document was in the possession of the opposite party and the case was thus one in which secondary evidence of the contents of the document would have been admissible under the Evidence Act.

But, the Calcutta³ and Madras⁴ High Courts took a different view of the matter. According to these High Courts, the clause did not preclude the admission of oral evidence of the contents of a document embodying an acknowledgment where secondary evidence of such contents would have been admissible under the Evidence Act. In giving reasons for the above view, the Calcutta High Court in *Shambhu Nath Nath v. Ram Chandra Shaha*,⁵ observed as follows :

'One branch of the law of Evidence is that already referred to. It is contained in S. 64 and the following sections of the Evidence Act, and it determines the cases in which secondary evidence may be given of the contents of a document not produced. Another branch of that law is contained in S. 91, and the following sections. It deals with the question how far *oral* evidence, or evidence of oral communications, may be given to vary, control, or add to the effect of a document.

The first part of the paragraph before us [sub-s. (2) of S. 19] clearly belongs to the latter branch of the law. And, it would seem, the object was to remove any question which might otherwise have arisen whether the rules generally excluding oral evidence to alter

2. ('88) 12 Bom 268 (269) (DB), *Ziulnissa Lad i Begum v. Motidev Ratandev*.

3. ('86) 12 Cal 267 (270, 271) (DB), *Shambhu Nath Nath v. Ram Chandra Shaha*.
(('86) 13 Cal 292 (294, 295) (DB), *Wajibun v. Kadir Buksh*. (Where an original account book containing an acknowledgment of debt had been filed in Court and subsequently lost, it was held that secondary evidence of such acknowledgment might be given, notwithstanding the words of S. 19 of this Act.)

4. ('92) 15 Mad 491 (492) : 2 Mad L Jour 253 (DB), *Chathu v. Virarayan*. (Document containing acknowledgment was in possession of defendant. Held that secondary evidence of its contents was admissible.)

5. ('86) 12 Cal 267 (269, 270) (DB).

the effect of documents might not exclude oral evidence of the date of an undated document, where the date is an essential matter. Accordingly, it is said that oral evidence of the date of the document may be given. The paragraph then proceeds: 'but oral evidence of its contents shall not be received.' These latter words are introduced with a 'but,' and they speak not of *secondary* evidence but of *oral* evidence. We do not think they ought to be understood as dealing with an entirely different branch of the law of evidence from the earlier part of the sentence, and as repealing S. 65 of the Evidence Act, so far as it relates to acknowledgments. We think the words in question are of the nature of a saving clause, guarding against the supposition that the prior words interfere with the general rules as to oral evidence further than the express words require."

By the introduction of the words "subject to the provisions of the Indian Evidence Act, 1872" into this clause the Legislature has now given effect to the above view, namely that secondary evidence may be given to prove the contents of an acknowledgment in cases in which such evidence is admissible under the Evidence Act. But, the *reasoning* of the Calcutta High Court in the above passage is not correct. It has proceeded on the view that evidence of the *date* of an undated document and of the *contents* of a document would fall within the category of evidence given for *altering the effect* of a document, while neither class of evidence would fall under such category. In the former case the date not being specified in the document at all, there is no question of *altering* the effect of the document by external evidence. In the latter case, evidence given to prove what is contained in a document cannot be evidence the object of which is to control or alter the effect of the document.

Sub-section (2) of this section is not applicable where the document itself is available and is being construed to find its meaning as a fact. Evidence is always admissible to prove the surrounding circumstances in which the document came to be executed.⁶ (See also Note 32.)

40. Oral evidence of the factum of acknowledgment. —

An acknowledgment of liability is required by this section to be in writing if it is to be relied on for saving limitation. Hence, an acknowledgment which is relied on for such a purpose is a "matter required by law to be reduced to the form of a document" within the meaning of S. 91 of the Evidence Act. Hence, under that section, the *fact* that an acknowledgment of liability has been made in writing cannot be proved except by the production of the document itself or by secondary evidence of the contents thereof.¹ In this connexion, the

6. ('42) 29 AIR 1942 Pat 170 (173): 199 Ind Cas 657 (DB), *Ramdin Singh v. Ramparishhan Singh*.

Section 19 — Note 40

1. ('21) 63 Ind Cas 490 (491) (DB) (All), *Hari Murut v. Ramhit*. (When plaintiff relies upon written statement in previous suit as amounting to acknowledgment, he ought to produce that statement or a certified copy of it; the production of

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distinction between proving the *contents* of a document and proving the *facts recorded* in such document must be remembered.² The prohibition against the admissibility of oral evidence (except in certain cases) as to the *contents* of an acknowledgment arises under the second part of sub-section (2) of this section, which it has been seen, merely re-enacts with reference to acknowledgments of liability the general provisions of the Evidence Act on the point. The prohibition against the reception of such evidence for proving the *factum* of an acknowledgment in writing arises under section 91 of the Evidence Act.

41. Admissibility of evidence for contradicting or varying, etc., matters stated in document containing acknowledgment of liability. — Though, as seen in Note 32, external evidence is not ordinarily admissible for the purpose of *construing* a document alleged to contain an acknowledgment of liability, such evidence is admissible for the purpose of contradicting, varying, adding to or subtracting from the contents of such document. The reason is that the prohibition contained in S. 92 of the Evidence Act against the admission of evidence to contradict, vary, add to or subtract from the terms of a written instrument does not apply to *unilateral* documents like acknowledgments of liability.¹ Hence, notwithstanding that a document admits that a liability exists at a certain time, evidence is admissible to show that the liability did not exist at that time. Similarly, where a person executes a document containing an acknowledgment of liability and, at the same time, orally promises to pay the debt, the oral promise can be proved in order to show that there was a fresh contract between the parties and not merely an acknowledgment of liability.²

42. Acknowledgment need not specify exact nature of property or right. — See Note 26.

43. Acknowledgment of liability coupled with averment that time for payment, etc., has not yet come. — Under explanation I of this section, an acknowledgment may be sufficient although it is coupled with an averment that the time for payment, etc., has not yet come. Thus, where a judgment-debtor states that the amount due under the decree remains unpaid but that the time for its payment has not yet come, his statement is a sufficient acknowledgment of liability under the decree.¹

the decree in the suit will not suffice, nor is the plaint in that suit admissible as secondary evidence of the contents of the written statement.)

2. See Woodroffe and Amir Ali's "Law of Evidence," 6th Edition, page 552.

Section 19 — Note 41

1. ('30) 17 AIR 1930 Nag 298 (299) : 26 Nag L R 320; 127 Ind Cas 894, *Chhedilal v. Manoharlal*. (Acknowledgment is not a document contemplated in S. 92 of Evidence Act.)

2. ('30) 17 AIR 1930 Nag 298 (299, 300) : 26 Nag L R 320 : 127 Ind Cas 894, *Chhedilal v. Manoharlal*.

Section 19 — Note 43

1. (22) 9 AIR 1922 Cal 187 (189) : 64 Ind Cas 993 (DB), *Paresh Nath Pal v. Ismail Sardar*.

An admission of a debt with the averment that the time for payment has not yet come must be distinguished from a statement that a sum of money will become due on the happening of an event, future and uncertain. In the latter case, there is no acknowledgment of a *debt* at all, but only the allegation of incidents out of which a debt may at some time arise.²

44. Acknowledgment of liability may be accompanied by refusal to pay, etc.—Under explanation I, an acknowledgment of liability under the section may be coupled with a refusal to pay or deliver the thing claimed. Thus, an admission that a debt is due from the defendant but that he is unable to pay it to the plaintiff as there are other claimants to the money, is sufficient acknowledgment for the purpose of the section.¹ Similarly, an assertion that a method of payment had been provided which it was the duty of the creditor to resort to before seeking to enforce the remedy against the debtor does not affect the efficacy of an admission of liability made by the debtor for the purposes of this section.² But, there must be a clear admission of liability in order to constitute a valid acknowledgment under this section. A mere statement that the liability existed once but has since been discharged is not an acknowledgment of liability coupled with a refusal to pay. The reason is that in such a case, there is no admission of a subsisting liability.³

2. ('67) 3 Mad H C R 308 (311) (DB), *John Young v. Mangalpilly Ramaiya*.

Section 19 — Note 44

1. ('19) 6 AIR 1919 Mad 941 (942) : 46 Ind Cas 973, *Subba Rao v. Parasurama Pattar*.

[See ('44) 31 AIR 1944 Nag 247 (250) : ILR (1944) Nag 244, *Ghansiam v. Girijashankar*.

('41) 28 AIR 1941 Oudh 254 (255, 256) : 192 Ind Cas 885 (DB), *Deputy Commissioner, Kheri v. Ram Kumar Saxena*. (A letter written by the agent of the debtor that the debtor is unable to pay money to the creditor and that something will be paid when money is recovered is sufficient acknowledgment.)]

[See also ('99) 26 Cal 204 (217) : 2 Cal W N 718, *Rungo Lall Lohea v. Wilson*. (Letter by defendants to plaintiffs' attorney to the effect that the defendants were willing to pay the rent in question in case the plaintiffs should show a title to give a good receipt to the defendants that would satisfy their lawyers, held to be a sufficient acknowledgment.)]

2. ('36) 23 AIR 1936 Mad 943 (944):170 Ind Cas 288, *Kuppuswami v. Sabapathy Pathan*.

[See also ('31) 18 AIR 1931 All 560 (561, 562) : 134 Ind Cas 254 (DB), *Salig Ram v. Radhay Shiam*. (Fresh note executed in renewal of earlier pronote — Endorsement on earlier note to the effect that "in lieu of the earlier pronote a second note was executed and the former thereby became void" — Held that the endorsement did not deny liability under the earlier note but only said that a different security was given for it. There was no allegation of the liability having been discharged or paid off. Endorsement amounted to acknowledgment of liability.)]

3. ('19) 6 AIR 1919 Mad 317 (319) : 42 Mad 687 : 50 Ind Cas 380 (DB), *Rangasami Chetti v. Thangavelu Chetti*. (Per Seshagiri Aiyar, J. — Following ('17) AIR 1917 Mad 892 (DB), *Ramamurthy v. Gopayya*.)

See also Note 20.

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45. Acknowledgment of liability coupled with a claim of set-off. — Under explanation I to this section, an acknowledgment of liability may be coupled with a claim of set-off. Thus, where the defendant *admits* that he owes a certain sum to the plaintiff but states that he is entitled to set off against this sum another sum which the plaintiff owes him, the admission is sufficient acknowledgment under this section.¹

But, there must be a definite *admission of liability* by the defendant. Thus, where in reply to a demand made by the plaintiff, the defendant claims that the debt has been *discharged* and states that he owes nothing because he has paid a *hundi* on account of the creditor, there is no *acknowledgment of liability* coupled with a claim of set-off. But it is a direct and express repudiation of the debt giving details of the manner in which it has been discharged.² Similarly, a statement that the money claimed is *not* due, but that if it is, it must be set-off against an amount due from the plaintiff, is not an acknowledgment of liability coupled with a claim of set-off. It is a *denial* of liability with a claim by way of set-off in the alternative.³ So also, where a defendant denies that he owes anything and claims that it is the plaintiff that owes him a certain sum, but admits that the latter is entitled to set off a certain amount against his claim, there is no acknowledgment of liability under this section. The reason is that in such cases there is no *acknowledgment of liability* coupled with a claim of set-off, but there is an *assertion of a claim* coupled with an admission of a right to set-off reducing the amount claimed.⁴

46. Acknowledgment not addressed to person entitled, sufficiency of — Explanation I. — Explanation I to the section provides that an acknowledgment for the purposes of this section may be sufficient "although it is addressed to a person other than the person entitled to the property or right."

The first question that arises on the above words is whether they imply that an acknowledgment under this section *must* be addressed or communicated to *anyone*. On this point, there is a conflict of decisions. One view is that the section contemplates only an acknowledgment addressed or communicated to some particular person,¹ so

Section 19 — Note 45

1. ('21) 8 AIR 1921 All 335 (337) : 59 Ind Cas 941 : 43 All 216 (DB), *Curlender v. Abdul Hamid*. (Letter enclosing account and showing how account settled.)
2. ('13) 20 Ind Cas 10 (11) (DB) (All), *Badri Dass v. Manohar Dass*.
3. ('13) 21 Ind Cas 30 (31) (DB) (Mad), *Saikh Meera Sahib & Co. v. Nainar Lubban*.
4. ('87) 1887 Pun Re No. 60, *Murree Brewery Co. v. Hazura Mal*.
(27) 14 AIR 1937 All 317 (317, 318) : 100 Ind Cas 189, *Jusal Khore v. T. Caul*.
[See ('48) 35 AIR 1948 East Punj 36 (37) : 50 Pun L R 85, *Lakshmi Sud Khadi Bhandar v. Bhagat Singh*. (Letter written by defendant along with statement of account alleging that it is the plaintiff who owed to defendant certain amount—Account referring to some amount payable by defendant to plaintiff at one time—*Held* not acknowledgment.)]

Section 19 — Note 46

1. ('06) 33 Cal 613 (618, 619) : 3 Cal L Jour 576 : 10 Cal W N 551 (DB), *Emam Ali v. Baij Nath Ram Sahu*.

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that an entry in the defendant's own book, not communicated to anyone else will not be a sufficient acknowledgment under this section.² The other view is that the section does *not* imply that an acknowledgment of liability *must* be addressed to some person^{2a} but only provides that *if* it is addressed to any person, it is not necessary that it must be addressed to the *person entitled*. Thus, according to this view, an acknowledgment under this section may be contained in a *will*.³

Where an acknowledgment of liability is addressed to any person, it is clear from the language of explanation 1 that it need not be addressed to the plaintiff or to anyone through whom he claims.⁴ In

2. ('85) 10 Bom 71 (73) (DB), *Mahalakshimibai v. Firm of Nageshwar Parshoram*. ('89) 1899 Bom P J 104 (DB), *Ziaulnisa v. Bai Ichha*. (Transfer of a debt in defendant's book to plaintiff's name as heir of the original creditor, was in itself not an acknowledgment.)
- 2a. ('39) 26 AIR 1939 Bom 237 (248) : 183 Ind Cas 225 (DB), *Bhalchand a Dattatraya v. Chanbaappa Mollipia*. (An acknowledgment made in a document though not addressed to any person is a valid acknowledgment.)
- ('38) 25 AIR 1938 Pat 180 (181) : 174 Ind Cas 779 (DB) *Amrit Narayan Singh v. Baijnath Pandey*. (Acknowledgment addressed to dead person is sufficient — Acknowledgment contained in a document executed in favour of a person who at the time of execution was dead is valid.)
- ('19) 6 AIR 1919 Cal 48 (50) : 53 Ind Cas 898 (DB), *Janardhan Shaha v. Radha Bullar*. (Abichalnama stating that accounts are remaining unadjusted which the arbitrators are to adjust amounts to acknowledgment.)
- [See also ('37) 24 AIR 1937 All 260 (261) : 168 Ind Cas 152, *Soudagar v. Joti Prasad*. (If the debtor and creditor agree to the debtor's making an entry in the books that a sum has been paid, whereas in fact it has not been paid, it might be that the entries could in certain special circumstances, amount to an acknowledgment by debtor.)]
3. ('93) 16 Mad 36 (368) : Mad L Jour 191 (DB), *Uppi Haji v. Mammavan*.
4. ('42) 29 AIR 1942 Pat 73 (74) : 20 Pat 770 : 199 Ind Cas 566 (DB), *Fida Ali v. Bhuneshwari Kuar*. (An admission of liability in respect of the mortgage debt by the mortgagor in a sale-deed transferring the equity of redemption in favour of a third person constitutes a valid acknowledgment under S. 19.)
- ('40) 27 AIR 1940 Bom 172 (174) : 1 L R (1940) Bom 225 : 188 Ind Cas 805 (DB), *Abdul Latif v. Jawhar State*.
- ('38) 25 AIR 1938 Mad 865 (875) : 181 Ind Cas 827 (DB), *Ramanathan Chettiar v. Dawlat Sing ee*. (Mortgagor while executing another mortgage in respect of suit properties addressing a letter to proposed mortgagee containing a statement that suit properties are under equitable mortgage with plaintiff.)
- ('21) 8 AIR 1921 Bom 291 (293) : 45 Bom 934 : 61 Ind Cas 406 (DB), *Pranjiwan Das v. Bai Mani*. (Entry made in a register of sanads, showing that the sanad-holder is a mortgagee and signed by the sanad holder, is sufficient acknowledgment.)
- ('06) 33 Cal 1047 (1058) : 3rd Ind App 165 : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 16 Mad L Jour 300 : 1 Mad L Tim 199 : 3 All L Jour 525 : 2 Nag L R 130 (PC), *Maniram Seth v. Seth Rupchand*.
- ('13) 18 Ind Cas 95 (96) (All), *Har Narayan v. Sheo Prasad*. (Statement in the sale deed that the property is a mortgaged property is sufficient acknowledgment for the purpose of redemption.)
- ('09) 4 Ind Cas 579 (581) (All), *Jai Gopal Misir v. Sheo Sagar Singh*.
- ('08) 1908 All W N 226 (227), *Lahmi Chand v. Allah Dia*.
- ('28) 15 AIR 1928 Cal 850 (852) : 115 Ind Cas 263, *Manikya Bewa v. Pushpa Charan Majhi*. (Acknowledgment made in a document to which creditor is not a party is valid.)

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some early decisions,⁵ however, a contrary view was taken and it was held that an acknowledgment under this section must be addressed to the plaintiff or some one through whom he claims. It is submitted that this view cannot be supported. One of these decisions⁶ bases its view on the fact that explanation 1 to this section only says that an acknowledgment not addressed to the person entitled *may* be sufficient and not that it *shall* be sufficient. It is submitted that the reasoning is not clear. The same decision also professes to follow the judgment of the Privy Council in *Vyapoory Moodliar v. Yeo Kay*.⁷ In the above judgment, no doubt, the following passage occurs :

“ He (the defendant) does not admit that he was liable to be turned out of possession, or that anyone had a right of possession against

(’26) 13 AIR 1926 Cal 686 (687) : 91 Ind Cas 461 (DB), *Azizur Rahman v. Ramachandra*. (A statement contained in a *kobala* that a certain mortgage on some of the properties comprised in the *kobala* is still subsisting has the effect of an acknowledgment.)

(’14) 1 AIR 1914 Cal 795 (797) : 22 Ind Cas 650 (DB), *Guru Charan v. Surendra*.

(’10) 8 Ind Cas 788 (790) (DB) (Cal), *Nistarini Debi v. Chandi Dasi Debi*.

(’03) 30 Cal 687 (689) (DB), *Ambica Dat Vyas v. Nityanund Singh*.

(’23) 10 AIR 1923 Lah 369 (370) : 76 Ind Cas 751 (DB), *Labha Mal v. Iman Din*. (Admission of liability contained in an endorsement of the Sub-Registrar about admission of execution and receipt of consideration and signed by the debtor is sufficient acknowledgment.)

(’09) 4 Ind Cas 902 (906) : 1910 Pun Re No. 43 (DB), *Abdul Ali v. Von Goldstein*.

(’97) 1897 Pun Re No. 9, *Jalli v. Mahar Pir Bakhsh*. (Statement made by mortgagees in a deed of mortgage executed by them that the land was mortgaged to them amounts to an acknowledgment of their liability.)

(’93) 16 Mad 366 (368) : 3 Mad L Jour 191 (DB), *Uppi Haji v. Mammavan*. (Acknowledgment contained in will.)

(’84) 7 Mad 392 (396) : 8 Ind Jur 186 (DB), *Raman v. Vairavan*. (Letter by the drawer of a hundi to the drawee asking him to pay the amount covered by the hundi to the person, in whose favour it is drawn, is a sufficient acknowledgment for the debt due as well on the account as on the hundi (hundi given for debt due on account).)

(’31) 18 AIR 1931 Oudh 54 (56) : 130 Ind Cas 347 (DB), *Aijaz Husain v. Ram Sarup*. (Admission of liability contained in a deed of gift executed by the debtor in favour of his son constitutes a valid acknowledgment.)

(’19) 6 AIR 1919 Pat 244 (246) : 49 Ind Cas 868, *Jagernath Gir v. Rajman Gir*. (Acknowledgment in a deed of assignment executed by the obligor in favour of a third person is sufficient to save limitation.)

(’13) 20 Ind Cas 27 (27, 28) : 35 All 437 (DB), *Megh Raj v. Mathura Das*. (Statement acknowledging debt due under a mortgage made and signed before a Judge in a suit is sufficient acknowledgment.)

[See (’81) 6 Cal 447 (451, 452) (DB), *Laljee Shahoo v. Roghoonundun Lal Sahoo*. (A creditor who does not openly assent to an amount acknowledged by his debtor to be due to him, is nevertheless entitled to take advantage of such acknowledgment so long as it remains uncontradicted and unexplained by his debtor.)]

5. (’85) 10 Bom 71 (73) (DB), *Mahalakshmi Bai v. Firm of Nageshwar Purshotam*.

(’06) 33 Cal 613 (618, 619) : 3 Cal L Jour 576 : 10 Cal W N 551 (DB), *Imam Ali v. Baijnath*.

6. (’06) 33 Cal 613 (618) : 3 Cal L Jour 576 : 10 Cal W N 551 (DB), *Imam Ali v. Baijnath Ram Sahu*.

7. (’87) 14 Cal 801 (808) : 14 Ind App 168 : 5 Sar 50 : 11 Ind Jur 397 (PC).

him, nor does he make any admission at all to the plaintiff or to anyone through whom he claims."

But, in the face of the clear language of the section, it must be held that the Privy Council in the above passage merely meant to state *as a fact* that in the case before them there was no admission made to the plaintiff or to anyone through whom he claimed, rather than to lay down as a proposition of *law* that an acknowledgment of liability under this section must be addressed to the plaintiff or some one through whom he claims. That this is so, is clear from the fact that the Privy Council itself in later decisions⁸ has only proceeded on the view that an acknowledgment under this section need not be addressed to the plaintiff or to anyone through whom he claims.

In *Fatimatulnissa Begum v. Sundar Das*,^{8a} a decision of the Privy Council, (in which it was held that the alleged acknowledgment was not sufficient) the following passage occurs:

" and that is an application for mutation of names in 1839 which was not an acknowledgment made *to the mortgagors*, but only an official proceeding to substitute the successor of a mortgagee for his predecessor under the title which then actually existed."

In view of the above discussion, this passage cannot be taken to imply that an acknowledgment of liability must be addressed to the person entitled. The passage must be taken as meaning only that in the *particular case*, there was no sufficient acknowledgment.

Illustrations.

1. A was the mortgagee with possession of certain rights in land which later were commuted into a fixed money allowance to be paid from the Government Treasury. A received such money payments from the Government and gave to *Government* receipts for such payments, signed by him as *mortgagee*. It was held that the receipts constituted acknowledgments of liability (i. e., liability to be redeemed) within the meaning of this section and saved limitation for a suit for redemption of the mortgage."

2. A, the proprietor of an estate, governed by the Chota Nagpur Encumbered Estates Act, made a gift of certain property to another. Under Section 12 of that Act, the owner could not alienate any of his properties without the previous sanction of the Commissioner. Such

8. ('06) 33 Cal 1047 (1058) : 33 Ind App 165 : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 16 Mad L Jour 300 : 3 All L Jour 525 : 2 Nag L R 130 (PC), *Maniram Seth v. Seth Rupchand*.

('32) 19 AIR 1932 P C 55 (56) : 59 Ind App 130 : 11 Pat 272 : 136 Ind Cas 798 (PC), *Bageshwari Charan v. Jagar Nath Kuari*.

('98) 25 Cal 844 (851) : 25 Ind App 95 : 2 Cal W N 402 : 7 Sar 294 (PC), *Sukhamoni Chowdhurani v. Ishan Chunder Roy*.

('13) 18 Ind Cas 909 (910) : 37 Bom 326 : 40 Ind App 68 (PC), *Hiralal Ichhalal v. Desai Narsilal Chaturbhujdas*.

8a. (1900) 27 Cal 1004 (1011, 1012) : 27 Ind App 103 : 4 Cal W N 565 (PC).

9. ('13) 18 Ind Cas 909 (910) : 37 Bom 326 : 40 Ind App 68 (PC), *Hiralal Ichhalal v. Desai Narasilal Chaturbhujdas*.

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sanction being absent in the case, the donee applied to the Commissioner praying that the gift might be sanctioned or that a fresh gift might be ordered on the same terms. The implied admission of the want of title contained in the application was held sufficient acknowledgment under this section though the admission was made to a third person, viz., the *Commissioner*, and not to the plaintiff (owner of the estate) or some one on his behalf.¹⁰

3. An acknowledgment of a debt contained in a letter to the *attorney* of the creditor is sufficient for the purpose of this section.¹¹

4. An acknowledgment of a debt made to the creditor's *brother* is sufficient under this section.¹²

5. An acknowledgment by a mortgagee of the mortgage and of his liability to be redeemed may be contained in a deed of sub-mortgage¹³ or other document executed by him in favour of a third person.¹⁴

6. An acknowledgment of liability may be contained in a document presented or addressed to the *Court*. (See Note 47.)

7. A dispute having arisen among the members of a Hindu joint family as to their respective liabilities in regard to certain debts owed by the family, the matter was referred to arbitration. The agreement of reference to arbitration contained an acknowledgment of liability to the creditor. It was held that though the acknowledgment was not made to the creditor but was only contained in a document embodying the mutual arrangement between the members of the family, it was sufficient under this section.¹⁵

8. An acknowledgment of a debt contained in a document executed in favour of a person who is dead at the time of the execution of the document is sufficient under this section.¹⁶

9. An acknowledgment of a debt in an application before a Debt Conciliation Board is sufficient under this section.¹⁷

10 ('32) 19 AIR 1932 P C 55 (56) : 59 Ind App 130 : 11 Pat 272 : 136 Ind Cas 798 (PC), *Bageshwari Charan v. Jagarnath Kuari*.

11. ('26) 13 AIR 1926 Cal 1140 (1142, 1143) : 97 Ind Cas 710 (DB), *Shamsud Ali v. Miriam*.

12. ('28) 111 Ind Cas 617 (618) (DB) (Bom), *Pandurang Shivram v. Maruti Niloba*.

13. ('51) 38 AIR 1951 Pepsu 52 (Para 1) : 2 Pepsu L R 148, *Arjan Singh v. Gurdial Singh*.

('09) 1 Ind Cas 510 (511, 512) (All), *Gendamal v. Ilahi Buksh*.

14 ('04) 6 Bom L R 38 (40) (DB), *Vithu v. Keshav*.

('32) 19 AIR 1932 Bom 531 (534) : 139 Ind Cas 218, *Amarchand Rajaram v. Narayan Vishnu*.

15 ('39) 26 AIR 1939 Sind 113 (123) : I L R (1939) Kar 693 : 181 Ind Cas 596, *Tikamdas Mathradas v. Kalianji Gordhadas*. (In this case an acknowledgment of a debt contained in a reference to arbitration was held sufficient under the section though the arbitration failed.)

('27) 14 AIR 1927 All 488 (489, 490) : 103 Ind Cas 181 : 49 All 801 (DB), *Phul Singh v. Bhojraj*.

16. ('38) 25 AIR 1938 Pat 180 (181) : 174 Ind Cas 779 (DB), *Amrit Narayan Singh v. Baijnath Pandey*.

17. ('46) 33 AIR 1946 Nag 344 (345, 346) : I L R (1946) Nag 493 : 225 Ind Cas 340 (DB), *Bhalchandra Rao v. Brijlal*. (Where in an application under S. 6 of

Although thus, an acknowledgment under this section need not be *addressed* to the plaintiff or some one through whom he claims, the liability admitted must be a *liability to the plaintiff* or some one through whom he claims. This is clear from the fact that the section requires an acknowledgment of liability in respect of the *particular* property or right claimed in the suit.¹⁸

46a. Acknowledgment contained in balance sheet. — A statement in a balance sheet submitted in obedience to statute, acknowledging a debt due is sufficient within this section.¹

47. Admission contained in document addressed to Court. — As seen in Note 46 above, an acknowledgment under this section need not be addressed to the plaintiff or anyone through whom he claims. Hence, an acknowledgment contained in a document presented to a *Court* is sufficient for the purposes of this section.¹

the C. P. and Berar Debt Conciliation Act before the Debt Conciliation Board the debtor includes a debt and in the remarks column reference is made to the decree under which the debt is due, the application is an admission of the existence of the debt and amounts to an acknowledgment that he is bound by the decretal debt: A I R 1941 Nag 95, doubted.)

('44) 31 AIR 1944 Nag 247 (250) : I L R (1944) Nag 244, *Ghansiam v. Girishankar*.

('40) 27 AIR 1940 Nag 214 (215) : 190 Ind Cas 818, *Jawanmal v. Akaji*.

[See also ('48) 35 AIR 1948 Nag 197 (198) : I L R (1947) Nag 572, *Sheolal v. Ramrao*. (Quære.)

[But see ('41) 28 AIR 1941 Nag 95 (96, 97) : 194 Ind Cas 120 (DB), *Udhao Nanaji v. Narayan Vithoba* (The statement contained in the debtor's application to the Debt Conciliation Board cannot be regarded as an admission within S 65 (b), Evidence Act — It is a statement—Under S. 6 of the Debt Conciliation Act the statement is not to be deemed a statement of the amount admittedly due but the amount claimed.)]

18. ('87) 14 Cal 801 (803) : 14 Ind App 163 : 5 Sar 50 : 11 Ind Jur 397 (PC), *Vyapoory Moodliar v. Yeo Kay*.

('93) 16 Mad 220 (228) : 3 Mad L Jour 35 (DB), *Venkata v. Parthasaradhi*. (Per Wilkinson, J.)

('36) 23 AIR 1936 Lah 659 (660) : 165 Ind Cas 74, *Ishar Singh v. Sadhu Singh*. (Bond executed in favour of several persons having equal shares—Acknowledgment in favour of only one person—Not sufficient as regards others.)

Section 19 — Note 46a

1. ('18) 1918 Mad W N (S N) 48 (DB).

Section 19 — Note 47

1. ('50) ILR (1950) All 235 (238, 239) : 1949 A L J 522, *Sardar Singh v. Raghu-raj Singh*. (Mortgages of 1851 and 1852—Death of mortgagor in 1886—Mortgages disputed in mutation proceedings—Statements of mortgagees recorded and mentioned in decision of Tahasildar—Statements held admissible and operated as acknowledgment within S. 19 to save limitation for redemption in 1946.)

('47) 34 AIR 1947 All 74 (80) : ILR (1947) All 11 : 229 Ind Cas 583 (FB), *Munshi Lal v. Hira Lal*. (Suit upon intermediate mortgage—Subsequent mortgagees impleaded—Latter holding prior mortgages—Plaintiff submitting in application to Court that subsequent mortgagees were prior mortgagees as they had obtained simple mortgage in lieu of prior debt—Subsequent mortgagees removed from array of defendants—Considering context application held constituted acknowledgment.)

('45) 32 AIR 1945 Bom 143 (145) : 46 Bom L R 931, *Supdu Laxmanshet v. Soniram Ragho*. (Acknowledgment contained in compromise petition to Court.)

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Illustrations.

1. An admission of liability contained in a plaint may operate as an acknowledgment under this section.²

- (143) 30 A I R 1943 Oudh 164 (168, 169) : 18 Luck 601 : 204 Ind Cas 444 (DB), *Sheo Prasad v. Parkash Rani*. (Prior mortgagee admitting genuineness of mortgage-deed in favour of subsequent mortgagee by a writing signed by him on the list of documents filed in the case.)
- (142) 29 AIR 1942 Mad 327 (328, 329) : 201 Ind Cas 782 (DB), *Murli Mohan v. Chinta Brahmappa*. (A deed of composition filed in Insolvency Court signed by the insolvent and his creditors, held amounted to acknowledgment of debts specified in the deed.)
- (133) 20 AIR 1933 All 364 (366) : 55 All 393 : 146 Ind Cas 836 (DB), *Adya Prasad v. Lal Girjish*. (Letter given by decree-holder to judgment-debtor not to take out execution for some time — Application by judgment-debtor to Court to place letter on record is acknowledgment of liability of amount due under decree.)
- (133) 20 AIR 1933 All 99 (100) : 142 Ind Cas 784 (DB), *Md. Rafi v. Kripa Ramji*. (Dakhalnama filed by mortgagee in execution proceedings against mortgagor — Dakhalnama containing admission of existence of mortgage is sufficient acknowledgment by mortgagee of such mortgage.)
- (114) 1 AIR 1914 All 294 (296) : 22 Ind Cas 816, *Bhola Nath v. Ghure*. (Compromise of proceedings in Court containing acknowledgment.)
- (137) 24 A I R 1937 Cal 226 (229) : 172 Ind Cas 121, *Sm. Sudhartoyee Bose v. Bhujendra Nath*. (Acknowledgment in the course of execution proceedings is sufficient to save limitation for suit subsequently brought.)
- (110) 6 Ind Cas 366 (367) (DB) (Cal), *Bindeswari Koer v. Awadh Behary Lal*. (Compromise to have rest of decree executed at future time is acknowledgment.)
- (107) 6 Cal L Jour 141 (142) (DB), *Brojo Nath Saha v. Gaya Sundari Dassya*. (Petition in which the judgment-debtor agreed to pay a certain sum to the person who attached the decree and took out execution, constitutes an acknowledgment of liability to the decree-holder's representative.)
- (195) 23 Cal 374 (387) (DB), *Norendra Nath Pahari v. Bhupendra Narain Roy*. (Petition on behalf of judgment-debtor admitting liability for judgment-debt and making part payment.)
- (106) 1906 Pun L R No. 23, p. 83 (DB), *Kanshi Ram v. Badda*. (Admission of existence of a mortgage contained in an application to the Court for permission to make a private alienation of property sought to be proceeded against in execution, is sufficient acknowledgment of mortgage.)
- (118) 5 A I R 1918 Mad 1122 (1123, 1124) : 38 Ind Cas 169 (DB), *Paramasivan Pillai v. Aristotle Chakma*. (Receiver of insolvent's estate applying to the Court for permission to sell insolvent's property—Admission in such application that the property is subject to mortgage—This is sufficient acknowledgment.)
- (109) 1 Ind Cas 240 (242) : 5 Nag L R 8, *Vithal v. Gopal Rao*. (Application of an arrested judgment-debtor, praying for his release and for an order to pay the decretal amount by instalments, is an acknowledgment of liability in respect of a right of decree-holder.)
- [But see (139) 26 AIR 1939 Nag 113 (118) : 184 Ind Cas 139 : 1 L R (1941) Nag 222 (DB), *Tapi Bai v. Shankar Lal*. (The observations that an entry in a 'list of reliance' a local term meaning a list filed in a suit of the documents which the party relies on is not acknowledgment as it is not addressed to any one juristically connected with the plaintiff, is not correct.)]
2. (114) 1 AIR 1914 All 481 (482) : 36 All 408 : 24 Ind Cas 104 (DB), *Baleshwar v. Ram Deo*. (Co-mortgagor's statement in the plaint of a redemption suit that the other co-mortgagors have been impleaded as defendants, as they would not join as plaintiffs, is an acknowledgment of the latter's right to redeem.)
- (124) 11 A I R 1924 All 876 (877) : 84 Ind Cas 5, *Krishna Misir v. Dwarka Pandey*. (Do.)
- (121) 64 Ind Cas 979 (979) (DB) (All), *Maqsood Husain v. Karimuddin*. (Do.)

2. An admission of liability contained in a written statement may amount to an acknowledgment of liability under this section.³

3. The acknowledgment of a debt by its inclusion in the schedule of creditors filed by an insolvent in the course of insolvency proceeding will be sufficient under this section.⁴

(25) 12 AIR 1925 Lah 529 (529): 86 Ind Cas 859 (DB), *Chiman Lal v. Ram Rikh*. (Admission in a *plan filed with a plaint* might possibly for certain purposes be regarded as an admission made in the plaint.)

(25) 12 AIR 1925 All 174 (175): 85 Ind Cas 330 (DB), *Sanwal Das v. Ali Madhi*. (Sub-mortgagee's suit for sale — Description of property as a mortgage interest is sufficient acknowledgment.)

3. (39) 26 AIR 1939 Cal 399 (402): ILR (1939) 2 Cal 33: 187 Ind Cas 831 (DB), *Gumti Debi v. Jugal Kishore*. (Suit by decree-holder for declaring certain alienations by judgment-debtor as void — Written statement by mother as guardian ad litem of the minor judgment-debtors admitting decree to be unsatisfied but contending that other properties left are sufficient to satisfy decree amounts to acknowledgment of decretal debt.)

(29) 16 AIR 1929 All 242 (242): 115 Ind Cas 627, *Chheda Lal v. Ghulam Abbas*. (Plaintiff suing for redemption — Allegation in plaint that defendant is in possession as mortgagee — Written statement of defendant admitting allegation is acknowledgment.)

(01) 24 Mad 361 (363) (DB), *Venkataram Naidu v. Ramaraju*.

(28) 15 AIR 1928 Cal 850 (851): 115 Ind Cas 263, *Sm. Manikya Bewa v. Pushpacharan Majhi*. (Plaintiff depositing certain sum with defendant 1 and father of defendant 2 — Defendant 1 admitting deposit in written statement in partition suit by mother of defendant 2 as next friend.)

(33) 20 AIR 1933 All 352 (353): 144 Ind Cas 903, *Raghubar Dayal v. Banwari Lal*. (In a suit on second promissory note the plaintiff relied on a written statement of defendant admitting the existence of two promissory notes — Held this was sufficient acknowledgment.)

(09) 3 Ind Cas 19 (20) (DB) (Mad), *Kadri Pakkappa v. Manki Husain Sahib*. (Acknowledgment in a prior written statement of the delivery of certain articles is sufficient to save limitation in a suit for the recovery of its price.)

(08) 32 Bom 296 (298, 299): 10 Bom L R 374 (DB), *Shrinivas Krishna Shiralkar v. Narhar Khandu Khanvilkar*. (Acknowledgment contained in an application by the judgment-debtor by way of a written statement, wherein he said that he was unable to pay the amount then but would pay if time were given him, is a valid acknowledgment.)

(87) 1887 Pun Re No. 20, *Balmokand v. Ramji Lal*. (Suit for redemption — Written statement in former suit containing a distinct acknowledgment of a mortgage will give a fresh start of limitation.)

(14) 1 AIR 1914 All 98 (99): 36 All 264: 23 Ind Cas 429 (DB), *Indarpal Singh v. Mewa Lal*. (Do.)

(30) 17 A I R 1930 Oudh 67 (68, 69): 5 Luck 446: 124 Ind Cas 425 (DB), *Balbhadar Singh v. Sheo Pearey Lal*. (Written statement in another suit, admitting rights of mortgagee is sufficient acknowledgment.)

4. (45) 32 AIR 1945 Mad 215 (216): (1945) 1 M L J 298, *Velayudha v. Annamalai*.

(41) 28 AIR 1941 Mad 772 (780): ILR (1942) Mad 95: 197 Ind Cas 199 (FB), *Mohana Reddi v. Gangaraju*. (Signing of schedule by insolvent constitutes acknowledgment within S. 19.)

(11) 9 Ind Cas 944 (945): 35 Bom 383, *Shrigopal Chiranjilal v. Dhanalal*.

(40) 27 A I R 1940 Cal 210 (210): I L R (1939) 2 Cal 523: 188 Ind Cas 280, *Sree Narain Kayan v. Bhagwandas Churiwala*. (An entry of decretal debt in the list of creditors signed by the debtor in his application to the Official Assignee to an acknowledgment.)

(23) 10 A I R 1923 Bom 33 (34): 67 Ind Cas 757: 47 Bom 244 (DB), *Sidhraj Bhojraj v. Ali Haji*. (Per Macleod, J.)

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4. A applies for probate of the will of B. Objection is raised on the ground that A is a debtor to the estate of B. A files a reply to this objection wherein he admits his liability. This is sufficient acknowledgment under this section.⁵

5. An application by a judgment-debtor for the postponement or stay of a sale in execution may be an acknowledgment of liability under the decree.⁶

6. An application to the Court by the judgment-debtor for entering up part satisfaction of decree amounts to an acknowledgment of liability under the decree.⁷

7. An application for extension of time for payment of the decretal amount is a sufficient acknowledgment of liability under the decree.⁸

48. Admission contained in deposition of witness.—An admission of liability contained in a deposition by a witness may amount to an acknowledgment of liability. But, for this purpose, the deposition must be signed by the witness.¹ If the statement is not

('12) 14 Ind Cas 1 (1) (DB) (Cal), *Nanda Lal Marwari v. Rampal Singh*.

('12) 13 Ind Cas 603 (604) (DB) (Cal), *Rampal Singh v. Nand Lal Marwari*.

('22) 9 AIR 1922 Lah 316 (316) : 66 I. C. 387 (DB), *Jwala Das v. Hukum Chand*.

('12) 14 Ind Cas 335 (338) (Lah), *Ramdas v. Kanshi Ram*.

('33) 20 AIR 1933 Mad 565 (565) : 143 Ind Cas 681, *Sakala Rattam v. Musalayya*.

('33) 20 AIR 1933 Mad 104 (104) : 140 Ind Cas 774, *Peramanayagam v. Raman*.

('17) 4 A I R 1917 Mad 518 (518) : 36 Ind Cas 389 (DB), *Kissendoss v. Khatau Makanjee Spinning and Weaving Co., Ltd.* (But such an acknowledgment in the insolvency petition by a manager of a Hindu family being personal, is not binding against other members.)

('28) 15 A I R 1928 Rang 326 (327) : 6 Rang 533 : 117 Ind Cas 570, *A. K. R. M. M. C. T. Chettyar Firm v. S. E. Munnee*.

('28) 15 AIR 1928 Rang 327 (328) : 117 I.C. 571, *Tong Hoek Hin v. Eng Hoe Seng*.

5. ('06) 33 Cal 1047 (1059) : 33 Ind App 165 : 4 Cal L Jour 94 : 8 Bom L R 501 : 10 Cal W N 874 : 16 Mad L Jour 300 : 1 Mad L Tim 199 : 3 All L Jour 525 ; 2 Nag L R 130 (PC), *Maniram Seth v. Seth Rupchand*.

6. ('80) 3 All 247 (249, 250) (FB), *Ramhit Rai v. Satgur Rai*.

('86) 10 Bom 108 (111) (DB), *Venkatrav Bapu v. Bijesing Vithalsing*.

7. ('45) 32 AIR 1945 Pat 280 (281) : 220 Ind Cas 378 (DB), *Satrughana Patro v. Ignesh Mahapatra*.

('21) 8 AIR 1921 Mad 126 (129, 132) : 61 Ind Cas 979 (DB), *Viswanatha Sastri v. Sitalakshmi Ammal*.

('14) 1 A I R 1914 Bom 288 (290) : 38 Bom 47 : 21 Ind Cas 407 (DB), *Bachraj Nihalchand v. Babaji Tukaram*.

('10) 6 Ind Cas 366 (367) (DB) (Cal), *Bindeswari Koer v. Awadh Behary Lal*.

('94) 16 All 228 (231) : 1894 All W N 55, *Muhammad Said Khan v. Payag Sahu*. (Acknowledgment of liability under decree contained in application certifying part satisfaction — Application presented to Collector to whom execution had been transferred — Application was held to have been rightly presented to Collector and acknowledgment was effective.)

8. ('08) 32 Bom 296 (298) : 10 Bom L R 374 (DB), *Shrinivas Krishna Shiralkar v. Narhar Khando*.

('82) 8 Cal 716 (717, 718) : 10 Cal L R 613 (DB), *Ram Koomar Kur v. Jakur Ali*.

('83) 9 Cal 730 (732) : 13 Cal L R 91 : 5 Shome L R 21 (DB), *Toree Mahomed v. Mahomed Mabood Bux*.

Section 19 — Note 48

1. ('97) 20 Mad 239 (242) : 6 Mad L Jour 266 (DB), *Peria Venkan Udaya Tewar v. Subramaniam Chetty*.

signed by the witness but is only signed by the Judge or some officer of the Court, the deposition cannot operate as an acknowledgment of liability under this section.² The reason is that the Judge or the officer signing the deposition is not the *agent* of the witness. In other words, the Judge or officer does not sign the statement *on behalf* of the witness for the purpose of acknowledging his liability but merely fulfils a statutory duty imposed upon him in order to bring into play the presumption raised by S. 80 of the Evidence Act.³

See also Note 50.

49. Entry in Settlement Record, etc.— Where an entry is made in a settlement record or other public record that certain property is under a mortgage and the record is signed by the parties concerned in token of their acceptance of the correctness of the entry, the document can be used as an acknowledgment of liability in respect of the mortgage.¹ But where the record has not been signed by the

('93) 16 Mad 220 (222) : 3 Mad L Jour 35 (DB), *Venkata v. Parthasaradhi*. (Per Muthuswami Ayyar, J.; Wilkinson, J., *contra*.)

('11) 10 Ind Cas 142 (142) (Lah) *Attah Ditta v. Karam Chand*.

('27) 14 AIR 1927 Mad 219 (222, 223, 224) : 50 Mad 548 : 100 Ind Cas 10 (DB), *Swaminatha Odayar v. Subbarama Ayyar*. (Such acknowledgment need not be express but may be implied from the facts and the surrounding circumstances.)

('02) 25 Mad 220 (231, 232) (FB), *Narayana Ayyar v. Venkataramana Ayyar*.

('13) 20 Ind Cas 27 (27) : 35 All 437 (DB), *Meghraj v. Mathura Das*.

2. ('40) 27 AIR 1940 Nag 354 (355) (DB), *Gajadhar Prasad Ramlal v. Udaichand Kapurchand*.

('34) 21 AIR 1934 Rang 282 (283, 284) : 12 Rang 610 : 153 Ind Cas 957, *U Po Yin v. U Ba Chit*.

[See ('29) 16 AIR 1929 All 332 (333, 334) : 119 Ind Cas 565, *Gayadin Singh v. Kalka Singh*.]

3. ('40) 27 AIR 1940 Nag 354 (355, 356) (DB), *Gajadhar Prasad Ramlal v. Udaichand Kapurchand*. (The fact that a witness who is a party to the suit voluntarily goes into the witness box does not make any difference.)

Section 19 — Note 49

1. ('48) 35 AIR 1948 Oudh 257 (258) : 1948 Oudh W N 87, *Sheo Prasad v. Rama Kant*. (Entry in khewat mentioning defendant's predecessors as mortgagors and plaintiff's predecessors as mortgagees — Entry signed and attested by mortgagees and verified by Settlement Officer — Entry operates as valid acknowledgment.)

('75) 1 All 117 (123, 124) (FB), *Daia Chand v. Sarfraz*. (Spankie, J., dissenting.)

('77) 1 All 425 (427) : 2 Ind Jur 115 (DB), *Daia Chand v. Sarfraz Ali*.

('09) 2 Ind Cas 469 (470) (DB) (Bom), *Hiralal Icchalal v. Narsilal*.

('08) 10 Bom L R 385 (387, 388) (DB), *Sheikh Mahomed v. Jamaluddin Mohamed*.

('19) 6 AIR 1919 All 401 (402) : 52 Ind Cas 229 (DB), *Mewa Ram Singh v. Ganga Ram*. (Entry of mortgage in wajib-ul-arz.)

('10) 5 Ind Cas 77 (78) (All), *Shankar v. Dharmon*. (Do.)

('11) 10 Ind Cas 215 (216) (All), *Maharaj Singh v. Shankar Lal*. (Entry in khewat attested by mortgagee — Signature made in the handwriting of third person but in his presence — Held sufficient acknowledgment.)

('27) 14 AIR 1927 Oudh 457 (465) : 105 Ind Cas 93 (DB), *Suraj Baksh v. Ganga* (Statement mentioning mortgage by mortgagee in pedigree table of the cosharers of a village which was the subject of mortgage and an entry in wajib-ul-arz signed by the mortgagee is sufficient acknowledgment.)

('21) 8 AIR 1921 Bom 291 (292, 293) : 45 Bom 934 : 61 Ind Cas 406 (DB), *Pranjivandas Purshottamdas v. Bai Mani*. (Entry made in register of Sanads showing that the sanad-holder is a mortgagee is sufficient.)

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party sought to be bound or by his agent, it cannot be used against him as an acknowledgment of liability. The signature of the settlement officer or other officer who may be signing the record cannot be taken as the signature of the agent of the parties whose rights and liabilities are recorded.²

50. Explanation II : Acknowledgment by agent. — Explanation II to the section provides that an acknowledgment under this section may be signed either personally or by an agent duly authorised in this behalf. The "signing" referred to here means the signature which a person affixes to a document in order to indicate that he is the author of the document. Hence, when A authorises B to affix the former's signature to a document on his behalf and B accordingly writes A's name on the document, the document is to be taken as "signed" by A himself and not by his *agent* B. (See Note 31.) In other words, in order to constitute signature by an agent, it is necessary that the latter should sign the document as one of his own authorship, the "agency" referring to the creation of the document itself and not merely to the writing of another person's name on it. Hence, the provision that an acknowledgment under this section may be "signed" personally or by a duly authorised agent really means that an acknowledgment may be *made* personally or by a duly autho-

('33) 20 AIR 1933 Lah 345 (346) : 14 Lah 587 : 147 Ind Cas 1174, *Bhagwan Das v. Said Mahommad*.

[See also ('88) 1888 Pun Re No. 63, *Maksud Ali v. Salar Bakish*. (*Held*, that under the circumstances of the case the entries were not sufficiently specific to operate as acknowledgment.)

('81) 1881 All W N 40 (40) (DB), *Dunni v. Basti*. (*Held*, that under the circumstances of the case, a statement contained in a Settlement Record styled "Tafrik Thok Patti" by which the defendant was alleged to have acknowledged the titles of two persons to certain shares and their right of redemption was signed for the defendant by his authority.)]

[See however ('43) 30 A I R 1943 All 393 (399, 405, 408) : ILR (1944) All 76 : 212 Ind Cas 238 (FB), *Gur Saran v. Shib Singh*. (Entries in *khewat* of 1878 showing mortgagees to be in possession mentioning amount and stating that mortgage was redeemable at *Dasehra* in *Jeth* — Entries attested by mortgagors and mortgagees or their representatives—*Held*, that entries did not save limitation—Unless they were conscious acknowledgments of a *subsisting* liability and unless it was shown that they were made within the period of limitation, they could not be relied upon to save limitation.)

[But see ('11) 10 Ind Cas 238 (240) (All), *Chunni v. Hukum Singh*.

('91) (1891) Pun Re No. 116, *Jwala Singh v. Sher Singh*. (Signature at foot of *wajib-ul-arz* not enough — Entry containing admission must be specially signed.)]

2. ('10) 5 Ind Cas 992 (994) : 1910 Pun Re No. 39, *Ganga Ram v. Pokhar Das*. ('05) 1905 Pun L R No. 75, p. 289 (291, 292) : 1905 Pun Re No. 53 : 1905 Pun W R No. 74 (FB), *Bahadur v. Nanka Ram*. (It may be observed that the Settlement Officer as the officer entrusted with the preparation of the record would *prima facie* be signing the document in his official capacity, just as a judge recording the deposition of a witness signs the deposition.)

[See also ('89) 1889 Pun Re No. 145, *Gul Muhammad v. Akbar*. (Fact that the signature of the defendant himself was absent is immaterial — No doubt that the signature was made by some person, probably a settlement official acting for him with *his full authority*.)]

rised agent. The provision does not refer to the mere act of writing another's name on a document as an agent.

The Act of 1871 used the words "generally or specially authorised in this behalf."¹ These words have been changed into "duly authorised in this behalf." But, this does not mean any change in the law, and even under the present Act, the authority of the agent to make an acknowledgment on behalf of another may be special or general.² Thus, where a letter acknowledging a debt on behalf of another is written at the request of the latter, the acknowledgment is made by an agent *specially* authorised in this behalf.³ But, where the authority is not confined to a particular case, it will be a general authority. Such authority also will be within the section. Thus, an agent under a general power of attorney may acknowledge debts due by the principal.⁴

The authority of an agent under this section may be express or implied⁵ and may be presumed from attendant circumstances.⁶

Section 19 — Note 50

1. ('81) 6 Cal 340 (351) : 7 Cal L R 121 (DB), *Mohesh Lal v. Busunt Kumaree*.
2. (1900) 22 All 123 (128, 129) : 1900 All W N 41 (FB), *M. J. Powell v. Municipal Board of Mussoorie*. (Authority to act in all cases or in a class of cases is included within the expression "authorised.")
3. ('41) 28 AIR 1941 Oudh 254 (255, 256) : 192 Ind Cas 885 (DB), *Deputy Commissioner, Kheri v. Ram Kumar Saxena*. (A letter written by a mukhtar at the instructions of the debtor is valid acknowledgment.)
- ('40) 27 AIR 1940 Pat 6 (7) : 18 Pat 715 ; 186 Ind Cas 225 (DB), *Ramjan Ali v. Khawja Meer Ahmed*. (Letter of acknowledgment written by person at instance of debtor — Debtor posting that letter to creditor's address — Person can be inferred to have been duly authorized to make acknowledgment.)
- ('29) 16 AIR 1929 Oudh 479 (480) : 5 Luck 510 : 120 Ind Cas 825 (DB), *Narain Das v. Chandrawati Kuar*. (Letter written and signed by general agent under instructions of debtor.)
- ('27) 14 AIR 1927 Oudh 613 (613) : 100 Ind Cas 784 (DB), *Ram Prasad v. Sant Din*. (Do.)
4. ('25) 12 AIR 1925 Mad 1260 (1262) : 91 Ind Cas 338 (DB), *Arunachallam Chetti v. Raja Rajeswara Sethupathi*.
5. ('40) 27 AIR 1940 Nag 354 (355) (DB), *Gajadhar Prasad Ramlal v. Udaichand Kapurchand*.
- ('36) 23 AIR 1936 Oudh 280 (288) : 12 Luck 185 : 162 Ind Cas 362 (DB), *Bhola Nath v. Maharani Kunwar*.
- ('31) 18 AIR 1931 All 398 (399, 400) : 133 Ind Cas 155 (DB), *Kamta Rai v. Rani Jaduraj Kunwari*. (Pleader's admission in course of his business may amount to acknowledgment.)
- ('33) 20 AIR 1933 Mad 332 (336) : 144 Ind Cas 784, *Srivilliputtur Municipal Council v. Arunachala Nadar*.
- ('19) 6 AIR 1919 Mad 370 (372) : 53 Ind Cas 878 (DB), *Thankammal v. Kunhamma*.
- [See also ('50) 37 AIR 1950 Ajmer 4 (2) (Para 3), *Badri Narain v. Gopi Nath*. (The words 'duly authorized in this behalf' in Expl. II to S. 19 do not connote that such authorization must be in writing)]
6. ('36) 23 AIR 1936 Oudh 280 (288) : 12 Luck 185 : 162 Ind Cas 362 (DB), *Bhola Nath v. Maharani Kunwar*.
- ('33) 20 AIR 1933 Mad 332 (336) : 144 Ind Cas 784, *Srivilliputtur Municipal Council v. Arunachala Nadar*.
- (25) 12 AIR 1925 All 176 (178) : 85 Ind Cas 633, *Ganga Ram v. Lachman Singh*.

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Hence, the question whether in any case there is authority to acknowledge depends on the facts and circumstances of that case.⁷ Thus, an authority to settle and pay claims includes authority to acknowledge such claims.⁸ Similarly, an authority to borrow implies authority to acknowledge debts.⁹ So also, an authority to buy goods and pay for them implies authority to acknowledge liability for the price of the goods bought.¹⁰ Where the business of a firm was being

7. ('43) 30 AIR 1943 Bom 381 (385) : ILR (1943) Bom 486 : 210 Ind Cas 532 (DB), *Dasrath Motiram v. Gajanan Keshav*. (Mortgage by *de facto* guardian of minor without any legal authority to act on his behalf—No inference that he was acting as his agent to save limitation.)
- ('09) 4 Ind Cas 38 (41) : 32 Mad 284 (DB), *Seshan Pattar v. Veera Raghava Pattar*. (Resolution whereby the members of a village community empower certain members to bind them by the latter's actions includes an authority to make acknowledgment.)
- ('36) 23 AIR 1936 Oudh 280 (288) : 12 Luck 185 : 162 Ind Cas 362 (DB), *Bhola Nath v. Maharani Kunwar*. (Letter written by general agent and manager may be presumed to be authorized.)
- ('29) 16 AIR 1929 Cal 155 (155) : 115 Ind Cas 177, *Amulya Charan v. Coral Engineering Works Ltd.* (There were three directors—One of them was manager—Acknowledgment given by him is sufficient.)
- ('24) 11 AIR 1924 Mad 96 (97), *Mahalakshmi v. Venkam Setti*. (Private debt of father of Hindu family—Acknowledgment by undivided son—No presumption that the son is agent for the father.)
- ('36) 23 AIR 1936 Oudh 332 (333, 334) : 162 Ind Cas 448, *Deputy Commissioner Kheri v. Jagdamba Prasad*. (Where a mukhtarnama in favour of a person only authorizes him to look after the case-work connected with an estate, he has no power to acknowledge liability by issuing cheque on his own responsibility.)
- ('80) 6 Cal L R 101 (106) : 7 Ind App 8 : 4 Sar 112 : 3 Suther 111 (PC), *Dinomoye Debi v. Roy Luchmiput Singh*. (Though at one time the man might have held a general power of attorney from the defendant, there being nothing to show that he was continuing as the agent of the defendant at the date of the acknowledgment in question, an acknowledgment by such a person is not sufficient.)
- ('22) 9 AIR 1922 All 230 (231) : 44 All 546 : 66 Ind Cas 394 (DB), *Narain Rao Kalia v. Mt. Manni Kuari*. (It cannot be assumed that a Mukhtar-am has power to acknowledge liability.)
- ('25) 12 AIR 1925 All 176 (178) : 85 Ind Cas 633, *Gangaram v. Lachman Singh*. [See ('26) 13 AIR 1926 All 85 (86) : 89 Ind Cas 161, *Bhagwan Din v. Sri Kishen*. (Held in the circumstances of the case that the cosharer who had signed on behalf of others could not be presumed to be acting under their authority.)]
8. ('16) 3 AIR 1916 Mad 235 (237) : 30 Ind Cas 675 (DB), *Muthuswami Nadan v. Sankara Lingam Chetty*. (Ex-partner authorized to collect the outstandings and pay all the debts of the partnership—Such authority includes the lesser power of acknowledging debts.)
9. ('39) 26 AIR 1939 Mad 414 (421) : 184 Ind Cas 735 (DB), *Margaret Lornie v. Abu Backer Sait*. (Guardian having authority to borrow can keep debt alive by acknowledgment.)
- ('09) 4 Ind Cas 708 (709) : 32 All 51 (DB), *Lalta Parshad v. Babu Parshad*. (Managing partner of firm can borrow and so can acknowledge in course of management.)
[See also ('26) 13 AIR 1926 Mad 452 (453) 92 Ind Cas 626 (DB), *Kesavaramayya v. Venkataratnam*.]
10. ('19) 6 AIR 1919 P C 120 (121) : 55 Ind Cas 543 (PC), *Braja Sunder Deb v. Bhola Nath*. (Authority to purchase and pay for all things required for the use of the principal and his household.)
- ('33) 20 AIR 1933 Mad 332 (336) : 144 Ind Cas 784, *Srivalliputtur Municipal Council v. Arunachala Nadar*. (President of Local Emergency Committee

carried on by a *gumastha* who generally managed all its affairs and he was always allowed to write letters on behalf of the firm which were never repudiated, it was held that he could also acknowledge debts on behalf of the firm.¹¹ But, an authority which is confined to dealings with lands does not empower the agent to acknowledge liability for personal debts not charged on lands.¹² So also, the mere fact that an agent used to write letters on behalf of his principal is not sufficient to enable the Court to infer that he was authorised to make acknowledgment of liability on behalf of the principal.¹³

The authority of an agent under this section need not be the outcome of a *contractual* arrangement between the parties. The authority may be the outcome of an order of Court or it may arise as a matter of *law* from the position occupied by the parties with regard to each other. The fact that S. 21 specifies certain cases in which one person can acknowledge liabilities on behalf of another though the latter has not *appointed* him an agent, does not imply that in *other* instances one person cannot acknowledge on behalf of another unless he has been *appointed* by the latter as his agent.¹⁴ Thus, a Court of Wards in charge of the estate of a ward is an agent authorized under the *statute* to make acknowledgments on behalf of the ward. (See Note 58.) So also, the authority of an executor (see Note 56) to give acknowledgments on behalf of the estate is based on his position under the *law* and is not the result of any contractual arrangement. A receiver derives his

appointed by Municipality to purchase rice can acknowledge liability with reference to price of rice purchased.)

(10) 6 Ind Cas 948 (951) : 1910 Pun Re No. 55 (DB), *Firm of Sheru Mal Chaina Mal v. Von Goldstein*. (Where A authorizes B to receive goods from C on A's account, the authority includes the authority to give an acknowledgment of receipt — It does not make a difference that the acknowledgment is given in a consolidated form for a number of supplies together instead of at the time of each supply.)

[But see (11) 11 Ind Cas 332 (333) : 35 Mad 142 (DB), *Sheik Mohideen v. The Official Assignee*. (A and B were partners and obtained goods on credit from C — A was entrusted with a branch of the business at X — B wrote to C that "the letters you may write to this place hereafter should be addressed to my brother A; you should also purchase and send such goods as he may write to you for" — Afterwards A wrote to C acknowledging a debt — It was held that letter by B to C was not an express authority to give an acknowledgment.)]

11. (11) 10 Ind Cas 888 (889) : 35 Bom 302 (DB), *Ebrahim v. Chunnilal*.

12. (95) 17 All 198 (207, 208) : 22 Ind App 31 : 6 Sar 551 (PC), *Beli Maharani v. Collector of Etawah*.

13. (24) 11 AIR 1924 All 855 (855) : 46 All 892 : 80 Ind Cas 6 (DB), *Uma Sankar v. Gobind Narain*.

14. (19) 6 AIR 1919 Mad 816 (816, 817) : 48 Ind Cas 179 (DB), *Lakshumanan Chetty v. Sadayappa Chetty*. (Receiver appointed by Court to do all things necessary for preservation of firm can acknowledge.)

(34) 21 AIR 1934 Rang 282 (284) : 12 Rang 610 : 153 Ind Cas 957, *U Po Yin v. U Ba Chit*. (Authority need not be the result of contractual relationship but may be derived by operation of law or by a legal duty having been cast upon the agent in the performance of which it was necessary for him to make the acknowledgment in question.)

(19) 6 AIR 1919 Mad 370 (372) : 53 Ind Cas 878 (DB), *Thankammal v. Kunhamma*.

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authority from the *order of the Court* and if the order authorizes him to acknowledge debts he may do so. (See Note 52.)

The onus of proving that the person, by whom an acknowledgment of liability has been made on behalf of another, was duly authorized to do so is on the plaintiff.¹⁵

An acknowledgment of liability by an agent necessarily implies that the agent acknowledges the liability of the principal in favour of a *third* party. Hence, where, for certain ulterior purposes, A asks B to state that the latter is entitled to a certain right against the former and B makes such statement, the statement is not an acknowledgment of liability by B on A's behalf.¹⁶

See also S. 20 Note 18 and Notes under S. 21.

51. Acknowledgment of liability by pleader on behalf of client.—An admission made by a pleader in the course of his duties on behalf of his client may bind the latter as an acknowledgment of liability under this section. The pleader will, in such cases, be the duly authorized agent of the client within the meaning of this section.¹ Thus, a petition by a *vakil* on behalf of a client and signed by the *vakil*, praying for additional time for the payment of the amount due under the decree passed against the client, will be an acknowledgment of liability under this section.² Similarly, an admission by a *vakil* in

15. ('37) 1937 Mad W N 1312 (1313), *Narayana Iyer v. Narayana Iyer*.

('08) 1908 Pun W R No. 164, p. 578 : 1908 Pun Re No. 102, *Shankar Das v. Jasodhan*.

('25) 12 AIR 1925 Mad 134 (135) : 80 Ind Cas 940, *Krishnayya v. Vekatappayya*.

16. ('35) 22 AIR 1935 Mad 947 (952) : 158 Ind Cas 854, *Venkata Krishnayya v. Venkataratnam*. (Where a claim order, by which the Court recognised the title of the petitioner to the property sought to be attached in execution by a decree-holder of the transferor of the petitioner, was signed only by the petitioner who was the benamidar of the transferor and was not signed by the transferor it was held that it could not operate as acknowledgment against the transferor.)

Section 19 — Note 51

1. ('50) 1950 K L T 97 (100) (DB), *Lakshmi Devakikunjamma v. Thomman Aipe*. ('34) 21 AIR 1934 Bom 186 (187, 188) : 151 Ind Cas 376 (DB), *Chhaganlal Shirlal v. Bonderbai Rup Chand*. (Admission in pursuance signed and given by the pleader in the previous suit amounts to acknowledgment.)

('98) 22 Bom 722 (727) (DB), *Trimbak v. Kashinath*.

('96) 23 Cal 374 (387) (DB), *Narendra Nath Pahari v. Bhupendra Narain Roy*.

('19) 6 AIR 1919 Pat 244 (246) : 49 Ind Cas 868, *Jagernath Gir v. Rajman Gir*.

('28) 15 AIR 1928 Mad 713 (719) : 109 Ind Cas 872 (FB), *Thimmanayanim v. Venkatappa Nayanim*.

('96) 18 All 384 (387) : 1896 All W N 101 (DB), *Hingan Lal v. Mansa Ram*. (But it is doubtful whether an advocate or *vakil* can make a signed acknowledgment so as to bind his client, if the acknowledgment relied on is unnecessary for the purpose for which the advocate or *vakil* has been retained.)

('31) 18 AIR 1931 All 398 (399, 400) : 133 Ind Cas 155 (DB), *Kamta Rai v. Rani Jaduraj Kunwari*. (Admission by a pleader in petition made in course of his business is binding as an acknowledgment so as to give fresh starting point irrespective of whether the pleader represents majors or guardian for minors.)

2. ('83) 9 Cal 730 (732) : 13 Cal L R 91 : 5 Shome L R 21 (DB), *Toree Mahomed v. Mahomed Mabood Bux*.

('82) 8 Cal 716 (717, 718) : 10 Cal L R 613 (DB), *Ram Kumar Kur v. Zaker Ali*.

('80) 3 All 247 (249, 250) (FB), *Ramhit Rai v. Satgur Rai*.

the course of a letter by him on behalf of his client will bind the client.³

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52. Acknowledgment by receiver. — It has been seen in Note 50, that the authority of a person to make an acknowledgment of liability on behalf of another may arise out of an *order of Court*. Thus, a receiver appointed by a Court can make an acknowledgment under this section on behalf of the party of whose property he is a receiver, if such acknowledgment falls within the scope of the authority conferred on him by the Court.¹ In the undermentioned case,² however, it was held that a receiver is an agent of the *Court* and not of the *party* and so, cannot acknowledge liability under this section. It is submitted that in view of the fact that an agent under this section need not be one appointed by the *party* (See Note 50), the decision is not correct.

Where, in a suit for the dissolution of a firm, a receiver has been appointed for the purpose of collecting outstandings and doing all things necessary for the preservation of the assets, there is a conflict of decisions as to whether the receiver can acknowledge liability for debts due by the firm. The Madras High Court³ has held that the power to do all things necessary for the preservation of the assets of the firm will include the power to acknowledge debts due by the firm where such acknowledgment is necessary for the above purpose. But the Chief Court of Lower Burma⁴ has held that the words "things necessary for the preservation of the assets" of the firm cannot cover the making of an acknowledgment of liability.

A receiver of the assets of a firm who has been given power to *pay debts* due by the firm can give acknowledgments so as to prevent the bar of limitation.⁵

53. Acknowledgment of liability by Official Assignee — Effect. — In a suit against the Official Assignee of the estate of an insolvent to enforce a mortgage executed by the insolvent, an acknowledgment made by the Official Assignee may be relied on as saving limitation. The reason is that the estate of the insolvent vests

3. ('20) 7 AIR 1920 Mad 742 (742) : 59 Ind Cas 898, *Arumuga Chettiar v. Ramanadhan*.

Section 19 — Note 52

1. ('19) 6 AIR 1919 Mad 816 (817) : 48 Ind Cas 179 (DB), *Lakshumanan Chetty v. Sadayappa Chetty*.

2. ('06) 10 Cal W N 959 (961), *Baij Nath Ram Goenka v Hem Chunder Bose*. (But admission by receiver in presence of party held in this case to operate as acknowledgment by agent.)

3. ('19) 6 AIR 1919 Mad 816 (817) : 48 Ind Cas 179 (DB), *Lakshumanan Chetty v. Sadayappa Chetty*.

4. ('15) 2 AIR 1915 Low Bur 63 (64) : 29 Ind Cas 27 : 8 Low Bur Rul 159 (DB), *S. M. A. Chetty Firm v. M. L. R. M. A. Chetty Firm*. (But power to *manage* would include power to give acknowledgment.)

5. ('37) 24 AIR 1937 Mad 764 (766) : 174 Ind Cas 22, *Krishnayya v. Seetharamayya*.

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in the Official Assignee and he is the "party against whom the right is claimed in the suit."¹

But, in a suit against the debtor after the termination of the insolvency, can a previous acknowledgment by the Official Assignee be relied on as saving limitation? In such a case, it is clear that the Official Assignee will not be a party against whom the right is claimed.² The Bombay High Court has held that the Official Assignee was not also an agent of the debtor so as to bind him by his acknowledgment in such cases.³ But, in the undermentioned case⁴ decided by the Madras High Court where an Official Receiver filed a petition to the Court asking for permission to bring the insolvent's property to sale and in the course of the petition admitted the existence of a mortgage on the property, it was held by one of the learned Judges that in the circumstances of the case it must be considered that the Official Assignee had acted as the duly authorized agent of the debtor in making the admission.

54. Acknowledgment by one of several co-judgment-debtors. — Where a joint decree is passed against several persons, an acknowledgment of liability by one of them will not save limitation as against the others.¹ But, such acknowledgment will save limitation as against the judgment-debtor who makes the acknowledgment.²

55. Acknowledgment of liability by administrator. — An administrator of the estate of a deceased person derives his title solely from the letters of administration. Hence, before such letters are granted, he cannot bind the estate by an acknowledgment of liability made by him in respect of a debt due by the estate. But, where letters of administration are granted to the *heir* of the deceased

Section 19 — Note 53

1. ('18) 5 AIR 1918 Mad 1122 (1124) : 38 Ind Cas 169 (DB), *Paramasivan Pillai v. Aristotle Chakona*. (Per Phillips, J.)
2. ('33) 20 AIR 1933 Bom 91 (92) : 143 Ind Cas 698 : 58 Bom 505 (DB), *Currimbhai Abdulhusain v. Ahmedali Lukmanji*.
3. ('33) 20 AIR 1933 Bom 91 (91, 92) : 143 Ind Cas 698 : 58 Bom 505 (DB), *Currimbhai Abdulhusain v. Ahmedali Lukmanji*.
4. ('18) 5 AIR 1918 Mad 1122 (1123, 1124) : 38 Ind Cas 169 (DB), *Paramasivan Pillai v. Aristotle Chakona*. (Per Oldfield, J.)

Section 19 — Note 54

1. ('05) 27 All 575 (579) ; 1905 All W N 108 : 2 All L Jour 287 (DB), *Ashan-ullah v. Dakkhinidin*.
('12) 14 Ind Cas 1 (2) (DB) (Cal), *Nanda Lal Marwari v. Rampal Singh*.
('12) 13 Ind Cas 702 (704) (DB) (Cal), *Chandra Kumar v. Ram Din*.
('17) 4 AIR 1917 Cal 422 (424) : 37 Ind Cas 738 (DB), *Jogendra Prosad v. Asutosh Goswami*.
('08) 1908 Pun L R No. 87, p. 244 : 1908 Pan Re No. 54 : 1908 Pun W R No. 40, *Bhagwan Singh v. Mohanlal*.
See also Section 21 Note 17.
2. ('12) 13 Ind Cas 702 (704) (DB) (Cal), *Chandra Kumar v. Ram Din*.
('12) 14 Ind Cas 1 (2) (DB) (Cal), *Nandlal Marwari v. Rampal Singh*.
('14) 1 AIR 1914 Cal 764 (765) : 22 Ind Cas 709 (DB), *Ban Behari Kapur v. Jnanendranath Ghosh*.

an acknowledgment of liability by such heir would be binding on him though made before the grant of such letters.¹

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56. Acknowledgment by executor. — An acknowledgment of liability by the executor of a will is binding on the estate.¹ Unlike an administrator who derives his authority solely from the letters of administration granted to him, an executor derives his title and authority from the *will* under which he has been appointed executor, and so, he represents the estate even before the grant of probate. Hence, an acknowledgment of liability by him, though made before the grant of probate, will be binding on the estate.²

57. Acknowledgment, if may be made by Court. — A statement in a judgment of Court that certain persons are mortgagees cannot be used as an acknowledgment of liability against them.¹ The reason is that in such cases, the Judge is not an agent authorized to give acknowledgments on behalf of the parties. Even where the judgment purports to record an admission made by or on behalf of a party, the judgment cannot operate as an acknowledgment of liability under this section, because it is not *signed* by the party or his agent and the Judge cannot be considered as the agent of the party for such purpose.²

See also Notes 48 and 50.

58. Acknowledgment by Court of Wards. — The general power of the Court of Wards to manage the estate of the ward includes the power to make acknowledgments on behalf of the ward. Hence, such acknowledgments will save limitation under this section.¹

Section 19 — Note 55

1. ('30) 17 AIR 1930 Mad 218 (220) : 122 Ind Cas 504 : 53 Mad 480 (DB), *Raja Rama v. Fakuruddin Sahib*.

Section 19 — Note 56

1. ('24) 11 AIR 1924 Mad 286 (287, 290) : 77 Ind Cas 740 (DB), *Official Assignee of Madras v. Subramania Ayyar*.

See also Section 21 Note 15.

2. ('30) 17 AIR 1930 Mad 218 (219) : 122 Ind Cas 504 : 53 Mad 480 (DB), *Raja Rama v. Fakuruddin Sahib*.

Section 19 — Note 57

1. ('09) 4 Ind Cas 579 (581) (All), *Jaigopal Misir v. Sheo Sagar Singh*.
2. ('37) 24 AIR 1937 Mad 760 (763) : 174 Ind Cas 28, *Appaji v. Govindasami*. [See also ('26) 13 AIR 1926 All 85 (86) : 89 Ind Cas 161, *Bhagwan Din v. Sri Kishen*. (A note of the revenue officer in his report that a mortgagee made an oral statement of an acknowledgment of the mortgage does not extend limitation.)]

Section 19 — Note 58

1. ('39) 26 AIR 1939 Bom 237 (248) : 183 Ind Cas 225 (DB), *Bhalchandra Datta'raya v. Chanbasappa Mallappa*. (A report made by the Collector admitting a claim on a mortgage under S. 16 of the Bombay Court of Wards Act is an acknowledgment.)
- ('38) 25 AIR 1938 All 217 (218) : I L R (1938) All 363 : 175 Ind Cas 556 (FB), *Shankar Lal v. Rana Lal Singh*. (Property of executant of promissory note under supervision of Court of Wards—Collector is agent of executant competent to acknowledge.)

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See also section 21 Note 5.

59. Acknowledgment by one of several co-heirs, if binds others. — See Note 8 under Section 21.

60. Acknowledgment on behalf of Hindu joint family. — See Notes under Section 21.

61. Acknowledgment by manager of Malabar tarwad. — See Note 21 under Section 21.

62. Husband and wife — Authority to acknowledge on each other's behalf. — A husband is not authorized, as such, to acknowledge debts due by his wife.¹ So also, the wife has no authority, as such, to acknowledge the husband's debts.²

63. Applicability of section to applications for execution. — The corresponding sections in the Acts of 1859 and 1871 applied only to debts and legacies. Under those sections there was a conflict of decisions as to whether the sections would apply to applications for execution. It was held in some cases that the expression "debt" would not include "*judgment-debt*" and that therefore the provisions as to acknowledgment did not apply to execution proceedings.¹ But, in other decisions it was held that where the judgment-debtor had admitted his liability, the decree-holder would be entitled to a fresh period of limitation.²

The scope of the section was widened in the Act of 1877 by making it applicable to all suits or applications in respect of *any* property or right. But, nevertheless, there was still a conflict of decisions as to the

(194) 17 All 198 (208): 22 Ind App 31 : 6 Sar 551 (PO), *Beti Maharani v. Collector of Etawah*.

(10) 6 Ind Cas 407 (408) : 34 Mad 221 (DB), *Linga Reddi v. Sarvarayudu*. (Acknowledgment by the Collector as the agent of the Court of Wards, is equally binding.)

(16) 3 AIR 1916 Cal 107 (108) : 43 Cal 211 : 34 Ind Cas 205 (DB), *Rashbehari Lal v. Anand Ram*.

(37) 24 AIR 1937 Oudh 26 (28) : 165 Ind Cas 269 : 12 Luck 531 (DB), *Sukhnandan Prasad v. Ahmad Ali Khan*.

(88) 1888 All W N 187 (189) (DB), *Kamla Kuar v. Har Sahai*.

Section 19 — Note 62

1. (26) 13 AIR 1926 Nag 252 (253) : 91 Ind Cas 402, *Raghoba v. Gopi*.

2. (33) 20 AIR 1933 Mad 686 (687, 688) : 56 Mad 964 : 146 Ind Cas 49 (DB), *Gomathi Ammal v. Avu Ammal*. (Admission, by wife of a lunatic, of debt in her petition for appointment of guardian — Husband dying before appointment — Held that her admission was not valid acknowledgment.)

Section 19 — Note 63

1. (67) 7 Suth W R 79 (79) (DB), *Mt. Luchmun Koonwar v. Luchmun Bhukut*. (79) 4 Cal 708 (709) (DB), *Mungol Prashad Dichit v. Shama Kanto Lahory*. (Debt applies only to a liability for which a suit may be brought.)

(77) 2 Cal 468 (469, 470) (DB), *Kally Prosonno Hazra v. Heera Lal Mandle*. (Do.) (79) 3 Cal L R 572 (573) (DB), *Ishana Dabia v. Grija Kant Lahiry*. (Do.)

(75) 24 Suth W R 282 (284) (DB), *Heera Lal Mookerjee v. Dhunput Singh*.

2. (66) 5 Suth W R Misc 12 (13) (DB), *Luchmee Narain v. Shudasheo Singh*. (66) 5 Suth W R Misc 31 (31) (DB), *Prosunno Coomar Roy v. Kashee Kant Buattacharjee*.

(66) 6 Suth W R Misc 115 (115) (DB), *Joteeram Doss v. Shaikh Huruf*.

(1865) 3 Suth W R Misc 27 (27) (DB), *Digamburee Debia v. Sharoda Pershad Roy*.

applicability of the section to execution proceedings. According to the High Courts of Allahabad,³ Bombay,⁴ Calcutta,⁵ the Punjab Chief Court⁶ and the Nagpur Judicial Commissioner's Court,⁷ the expression "application in respect of a right" would include applications for execution and so the section was applicable to such applications. But the Madras High Court took a contrary view.⁸ The amendment of the section in 1908 by the addition of explanation III gives effect to the former view,⁹ so that the Madras view is no longer good law.

64. Promissory note for pre-existing debt, if can be used as acknowledgment of liability in suit on original cause of action. — Where a promissory note is executed in lieu of a *pre-existing debt* and such promissory note becomes unenforceable for any reason, a suit can be brought on the original cause of action. The reason is that in such cases the original right must be deemed as agreed to be given up only on condition of the latter arrangement being enforceable.¹ Where a suit is brought on the original cause of

- 3.** ('81) 3 All 247 (249, 250) (FB), *Ramhit Rai v. Satgur Rai*.
 ('96) 18 All 384 (387) : 1896 All W N 101 (DB), *Hingan Lal v. Mansa Ram*.
 ('94) 16 All 228 (231) : 1894 All W N 55, *Muhammad Said v. Payag Sahu*.
 ('85) 7 All 424 (428, 430) : 1885 All W N 76 (DB), *Fateh Muhammad v. Gopal Das*.
 ('82) 5 All 201 (205, 206) : 1882 All W N 221 (DB), *Janki Prasad v. Ghulam Ali*, (Tyrrell, J. expressed his personal doubt as to whether this section can be applied to affect the limitation for the execution of decrees.)
- 4.** ('08) 32 Bom 296 (298, 299) : 10 Bom L R 374 (DB), *Srinivas Krishna v. Narhar*.
 ('98) 22 Bom 998 (1000, 1001) (DB), *Jeddi Subraya v. Ram Rao*.
 ('98) 22 Bom 722 (727) (DB), *Trimbak Bapuji v. Kashinath Vidyadhar*.
 ('86) 10 Bom 108 (111) (DB), *Venkatrav Bapu v. Bijesing Vithalsing*.
- 5.** ('10) 6 Ind Cas 366 (367) (DB) (Cal), *Mt. Bindeswari Koer v. Awadh Behari*.
 ('04) 8 Cal W N 470 (471, 472) (DB), *Bhagabuty Charan v. Ashutosh Chatopadhyaya*.
 ('07) 6 Cal L Jour 141 (142) (DB), *Brojonath Shaha v. Gaya Sundari Dassya*.
 ('06) 3 Cal L Jour 347 (348) (DB), *Rakhal Chandra Tewari v. Hemangini Debi*. (Execution of rent decree under Bengal Tenancy Act.)
 ('96) 23 Cal 374 (387) (DB), *Norendra Nath Pahari v. Bhupendra Narain Roy*.
 ('83) 9 Cal 730 (732) : 13 Cal L R 91 : 5 Shome L R 21 (DB), *Toree Mahomed v. Mohamed Mabood*.
 ('82) 8 Cal 716 (718, 719) : 10 Cal L R 613 (DB), *Ram Kumar Kur v. Zaker Ali*.
- 6.** ('09) 2 Ind Cas 102 (105) : 1909 Pun Re No. 52 (DB), *Peachey v. Punjab Banking Co., Ltd., Lahore*.
 ('85) 1885 Pun Re No. 28, *Bhagat Ram v. Chint Ram*.
- 7.** ('09) 1 Ind Cas 240 (242) : 5 Nag L R 8, *Vithal v. Gopal Rao*.
- 8.** ('15) 2 AIR 1915 Mad 749 (749) : 26 Ind Cas 368 (DB), *Akkamma v. Rangappa*. (Case under 1877 Act.)
 ('05) 28 Mad 40 (41) (DB), *Srinivasa Chariar v. Ponnuswamy Nadar*.
 ('82) 5 Mad 171 (173) (FB), *Rama v. Venkatesa*.
- 9.** ('25) 12 A I R 1925 Pat 197 (198) : 79 Ind Cas 897 (DB), *Reshma Kuari v. Rameshwar*.
 ('14) 1 A I R 1914 Cal 764 (765) : 22 Ind Cas 709 (DB), *Ban Behari Kapur v. Jnanendranath Ghose*.

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- 1.** ('26) 13 AIR 1926 Mad 1148 (1150) : 98 Ind Cas 75, *Gopala v. Rajagopal*.
 ('27) 14 AIR 1927 Nag 241 (242) : 104 I. C. 470, *Udaram Magniram v. Larman*.

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action, the period of limitation commences to run from the date of such cause of action. The question arises if the promissory note which has become unenforceable can be used as an acknowledgment of liability in such suit. The question may be considered under the following heads with reference to the cause which has made the promissory note unenforceable :

- (1) *Promissory note inadmissible for want of sufficient stamp.*—
A promissory note which is not sufficiently stamped is inadmissible in evidence for any purpose under s. 35 of the Stamp Act. Hence, such a promissory note cannot be relied on even for the purpose of serving as an acknowledgment of liability in a suit on the original cause of action.² But under s. 36 of the same Act,

[See ('40) 27 A I R 1940 Nag 214 (215) : 190 Ind Cas 818, *Jawanmal v. Akaji Anand*. (Promissory note executed in lieu of bond insufficiently stamped — Suit on promissory note — Plaintiff allowed to be amended so as to base the claim on the original bond.)

('39) 26 AIR 1939 Mad 34 (35, 36) : 183 Ind Cas 882, *Kondamma v. Venkatarayudu*. (Promissory note executed in renewal of old note, insufficiently stamped—Suit on new promissory note—Plaintiff praying for amendment so as to base his suit on original note — Held that the amendment could be granted as the amendment did not introduce any new cause of action and did not prejudice the defendant in putting forward the plea of limitation.)]

[See also ('68) 10 Suth W R 293 (294) (DB), *Bengal Indigo Co. v. Koylas Chunder*.]

2. ('40) 27 AIR 1940 Nag 214 (214, 215) : 190 Ind Cas 818, *Jawanmal v. Akaji*.

('39) 26 AIR 1939 Mad 34 (36) : 183 Ind Cas 882, *Kondamma v. Venkatarayudu*. (But an endorsement on the back of the promissory note can be admitted in evidence to prove an acknowledgment.)

('36) 63 Cal 813 (816, 818) : 40 Cal W N 399, *Jogendra Chandra Banerjee v. Sacheendra Kumar Seal*.

('38) 25 A I R 1938 Mad 75 (77) : I L R (1938) Mad 210 : 175 Ind Cas 24 (DB), *Nageswara Rao v. Narayanamurthi*.

('37) 24 A I R 1937 Mad 364 (365) : 169 Ind Cas 692, *Ramanatha Ayyar v. Narayanaswami Ayyar*.

('33) 20 AIR 1933 Lah 240 (240) : 141 Ind Cas 569, *Rup Chand v. Beli Ram*.

('37) 24 A I R 1937 Rang 408 (411, 412) : 1937 Rang L R 127 : 173 Ind Cas 604, *J. N. Ezekiel v. Mordecai*. (Pronote invalid under Section 12, Stamp Act—Such pronote cannot be used as acknowledgment of liability by promisor so as to bring within time suit based on original consideration — Distinction between collateral purpose and collateral matter stated.)

('33) 20 AIR 1933 Nag 391 (391) : 147 Ind Cas 981, *Govinda v. Hari Bhao*.

('28) 15 AIR 1928 Oudh 408 (409) : 112 Ind Cas 247, *Bishunath Singh v. Ishri Dayal* (The contention, that the only effect of the pronote not being sufficiently stamped as a pronote is that the instrument cannot be admitted in evidence as a pronote but that it can be used as an acknowledgment, if accepted the result will be to make the words 'for any purpose' in Section 35 of Stamp Act quite superfluous — Distinguishing 3 All 581 (FB), *Kanhaya v. Stowell*.)

[See however ('38) 25 AIR 1938 Nag 294 (295, 296) : 177 Ind Cas 678, *Sudamsa Arjuna v. Kisanrao*. (Insufficiently stamped promissory note is not admissible as an acknowledgment of a debt for the purpose of supplying evidence of such debt, such acknowledgment coming under Article 1, Stamp Act—But such promissory note is admissible to prove fact of admission made by debtor of his existing liability and can extend period of limitation—It can also be treated as agreement chargeable with duty under Article 5 (c), Schedule I, Stamp Act, and is admissible in evidence on payment of requisite duty and penalty.)

where such promissory note has once been admitted in evidence, such admission cannot be questioned at any stage of the same suit or proceeding.³ Further, where in addition to the promissory note there is some other document executed as part of the same arrangement, such as a receipt which is admissible in evidence and which contains an admission of liability in regard to the original debt, such document can be used as an acknowledgment in the suit on the original cause of action notwithstanding the inadmissibility of the promissory note.⁴ It has also been held that where the document includes not only a promissory note but also other matters which amount to an acknowledgment of a pre-existing liability, the prohibition contained in S. 35 of the Stamp Act does not apply to the matters other than the promissory note and hence, notwithstanding the inadmissibility of the document to prove the promissory note, it can be used to prove the acknowledgment of liability contained in it.⁵

(2) *Promissory note failing as contravening section 26 of the Paper Currency Act, 1910 (now repealed).*—Where a promissory note

('21) 8 A I R 1921 Pat 317 (318) : 60 Ind Cas 385 (DB), *Ram Narain Sahu v. Lachmi Prasad Sahu*. (A hundi which does not comply with the provisions of Section 13 of the Stamp Act though not admissible as a hundi can be admitted in evidence as an acknowledgment.)]

[But see ('27) 14 AIR 1927 Nag 241 (242): 104 Ind Cas 470, *Udaram Magniram v. Laxman Marwari*.]

3. ('35) 22 A I R 1935 Pat 375 (375) : 14 Pat 233 : 158 Ind Cas 962 (DB), *Tribhuan Ojha v. Ramchandra*.

('33) 20 AIR 1933 Lah 240 (240) : 141 Ind Cas 569, *Rup Chand v. Beli Ram*.

('34) 21 AIR 1934 All 951 (951) : 153 I. C. 551, *Randhir Singh v. Thaman Lal*.

('26) 13 AIR 1926 Mad 1148 (1149) : 98 Ind Cas 75, *Gopala Padayachi v. Rajagopal Naidu*.

4. ('30) 17 AIR 1930 All 368 (369) : 126 I. C. 353, *Jagan Nath v. Girwar Singh*.

('33) 20 AIR 1933 Oudh 80 (81) : 141 Ind Cas 298 : 8 Luck 195, *Ram Chaube v. Sheo Harakh Tewari*.

('37) 24 A I R 1937 Oudh 387 (388, 389) : 13 Luck 376 : 168 Ind Cas 927 (DB), *Ambika Singh v. Jaydeo Upadhyaya*. (('35) A I R 1935 All 129 (DB), *Ghulam Murtaza v. Fasiunnisa*, not followed.)

('31) 18 AIR 1931 All 560 (561, 562): 134 Ind Cas 254 (DB), *Salig Ram v. Radhay Shiam*. (Endorsement on prior note admitting liability, as well as new note — New note inadmissible in evidence — Endorsement on prior note can be used as acknowledgment of liability in suit on prior note.)

[See also ('29) 16 A I R 1929 All 980 (981, 983) : 52 All 169 : 121 Ind Cas 108, *Govind Singh v. Bijay Bahadur*. (In this case the receipt is treated as itself constituting a new cause of action).]

5. ('39) 26 A I R 1939 Mad 34 (36) : 183 Ind Cas 882, *Kondamma v. Venkatarayudu*. (New promissory note executed in lieu of old note — New promissory note inadmissible in evidence being insufficiently stamped — Endorsement of payment appearing on it can be availed of as acknowledgment of liability of original note.)

('33) 20 AIR 1933 Mad 251 (252) : 141 Ind Cas 169, *Vancheswara Sastri v. Narayana Ayyar*.

('30) 17 A I R 1930 Mad 485 (486) : 124 Ind Cas 53, *Rakkappan Ambalam v. Suppiah Ambalam*. (The reason given is that what is shut out by Section 35 of Stamp Act is the instrument and not collateral matters connected with the instrument.)

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was made payable to bearer and as such was unenforceable under S. 26 of the Paper Currency Act, 1910, it was held that the promissory note could be used as an acknowledgment of liability in a suit on the original cause of action where such promissory note had been executed in lieu of a prior debt.⁶

(3) *Promissory note unenforceable under section 28 (now repealed by section 6 of Act XXI of 1926) of the Legal Practitioners Act.* — It was held in the case noted below⁷ that where a promissory note was incapable of being sued on under S. 28 of the Legal Practitioners Act, (now repealed) it could nevertheless be used as an acknowledgment of liability in a suit on the original cause of action.

(4) *Promissory note invalid on other grounds.* — Though a promissory note executed in favour of a dead person is incapable of being sued on as a promissory note it can nevertheless be used as an acknowledgment of liability in a suit on the original cause of action.⁸

The giving of a promissory note for an old debt need not necessarily mean that the old debt is intended to be given up and replaced by the new obligation. The intention of the parties may simply be that the promissory note should serve as an acknowledgment of liability for the old debt so as to extend the period of limitation for a suit for such debt. In such cases, clearly, the promissory note can be used as an acknowledgment under this section, in a suit on the old debt.⁹

See also Note 29.

65. Admission of liability by person in adverse possession. — An admission by a person who is in possession of property adversely against another, that he is liable to return the property to the latter, will not interrupt the continuity of the adverse possession. But, if such admission is in writing and signed by the person in adverse possession, it will serve to furnish a fresh period of limitation as an acknowledgment of liability under this section.¹ As to what would

6. ('18) 5 AIR 1918 Mad 634 (635) : 42 Ind Cas 706 (DB), *Nachimuthu Chetty v. Andiappa Pillai*.

('26) 13 AIR 1926 Mad 452 (453) : 92 Ind Cas 626 (DB), *Kesavaramayya v. Venkataratnam*.

('22) 9 AIR 1922 Mad 181 (183) : 45 Mad 778 : 69 Ind Cas 939 (DB), *Natarajulu Naicker v. Subramanian Chettiar*.

7. ('15) 2 AIR 1915 Mad 688 (689) : 27 Ind Cas 116, *Natesa Mooppan v. Ramachandra Iyer*.

8. ('38) 25 AIR 1938 Pat 180 (181) : 174 Ind Cas 779 (DB), *Amrit Narayan Singh v. Baijnath Pandey*.

9. ('28) 15 AIR 1928 Sind 17 (19, 20) : 22 Sind L R 222 : 105 Ind Cas 765, *Punjab National Bank, Ltd. v. Mulji Morarji*.

Section 19 — Note 65

1. ('33) 20 AIR 1933 Cal 414 (415) : 60 Cal 404 : 144 Ind Cas 177, *Nutbihari Das v. Bishweshwari Debee*.

('97) 1 Cal W N 569 (572) (DB), *Jagabandhu Bhattacharjee v. Hari Mohan Roy*.

(1900) 2 Bom L R 407 (409) (DB), *Sitaram Raghunath v. Naro Govind*.

constitute such an admission, see the undermentioned cases.²

66. Acknowledgment contained in letter marked "without prejudice."—Section 23 of the Evidence Act provides as follows :

"In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given."

In view of the above provision, the question arises whether an acknowledgment of liability contained in a letter marked "without prejudice" is admissible in evidence. In *Madhavray v. Gulabbhai*,¹ the above question arose in connexion with a post card written by a debtor to his creditor and marked "without prejudice." The question was left open by Farran, C. J. Candy, J., who sat with him observed as follows :

"I doubt whether the post-card was inadmissible in evidence. To exclude it from evidence it would be necessary to hold that the words 'without prejudice' amounted to an express condition that the card should not be used in evidence against the writer. In England, apparently, the card would have been admissible. The remarks of Vaughan Williams, J., in *In re Daintrey; Ex parte Holt*,² which the Subordinate Judge in the Court of first instance quoted are not, as the Subordinate Judge supposes, mere *obiter dicta*. They state the fact that the rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation."

The above decision may also be consulted for an *interpretation* of the words "without prejudice" occurring in a document, *assuming* that such document is *admissible* in evidence.

('25) 12 AIR 1925 Cal 193 (193) : 84 Ind Cas 657 (DB), *Golam Na'ar v. Abbas Molla*.

('29) 16 AIR 1929 Pat 117 (121) : 8 Pat 549 : 115 Ind Cas 699 (DB), *Bageswari Charan Singh v. Jagarnath Kuari*. (Reversed in ('32) 19 AIR 1932 PC 55 (PC) *Bageshwari v. Jagarnath* on another point.)

2. ('14) 1 AIR 1914 Cal 795 (797) : 22 Ind Cas 650 (DB), *Guru Charan Saha v. Surendra Krishna Roy*. (Where a person admits that land of which he is in possession at the time is the property of another, he admits that he is liable to restore it to that other.)

(1900) 2 Bom L R 407 (409) (DB) *Sitaram Raghunath v. Naro Govind*. (Suit for possession—Offer by defendant to *purchase* the land from the plaintiff does not amount to an admission of title.)

('24) 79 Ind Cas 279 (280) (Lah), *Balmokand v. Wazir Chand*. (Cosharers — Adverse possession by one—Post-card by the adverse possessor in which plaintiff was called upon to pay his share of the moneys expended on repairs or to surrender his interest in the house amounted to an acknowledgment of the plaintiff's title.)

Section 19 — Note 66

1. ('99) 23 Bom 177 (179, 180) (DB).

2. (1893) L R 2 Q B 116 (119, 120) : 41 W R (Eng) 590: 62 L J Q B 511: 5 R 414: 69 L T 257 : 10 Morrel 158.

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Notes 66-68

In the undermentioned case,³ the late Nagpur Judicial Commissioners' Court held that a suggestion made "without prejudice" that the matter might be settled could not operate to extend limitation. The decision, however, seems to proceed on the ground that the words used do not mean an admission of liability, rather than on the ground of the inadmissibility in evidence of the statement.

Where a letter stated "the money was received from you and I have purchased shares for you but I have handed them to another person. To settle your dispute I would pay Rs. . . . to you without prejudice" it was held that in spite of the words "without prejudice" the letter amounted to an acknowledgment of liability.⁴

67. Material alteration of document containing acknowledgment.—It is a general principle of law that a material alteration of a document by a party to it, after its execution without the consent of the other party, renders it void. But this principle only applies to a document which is the foundation of the plaintiff's claim. The principle does not apply to a written acknowledgment which is intended only to serve as evidence and to save the bar of limitation and not to give a right of action. Hence, notwithstanding a material alteration in a document containing an acknowledgment of liability after it is given, the document can be relied on as saving limitation under this section.¹

68. Acknowledgment contained in document thirty years old. — Under s. 90 of the Evidence Act, documents which are thirty years old and which are produced from proper custody may be presumed to have been signed, executed or attested by the persons by whom they purport to be signed, executed or attested. This presumption applies also to documents which contain an acknowledgment of liability.¹

3. ('26) 13 AIR 1926 Nag 57 (59) : 90 Ind Cas 135 (DB), *G. I. P. Railway Company v. Radhakisan Jaikisan*.

4. ('51) 38 AIR 1951 Hyd 47 (Pr 6), *Commercial Enterprisers v. Madan Mohan*. (Liability does not arise from the fact of handing over to other person but from the fact of receiving money for purchasing the shares for the plaintiff. As soon as these two items are admitted the liability is admitted. As to handing over the shares to other person it may be a defence being a complete performance of the contract but it has no bearing on the question of limitation.)

Section 19 — Note 67

1. ('80) 5 Cal 215 (217) : 4 Cal L R 361 : 4 Ind Jur 625 (DB), *Nundu Kishore Lal v. Mt. Ramsookhe Kooer*. (Material alteration of date of document.)

('01) 25 Bom 616 (622, 623) : 3 Bom L R 213 (DB), *Atmaram v. Umedram*. (Do.)

('05) 9 Cal W N 695 (696) (DB), *Harendra Lal Roy Chowdhry v. Uma Charan Ghosh*. (Defendant acknowledged certain sum in hatchita — It was found that entry relating to interest was interpolated at a subsequent date — In a suit to recover the amount acknowledged plaintiff put the hatchita in evidence but no reliance was placed on the entry relating to interest, it was held that hatchita was put in merely as an acknowledgment of defendant's liability and that the plaintiff was entitled to a decree.)

[See also ('06) 33 Cal 812 (815, 819) : 3 Cal L Jour 363 : 10 Cal W N 788 (DB), *Gour Chandra Das v. Prasanna Kumar Chanda*.]

Section 19 — Note 68

1. ('19) 6 AIR 1919 Pat 244 (246) : 49 Ind Cas 868, *Jagernath Gir v. Rajman Gir*. ('01) 1901 Pun Re No. 59, *Anis-ul-Rehman Khan v. Beni Ram*.

Where the signature of the executant of the document purports to have been written by another person under the former's authority, the presumption of execution under S. 90 will include the presumption that the person affixing the signature of the executant had his authority to do so.² It was held by the Oudh Chief Court in the case cited below³ that the presumption applies not only where the *original* is produced but also where a copy is produced as secondary evidence. But this must be considered as no longer good law in view of the Privy Council decision in *Basant Singh v. Brij Raj Saran*⁴ in which it was held that when a *copy* is produced no presumption as to the genuineness of the *original* can be drawn under S. 90 of the Evidence Act. The presumption under S. 90 applies only to handwriting, execution and attestation. So, where a document more than thirty years old purports to be signed by an agent on behalf of a principal, no presumption arises as to the agent's authority, which must be proved.⁵

69. Acknowledgment under circumstances that would vitiate contract. — In *Dharma Vithal v. Govind Sadvalkar*,¹ West, J., of the Bombay High Court observed as follows :

"The intention of the law is manifestly to make an admission in writing of an existing jural relation of the kind specified equivalent for the purposes of limitation to a new *contract*; but for this purpose, the consciousness and intention must be as clear as they would be in a contract itself"

Thus, it is clear that although an acknowledgment under this section is *distinct* from a contract, yet, the acknowledgment, quite as much as a contract, must be the *voluntary* act of a person who is fully conscious of what he is about. An acknowledgment obtained by threat or intimidation cannot be used under this section.² An acknowledgment by a minor will not be available against him.³

See also the undermentioned case.⁴

2. ('33) 20 AIR 1933 All 99 (99, 100) : 142 Ind Cas 784 (DB), *Md. Rafi v. Kripa Ramji*.

3. ('29) 16 AIR 1929 Oudh 483 (486) : 5 Luck 424 : 121 Ind Cas 273, *Brij Kishore v. Beni Pershad*.

4. ('35) 22 AIR 1935 P C 132 (136) : 57 All 494 : 62 Ind App 180 : 156 Ind Cas 864 (PC).

5. ('78) 3 Cal 557 (559) (DB), *Ubilack Rai v. Dallial Rai*.

('81) 6 Cal 209 (211, 212) (DB), *Uggrakant Chowdhry v. Hurro Chunder Shickdar*.

Section 19— Note 69

1. ('84) 8 Bom 99 (102) : 8 Ind Jur 261 (DB).

[See also ('93) 16 Mad 220 (227, 228) : 3 Mad L Jour 35 (DB), *Venkata v. Parthasaradhi*. (Per Wilkinson J.)]

2. ('21) 8 AIR 1921 Lah 362 (363) : 59 Ind Cas 781, *Bis Ram v. Kewal Ram*.

('73) 1873 Pun Re No. 62, *Hamilton & Co v. Showers*. (Threat to put the matter into Court and apply for arrest before judgment.)

3. ('01) 1901 Pun Re No. 59, *Anis-ul-Rehman Khan v. Beni Ram*.

4. ('33) 20 AIR 1933 All 175 (176) : 144 Ind Cas 1005, *Mani Ram v. Badri Das Behari Lal*. (Where an acknowledgment is proved to have been made by inadvertence or mistake, it cannot be treated as implying a promise to pay even though it may be ostensibly unconditional.)

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Notes 70-73a

70. Acknowledgment made in official confidence.—Where a person applies to the Collector setting forth the state of his financial position and requesting that his estate may be taken over by the Court of Wards, the communication is one made in official confidence within the meaning of S. 124 of the Evidence Act and hence, its production cannot be compelled by the Court for proving an acknowledgment of liability by the person who made the application.¹

See also the undermentioned case.²

71. Mortgage invalid under tenancy laws, if can operate as acknowledgment of liability.—Where a mortgage of tenancy rights was executed in lieu of certain old debts but was invalid under the Oudh Tenancy Law, it was held that it could be used as an acknowledgment of liability in a suit on the original cause of action.¹

72. Offer of Collector under Section 16 of the Bombay Court of Wards Act, if acknowledgment.—Although an offer made by the Collector under S. 16 of the Bombay Court of Wards Act (I of 1905), cannot be proved in a suit by the claimant, for the purpose of substantiating and establishing his claim, yet, such offer can be used as an *acknowledgment of liability* so as to save limitation.¹

73. Agreement to extend time for performance of contract.—Under S. 63 of the Contract Act, the promise under a contract may extend the time for the performance of the promise. Where time is so extended, limitation for a suit on the contract will only run from the date to which the time has been extended.¹

73a. Suit based on default clause in mortgage deed, etc.—Where a mortgage deed contains a provision that in default of the payment of the annual interest the mortgagee should be entitled to possession of the mortgaged property and default is made, but subsequently the mortgagor executes a second mortgage in favour of the mortgagee for all the arrears of interest up-to-date, the cause of action which the mortgagee got for a suit for possession on the occurrence of the first default is satisfied by the execution of the second mortgage

Section 19 — Note 70

1. ('22) 9 AIR 1922 All 37 (41) : 44 All 360 : 66 Ind Cas 171 (DB), *Collector of Jaunpur v. Jamna Prasad*.
2. ('39) 26 AIR 1939 Bom 237 (245) : 183 Ind Cas 225 (DB), *Bhalchandra Dattatraya v. Channasappa Mallappa*. (In this case it was held that the privilege under S. 124 of the Evidence Act could not be claimed as the Collector to whom the statements were made in official confidence did not claim privilege on the ground that public interest would be affected by the disclosure.)

Section 19 — Note 71

1. ('25) 12 AIR 1925 Oudh 401 (402) : 89 Ind Cas 175, *Umrao v. Narain*.

Section 19 — Note 72

1. ('20) 7 AIR 1920 Bom 137 (138, 139) : 58 Ind Cas 319 : 44 Bom 871 (DB), *Shivajirao Narayan Rao Thorat v. Hari Narayan Tagre*.

Section 19 — Note 73

1. ('02) 4 Bom L R 50 (51, 52) (DB), *Srinivas v. Raghunath*.
(02) 12 Mad L Jour 351 (353) (DB), *Suggappa v. Govindappa*.

and there is no question of the period of limitation for a suit based on such default being extended by the acknowledgment contained in the second mortgage deed. In such a case, limitation for a suit for possession by the mortgagee will run from the next default.¹ See also S. 20 Note 36.

74. Stamp.—An acknowledgment of liability under this section need not be stamped in every case.¹ But, if it is an acknowledgment of a debt and otherwise falls within the provisions of Art. 1, Sch. I of the Stamp Act, it is liable to a stamp duty of one anna. If it is not duly stamped, it cannot be relied on for any purpose including that of saving limitation under the section.² In order to see whether an acknowledgment is liable to stamp duty under Art. 1, Schedule I of the Stamp Act it must be seen whether it is given with the dominant intent to supply evidence of the debt and the Court has to apply its mind to the question looking at the document and the surrounding

Section 19 — Note 73a

1. ('39) 26 AIR 1939 Lah 212 (215), *Abdullah v. Ishaq Mohammad*.

Section 19 — Note 74

1. ('50) 37 AIR 1950 Mad 135 (Pr 3) : (1949) 2 Mad L Jour 543 (544), *Sambasiva Rao v. Venkatasuryanarayana murthy*. (A mere signature in a running account is not evidence of the debt of which there is already evidence in the account book. It is merely an acknowledgment of the correctness of the account and does not require to be stamped. There is no law requiring an acknowledgment of liability for the purpose of saving limitation to be stamped.)
- ('42) 29 AIR 1942 Lah 50 (54, 55) : ILR (1942) Lah 282 : 199 Ind Cas 161 (FB), *Shiv Ram Punnum Ram v. Faiz*. (The expressions, *baqi dene*, *baqi lene*, or *baqi rahe*, mean really the same things. Balance couched in words *baqi rahe lene lekha karke* written by creditor, signed by debtor and attested by witnesses, amounts to acknowledgment within Art. 1 and not to agreement within Art. 5 or to bond within Art. 15 of Stamp Act.)
- ('36) 63 Cal 813 (815) : 40 Cal W N 399, *Jogendra Chandra v. Shacheendra Kumar Seal*.
- ('38) 25 AIR 1938 Nag 51 (51) : I L R (1939) Nag 695 : 172 Ind Cas 880. *Tilakchand v. Ram Kisan*. (A document is not an acknowledgment within the terms of Art. 1 of Sch. I, Stamp Act, unless it is given with the dominant intent to supply evidence of debt.)
2. ('47) 34 AIR 1947 Bom 337 (338) : I L R (1947) Bom 223, *Manilal v. Natwarlal*. (Debtor's admission in creditor's book—Held that the endorsement signed in the creditor's book was acknowledgment and being unstamped was inadmissible in evidence to save limitation.)
- ('97) 21 Bom 201 (204) : Chitty's S C C R 482 (FB), *Mulji Lalla v. Lingu Makaji*. (Overruling ('93) 18 Bom 614 (DB), *Fatechand v. Kisan*.)
- ('19) 6 AIR 1919 Nag 141 (142) : 50 Ind Cas 781, *Sitaram v. Thakur Das*.
- ('23) 10 AIR 1923 All 297 (297, 298) : 45 All 374 : 71 Ind Cas 1027 (DB), *Ram Das v. Inayatulla*.
- ('34) 21 AIR 1934 Nag 273 (274) : 153 Ind Cas 255 : 31 Nag L R 105, *Ram Chandra Bachharaj v. Muka Gujan*.
- ('21) 8 AIR 1921 Pat 292 (292), *Rakhal Chandra Chakraverty v. Ram Chandra*. [See also ('28) 15 AIR 1928 All 666 (667) : 115 Ind Cas 428, *Ali Mohamed v. Jagannath Prasad*. (Acknowledgment executed in Gwalior State and stamped with one anna Gwalior stamp—Account book produced in British India subsequently but not stamped within three months since—Held that acknowledgment was inadmissible.)]

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Note 74

circumstances as to what was the intention with which it was given.³ Where, however, an acknowledgment has once been admitted in evidence, although it is not duly stamped, its admissibility cannot be questioned subsequently, under section 36 of the Stamp Act.⁴

The inadmissibility of the acknowledgment of a debt for want of stamp does not, however, preclude the *debt* acknowledged from being proved by parol evidence.⁵

See also Notes under Sch. I, Art. 1 of the A I R Commentaries on the Stamp Act, 2nd (1950) Edn.

3. ('47) 34 AIR 1947 Bom 337 (338): I L R (1947) Bom 223, *Manilal v. Natwarlal*. (Debtor's admission as to correctness of accounts taken in order that he may not dispute its correctness subsequently — Not an acknowledgment intended to supply evidence of debt.)
- ('47) 34 AIR 1947 Nag 145 (150): I L R (1946) Nag 796: 226 Ind Cas 568 (DB), *Pachkodi Gulab v. Krishnaji*. (Intention of debtor in acknowledging debt not to supply evidence of debt but merely to extend limitation — Art. 1 does not apply.)
- ('45) 32 AIR 1945 Nag 212 (213): I L R (1945) Nag 728, *Shriram v. Maroti*. (Endorsement on back of mortgage that debt was due on a particular previous mortgage held not made with dominant idea of supplying evidence of debt so as to come within Sch. I, Art. 1, Stamp Act.)
- ('41) 28 AIR 1941 Nag 70 (71): 192 Ind Cas 891, *Madhaorao v. Hanmant*. (Admission of correctness of account by a debtor so that he might not subsequently dispute its correctness is not an acknowledgment to supply evidence of debt and as such does not require stamp under Sch. I Art. 1, Stamp Act.)
- ('38) 25 AIR 1938 Nag 51 (52): ILR (1939) Nag 695: 172 Ind Cas 880, *Tilakchand v. Ramkisan*. (Held that the letter reciting settlement of account did not require stamp as there was no intention to supply it as evidence of debt.)
- ('38) 25 AIR 1938 Pat 139 (140): 174 Ind Cas 585, *Ramprabha Ojha v. Bishunath Ojha*.
- ('24) 11 AIR 1924 Mad 352 (353, 354): 46 Mad 948: 74 Ind Cas 1029 (DB), *Surjimmull Murlidhar v. Ananta Lal*. (Acknowledgment not for purpose of supplying evidence of debt — Article 1, Stamp Act, not applicable.)
- ('03) 30 Cal 687 (688, 689) (DB), *Ambica Dat v. Nityanand Singh*. (Do.)
- ('92) 15 All 56 (58): 1892 All WN 234 (DB), *Bishambar Nath v. Nand Kishore*. (Do.)
- ('26) 92 Ind Cas 1046 (1046) (Mad), *Ramaswami Ayyangar v. Raghava Aiyangar*. (Do.)
- ('36) 23 AIR 1936 Mad 939 (939): 166 Ind Cas 750, *Subbaroyadu v. Narasimha Reddi*. (Acknowledgment of correctness of account does not necessarily require stamp.)
- ('12) 15 Ind Cas 279 (280, 282): 39 Cal 789 (DB), *J. C. Galstaun v. Hutchinson*. (A balance-sheet prepared and signed by the debtor and showing a balance, errors and omissions excepted, due from him was held, having regard to the circumstances of the case, not an acknowledgment within Article 1 Schedule I.)
4. ('45) 32 AIR 1945 Nag 212 (213): I L R (1945) Nag 728, *Shriram v. Maroti*. (Acknowledgment not duly stamped rejected by trial Court but admitted in first appeal — Admission cannot be questioned in second appeal.)
- ('35) 22 AIR 1935 Rang 160 (160): 13 Rang 322: 156 Ind Cas 589, *Vellayappa v. Somasundaram*.
- ('25) 12 AIR 1925 Mad 1215 (1215, 1216): 91 Ind Cas 494 (DB), *Nagappa Chetty v. V. A. A. R. Firm*.
- ('15) 2 AIR 1915 Cal 280 (281): 22 Ind Cas 858 (DB), *Sitaram v. Ram Prosad Ram*.
5. ('82) 8 Cal 282 (284): 6 Ind Jur 415 (DB), *Binga Ram v. Rajmohun Roy*. (Suit for price of goods sold and delivered — Written admission of the defendant that the goods had been supplied to him — Inadmissibility for want of stamp — Oral evidence to prove delivery of goods sold and their value admissible.)
- ('23) 10 AIR 1923 Lah 301 (301): 74 Ind Cas 939 (939), *Tikkan Ram v. Lal*.

75. Registration.—A document whereby a person acknowledges his liability in respect of a right to or in immovable property of the value of Rs. 100 or more is not a document which purports to “declare” any right, title or interest in such immovable property within the meaning of S. 17 of the Registration Act, and hence is not compulsorily registrable under that section. The reason is that an acknowledgment of liability merely constitutes a statement of an existing fact while the expression “declare” in section 17 of the Registration Act indicates something more than a mere statement of an existing fact and implies a declaration of *will* to cause a change of legal relationship in respect of the property concerned.¹

Where an acknowledgment of liability is contained in a document which is compulsorily registrable but which is not registered, although the document is not admissible in evidence for the purpose of proving the transaction which it is designed to effect, yet, it is admissible for proving the acknowledgment of liability contained in it.²

76. Onus of proof.—The onus of proving that a suit is saved from the bar of limitation on account of an acknowledgment of

Section 19 — Note 75

1. ('42) 29 A I R 1942 Nag 102 (103): I L R (1942) Nag 541 : 201 Ind Cas 748, *Parasram v. Punamchand*. (Acknowledgment of liability in respect of a charge under S. 55 (4) (b), Transfer of Property Act—Registration unnecessary.)
- ('32) 19 A I R 1932 P C 55 (57) : 59 Ind App 130 : 11 Pat 272 : 136 Ind Cas 798 (P C), *Bageshwari Charan Singh v. Jagarnah Kuari*. (Overruling ('80) 4 Bom 590 (DB). *Faki v. Khotu*.)
- ('32) 19 AIR 1932 Lah 154 (156, 157) : 136 Ind Cas 14 (DB), *Radha Kishen Singh v. Hukam Chand*. (Document executed by mortgagor stating that some of the mortgage debt was paid and land was to remain mortgaged for balance—Document held not to require registration as it made no legal change in relation to the property charged.)
- ('32) 19 A I R 1932 Lah 592 (594, 595) : 140 Ind Cas 387, *Karam Singh v. Mt. Maya Wanti*. (Document purporting to be a mortgage deed and containing recital as to existence of prior existing mortgage—It was held that the reference to the earlier mortgage was a mere recital of a pre-existing fact and therefore it was exempt from registration.)
- ('81) 5 Bom 232 (236, 237), *Sakharam Krishnaji v. Madan Krishnaji*.
[See also ('23) 10 A I R 1923 Mad 621 (622) : 72 Ind Cas 456 (DB), *Ranganayaki Ammal v. Virupakshee Rao Naidu*.]
2. ('38) 25 A I R 1938 Mad 865 (875) : 181 Ind Cas 827 (DB), *Ramanathan Chettiar v. Dowlat Singjee*.
- ('81) 3 All 523 (526) : 1881 All W N 19 (DB), *Khushala v. Behari Lal*.
- ('99) 26 Cal 334 (336), *Mugniram v. Gurmukh Roy*.
- ('80) 5 Cal 215 (217) : 4 Cal L R 361 : 4 Ind Jur 625 (DB), *Nundo Krihore Lall v. Mt. Ramsookhe Kooer*.
- ('36) 23 AIR 1936 Lah 276 (277) : 162 I. C. 306, *Shantilal v. Lyallpur Bank Ltd.*
- ('32) 19 A I R 1932 Lah 592 (594, 595) : 140 Ind Cas 387, *Karam Singh v. Mt. Maya Wanti*.
- ('32) 19 AIR 1932 Lah 400 (400) : 137 Ind Cas 155, *Baru Mal v. Daulat Ram*.
- ('32) 19 A I R 1932 Lah 154 (156, 157) : 136 Ind Cas 14 (DB), *Radha Kishen Singh v. Hukamchand*.
- ('30) 17 A I R 1930 Lah 985 (989, 990) : 12 Lah 239 : 129 Ind Cas 281 (D B), *Davindar Singh v. Mt. Lachhmi Devi*.
- ('80) 1880 Pun Re No. 88, *Sayad Muhammad Khan v. Jaisukh*.
[See also ('81) 1881 Pun Re No. 17, *Chuhar v. Wazira*.]

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liability is on the plaintiff. The reason is that the onus of proving that a suit is within time is on the plaintiff and consequently, the onus of proving that a suit which is on the face of it barred by limitation is saved from such bar on account of some exception to the statute is also on the plaintiff. (See Note 38 to s. 3.) The plaintiff must give cogent proof of his allegations in order to sustain the plea of acknowledgment raised by him.¹

Where a decree-holder relies on an acknowledgment signed by the judgment-debtor to save the bar of limitation but the judgment-debtor denies the signature as being forged, the onus of proving that the signature is that of the judgment-debtor lies on the decree-holder.^{1a}

Onus of proving that acknowledgment was made before expiry of limitation. — There is a conflict of decisions on the question as to whether the burden of proving that an acknowledgment under this section was made before the expiry of the period of limitation is on the plaintiff, or whether the onus is on the defendant to prove that the acknowledgment was made after the expiry of the period of limitation. One view is that the onus is on the defendant to show that the acknowledgment was made after the expiry of the period of limitation.^{1a} This view is based on the fact that an acknowledgment which is sufficient for the purposes of this section necessarily implies the admission of a *subsisting* liability. In other words, an acknowledgment under this section implies in itself an admission that at the time when it is made the liability admitted is not barred by limitation. Hence, the burden of proving that the fact admitted is not true is on the party making the admission, viz., the defendant. The other view is that the burden of proving that the acknowledgment was made before the expiry of the period of limitation is on the plaintiff.² This view seems to be based on the fact that an acknowledg-

Section 19 — Note 76

1. ('22) 9 A I R 1922 All 37 (41) : 66 Ind Cas 171 : 44 All 360 (D B), *Collector of Jaunpur v. Jamna Prasad*.
- 1aa. ('47) 34 AIR 1947 Pat 139 (141) : 225 Ind Cas 528 (DB), *Chandra Bhukhan v. Ramdutt Mahto*.
- 1a. ('04) 26 All 313 (316) : 1904 All W N 38 : 1 All L Jour 1 (DB), *Dip Singh v. Girand Singh*.
- ('29) 16 AIR 1929 All 209 (210) : 115 Ind Cas 451, *Mihi Lal v. Soni Ram*.
- ('30) 17 AIR 1930 Mad 65 (66) : 124 Ind Cas 301 (DB), *Ahamad Haji v. Mayan*.
2. ('43) 30 A I R 1943 All 393 (401, 408) : I L R (1944) All 76 : 212 Ind Cas 238 (FB), *Gur Saran v. Shib Singh*.
- ('32) 19 A I R 1932 All 555 (557) : 137 Ind Cas 193 (DB), *Makkhan Lal v. Mt. Sardar Kunwar*.
- ('32) 19 A I R 1932 All 461 (464) : 54 All 506 : 140 Ind Cas 783 (D B), *Girdhari Lal v. Firm Bishnu Chand*. (Reversed in ('34) AIR 1934 P C 147 (P C), *Bishun Chand v. Girdhari Lal* on another point.)
- ('32) 19 A I R 1932 All 199 (207) : 53 All 963 : 137 Ind Cas 243 (DB), *Abdul Rafiq v. Bhajan*.
- ('26) 13 A I R 1926 All 155 (156) : 89 Ind Cas 402, *Reoti Ram v. Lachman Prasad*.
- ('99) 1 Bom L R 2 (4) (DB), *Chotiram Lal Chand v. Bhau*.
- ('35) 22 A I R 1935 Lah 515 (516) : 155 Ind Cas 576 (D B), *Sher Mohammad v. Karamchand*. (Letters Patent appeal from A I R 1934 Lah 121.)

ment of liability does not necessarily imply an admission that the liability is not *barred by limitation*,³ inasmuch as the question of limitation may not be present to the mind of the person making the admission at all. But, even according to this view, there may be peculiar circumstances in a case which necessitate the placing of the onus of proof on the defendant to show that the acknowledgment was made after the period of limitation.⁴

77. Pleading. — Under O. 7, R. 6 of the Civil Procedure Code where the plaint is *prima facie* barred by limitation, it must state the ground on which exemption from the bar is claimed. Accordingly, where on the face of the plaint a suit is barred by limitation, but an acknowledgment of liability is relied on to save the suit from the bar of limitation, the fact that such acknowledgment is relied on must be stated in the plaint.¹ But, this rule only applies where the suit is

('34) 21 A I R 1934 Lah 121 (122) : 154 Ind Cas 773, *Gian Chand v. Sher Mahomed*.

('80) 17 AIR 1930 Lah 985 (990) : 129 Ind Cas 281 : 12 Lah 239 (D B), *Davindar Singh v. Mt. Lachhmi Devi*.

3. ('32) 19 AIR 1932 All 555 (557) : 137 Ind Cas 193 (D B), *Makkhan Lal v. Mt. Sardar Kunwar*.

('29) 16 AIR 1929 All 209 (209) : 115 Ind Cas 451, *Mihi Lal v. Soni Ram*.

('35) 22 A I R 1935 Lah 515 (516) : 155 Ind Cas 576 (D B), *Sher Mohammed v. Karam Chand*.

('04) 1 Bom L R 2 (4) (D B), *Chotiram Lal Chand v. Bhau*.

4. ('19) 6 AIR 1919 All 227 (228) : 51 Ind Cas 283 (DB), *Kamla Devi v. Gurdayal*.

('29) 16 A I R 1929 All 209 (210) : 115 Ind Cas 451, *Mihi Lal v. Soni Ram*.

(Acknowledgment of a mortgage by mortgagee — Acknowledgment itself clearly admitting that on the date on which it was made the mortgagor had a *subsisting* right. Held it was not necessary for mortgagor to prove by evidence *aliunde* that the acknowledgment was made within limitation.)

('20) 7 A I R 1920 All 92 (94) : 42 All 575 : 56 Ind Cas 986 (F B), *Anup Singh v. Fateh Chand*. (Acknowledgment by mortgagee that mortgage existed — It is *prima facie* evidence that at the time of the acknowledgment the mortgage had not become time barred.)

[See ('16) 3 A I R 1916 All 201 (205) : 38 All 540 : 36 Ind Cas 452 (D B), *Khiali Ram v. Taik Ram*. (In this case the burden of proof was on the plaintiff.)]

Section 19 — Note 77

1. ('41) 28 A I R 1941 Pat 147 (151) : 19 Pat 938 : 189 Ind Cas 855 (DB), *Mukhnarain v. Ram Lochan*.

('37) 24 A I R 1937 Mad 826 (828) : 176 Ind Cas 939, *Madappayya v. Mahabala Rao*.

('19) 6 AIR 1919 Mad 332 (333) : 52 Ind Cas 243, *Marudai Muthirian v. Chinna-kannu Muthirian*.

('22) 9 A I R 1922 Lah 39 (40) : 3 Lah 233 : 69 Ind Cas 419 (D B), *Uttam Chand v. Mt. Thakar Devi*.

('28) 15 A I R 1928 Sind 17 (20) : 105 Ind Cas 765 : 22 Sind L R 222, *Punjab National Bank Ltd. v. Mulji Morarji Sundarji*.

('33) 20 AIR 1933 Lah 491 (492) : 145 Ind Cas 343, *Mt. Umri v. Kalu*.

[See also ('34) 21 A I R 1934 Lah 753 (756) : 155 Ind Cas 819 (DB), *Secretary of State v. Akbar Shah*. (Suit *prima facie* barred by limitation — Plaintiff relying on acknowledgment at late stage in course of arguments — Question depending on facts — Plaintiff cannot be allowed to rely on plea.)

('86) 10 Bom 461 (467, 468) : 13 Ind App 66 : 4 Sar 719 : 10 Ind Jur 310 (P C), *Hari Ravji Chiplunkar v. Shapurji Hormasji Shet.*]

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barred on the face of the plaint. The rule does not apply where the presumption of the bar of limitation does not arise on the face of the plaint.²

A plaint can, in the discretion of the Court, be allowed to be amended by the inclusion of an allegation of acknowledgment of liability.³

Where a plaint complies with the requirements of O. 7, R. 6 by stating the ground on which exemption from the bar of limitation is claimed, it has been held that the plaintiff can rely, at the hearing, on a different ground of exemption.⁴

Where a plaint contains a definite allegation of acknowledgment of liability as saving limitation, the allegation will be deemed as admitted by the defendant if it is not specifically denied in the written statement. The mere plea that the suit is barred by limitation will not be sufficient to constitute a specific denial of the allegation in the plaint for this purpose.⁵

78. Acknowledgment, whether question of law or fact.
— See A. I. R. Commentary on the Civil Procedure Code, 5th (1951) Edition, section 100, Note 29.

2. ('19) 6 A I R 1919 All 227 (228) : 51 Ind Cas 283 (D B), *Kamala Devi v. Gur Dayal*.

('19) 6 AIR 1919 Lah 20 (21) : 1 Lah 89 : 51 Ind Cas 956, *Khandu Lal v. Fazal*.

('20) 7 A I R 1920 Oudh 236 (237) : 23 Oudh Cas 176 : 60 Ind Cas 189, *Jageshar Singh v. Bir Ram*.

('22) 9 A I R 1922 Oudh 135 (137) : 25 Oudh Cas 89 : 68 Ind Cas 196, *Ram Autar v. Beni Singh*.

3. ('35) 22 AIR 1935 Mad 158 (159, 160) : 154 Ind Cas 707, *Muthammal v. Gurusami Nayakkan*. (As no new relief was prayed nor fresh cause of action added, the amendment was allowed.)

('34) 21 A I R 1934 Lah 753 (756) : 155 Ind Cas 819 (D B), *Secretary of State v. Akbarshah*. (Plea not allowed to be taken up at late stage, as it was unfair for the defendant.)

4. ('49) 36 AIR 1949 East Punj 219 (220), *Thakar Das v. Sant Ram*. (A I R 1922 Lah 230 : 2 Lah 13, *Parmeshari Das v. Fakiria*, followed.)

('22) 9 A I R 1922 Lah 230 (232) : 2 Lah 13 : 60 Ind Cas 772 (D B), *Parmeshari Das v. Fakiria*.

('22) 9 A I R 1922 Lah 39 (40) : 6 Lah 233 : 69 Ind Cas 419 (DB), *Uttam Chand v. Mt. Thakar Devi*. (In this case as no ground of exemption was stated in the plaint, acknowledgment as a ground of exemption could not be allowed to be set up in appeal.)

('37) 24 A I R 1937 Oudh 391 (392) : 13 Luck 334 : 168 Ind Cas 799 (DB), *Satgur Nath v. Brahma Dat*.

[But see ('14) 1 AIR 1914 Lah 337 (338) : 1914 Pun Re No. 83 : 26 Ind Cas 441 (DB), *Govinda Mal v. Santa*.

('24) 11 AIR 1924 Pat 806 (806) : 78 Ind Cas 919 (DB), *Chhater Dhari Mahto v. Nasib Singh*.]

5. ('16) 3 A I R 1916 Pat 39 (41) : 38 Ind Cas 85 : 2 Pat L Jour 24 (D B) *Balukchand v. Nathunni Singh*. (But petition for leave to execute a decree is not a pleading and hence this rule does not apply to such petition.)

20.* ^a[(1) Where payment on account of a debt or of

Effect of payment on interest on a legacy is made before the account of debt or of expiration of the prescribed period by the interest on legacy. person liable to pay the debt or legacy, or

by his duly authorized agent, a fresh period of limitation shall be computed from the time when the payment was made.]

^b[Provided that, save in the case of a payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.]

(2) Where mortgaged land is in the possession of the

Effect of receipt of mortgagee, the receipt of the rent or produce of mort- duce of such land shall be deemed to be a gaged land. payment for the purpose of sub-section (1).

Explanation. — Debt includes money payable under a decree or order of Court.

a. This sub-section was substituted by the Indian Limitation (Amendment) Act, 1942 (XVI [16] of 1942), S. 2, [30-3-1942] for the substantive part of sub-section (1) which ran as follows :

*** Act of 1877 : S. 20.**

20. When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf,

Effect of part-pay- or when a part of the principal of a debt is, before ment of principal. the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf,

a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made :

Provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same.

Effect of receipt Where mortgaged land is in the possession of the of produce of mort- mortgagee, the receipt of the produce of such land shall be gaged land. deemed to be a payment for the purpose of this section.

Act of 1871 : S. 21.

21. When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent generally or specially authorized in this behalf,

Effect of part-pay- or when part of the principal of a debt is, before the ment of principal. expiration of the prescribed period, paid by the debtor or by his agent generally or specially authorized in this behalf,

a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made :

Provided that, in the case of part-payment of principal, the debt has arisen from a contract in writing, and the fact of the payment appears in the handwriting of the person making the same, on the instrument, or in his own books, or in the books of the creditor.

Act of 1859.

No corresponding provision.

Section 20

"(1) Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf,

or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf,

a fresh period of limitation shall be computed from the time when the payment was made."

b. This proviso was substituted by S. 2 of the Indian Limitation (Amendment) Act, 1927 (I [1] of 1927). The old proviso was as follows :

"Provided that, in the case of part payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same."

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Distinction between Section 19 and Section 20. See Note 5 to Section 19.
4. Section applies only to debts and legacies.
5. Distinction between paying interest and paying principal.
6. Intention of debtor to pay interest or principal, how ascertained.
7. "Interest" includes part of interest due.
8. Payment expressed to be made for principal and interest generally.
9. Payment "without prejudice."
10. "Before the expiration of the prescribed period."
11. "Payment", meaning of.
12. Money need not belong to the person paying.
13. Who must make the payment — General.
14. Person liable to pay the debt or legacy.
- 14a. Debtor — Meaning of. See Note 13.
15. Principal and surety. See Note 12 to Section 21.
16. Payment by one of several joint debtors. See Notes to Section 21.
17. Payment by one of several Muhammadan co-heirs. See Note 10 to Section 21.
18. "Duly authorised agent".
19. Payment by Court. See Note 18.
20. Payment by husband or wife. See Note 18.
21. Payment by pleader.
22. Payment by receiver.
23. "Fresh period" — Computation of.
24. Proviso — "Appears in the handwriting of, or in a writing signed by."
25. Payment and writing need not be simultaneous.
26. Signature must have reference to the acknowledgment of payment.
27. Proviso — "Person making the payment."
28. Sub-section (2) — Mortgagee in possession.
29. Explanation.
30. Decree debt — Payment — Certification.
31. Nature of liability affected by payment.
32. Question, what a sum of money was paid for, is one of fact.
33. Second appeal.
34. Unregistered endorsement of payments.
35. Burden of proof.
36. Article 75 and this section.
37. Distinction between Sections 19 and 20 and Article 183.

TOPIC INDICATOR.

Addition of interest to principal — Whether payment. See Note 11.

Adjustment of accounts. See Note 11.

Authority to pay includes authority to endorse. See Note 18.

Court — Whether can be agent of party. See Note 18.

"Decree" includes preliminary decree for sale. See Note 29.

Formal or express authorisation not necessary. See Note 18.

Illiterate person touching pen. See Note 24.

Mark of illiterate person. See Note 24.

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| Only payment and not appropriation to be in writing. See Note 24. | Payment under compulsion of Court. See Note 11. |
| Part-payment and endorsement by judgment-debtor on decree. See Note 24. | Period under S. 48, C. P. Code — Not "prescribed period" See Note 10. |
| Payment and not acknowledgment to be within time. See Note 25. | Recovery by levying execution. See Note 11. |
| Payment by cheque — Whether payment. See Note 11. | Section applies to all debts, secured or unsecured. See Note 4. |
| Payment by labour. See Note 11. | Writing in money-order coupon or signing of cheque whether sufficient. See Note 24. |
| Payment in kind. See Note 11. | |

1. Legislative changes.

- (1) There was no section corresponding to this section in the Act of 1859, and a part payment of a debt or payment of interest did not operate to extend time.¹ By the rules promulgated under Circular Order 104 of 1860 (which were modifications of the Punjab Code) which were in force in certain provinces to which the Act of 1859 did not apply, it was, however, provided that a fresh period of limitation would be available where there was a "partial satisfaction of demand."²
- (2) The rule that payments of interest and part payments of principal should, under specified circumstances, operate to start a fresh period of limitation, was borrowed from English law and first became a part of the limitation law of this country on the passing of Act IX of 1871, in S. 21 of which it was incorporated.³ In that section, however,
 - (a) the words "generally or specially authorized" were used instead of the words "duly authorized";
 - (b) the proviso applied only to cases where the debt arose from a *contract in writing*⁴ and the writing evidencing the fact of payment had to be *on the instrument* or *in the books* of the debtor or of the creditor.

Section 20 — Note 1

1. ('71) 8 Bom H C R A C 6 (7) (DB), *Mulchand Gulabchand v. Girdhar Madhav*. (1864) 2 Mad H C R 79 (80) (DB), *Md. Janula v. Venkatarayar*. (Though evidenced by writing.)
- (1864) 2 Mad H C R 84 (85), *Raja Isvara Das v. Richardson*.
[See ('76) 1 Mad 228 (234) : 1 Ind Jur 231 : 1 Mad L R 351 (DB), *Valia Tambarratti v. Vira Rayan*. (Section 21 of Act of 1871 saves actions barred under old Act.)
- ('77) 1 Mad 264 (265, 266): 1 Ind Jur 310 (DB), *Teagaraya Mudali v. Mariappa Pillai*. (Do.)]
2. ('66) 5 Suth W R P C 18 (21) : 10 Moo Ind App 362 (PC), *Mukkun Lal v. Imtiaz-ood Dowlah*. (But it must be a payment according to continuous and regular course of dealing.)
3. ('94) 1894 Pun Re No. 124, p. 477, *Diwan Buya Singh v. Hukam Chand*.
4. ('79) 3 Bom 198 (200) (DB), *Hanmantmal Motichand v. Rambabai*. (An entry of an account stated, made by a debtor in a creditor's books, is not a contract in writing within the meaning of S. 21.)
- ('73) 10 Bom H C R 375 (377) (DB), *Amritlal v. Maniklal*. (Do.)
- ('81) 1881 Pun Re No. 62, *Gobind Rai v. Chajju Mal*. (In this case there was no contract in writing. Held also that a debt barred under Act of 1871 is not revived by S. 20 of Act of 1877.)

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Notes 1-2

- (3) Section 20 of the Act of 1877, substituted the words "duly authorized" for the words "generally or specially authorized" and deleted the requirement in the proviso that the debt should arise from a contract in writing and that the writing should be in particular places.

A provision corresponding to sub-s. (2) of the present section was newly inserted.

- (4) The Act of 1908 repeated the section as it was enacted in 1877 with the addition of an explanation.
- (5) By the Limitation (Amendment) Act I of 1927, the proviso in its present form was substituted for the old proviso.
- (6) By the Limitation (Amendment) Act 16 of 1942 sub-s. (1) in its present form was substituted for the old sub-section (1).

2. Scope of the section.—The present sub-section (1) provides that a payment on account of a debt or of interest on a legacy shall give a fresh period of limitation for suits for debts and legacies. The old sub-section (1) provided that a payment of interest as such, or a part payment of the principal, in respect of a debt shall give a fresh period of limitation to the creditor for enforcing the debt.^{1a} In the undermentioned cases¹ it was held that the principle underlying this provision is that such payment implies an admission of a right and an acknowledgment of a corresponding liability. This view, based on English law, has since been overruled by the decision of the Privy Council in *Rama Shah v. Lal Chand*.² In that case, their Lordships of the Privy Council observed as follows :

"Their Lordships cannot agree that the section is to be read as governed by any such principle as is suggested familiar though it be in the law of England. They can discover no sufficient reason for the assumption that the section is an expression of any single principle. In English law effect was first given to acknowledgments and payments by reason of general principles of exception applied by the Courts to the Statute of Limitation (1623) which did not contain express exceptions in these respects, and though the exceptions were in the end made statutory they retained much of their original character. In the Limitation Act,

Section 20 — Note 2

1a. ('46) 33 A I R 1946 Nag 112 (113) : I L R (1946) Nag 21, *Bulakhidas v. Ganpatrao*.

1. ('35) 22 AIR 1935 All 946 (956) : 58 All 261 : 159 Ind Cas 387 (F B), *Udeypral Singh v. Lakshmi Chand*.

('35) 22 AIR 1935 Mad 371 (372) : 157 Ind Cas 259, *Appasami Pillai v. Morangam Muthirian*.

('17) 4 AIR 1917 Mad 460 (464) : 34 Ind Cas 417 (DB), *Chokkalingam Chetty v. Annamalai Chetty*.

('17) 4 A I R 1917 Oudh 124 (125, 126) : 42 Ind Cas 119, *Didar Husain v. Gaya Prasad*.

('94) 1894 Pun Re No. 124, p. 477, *Diwan Buta Singh v. Hukum Chand*.

2. ('40) 27 AIR 1940 P C 63 (67) : I L R (1940) Lah 470 : I L R (1940) Kar (P C) 134 : 67 Ind App 160 : 187 Ind Cas 293 (PC).

section 19, which deals with acknowledgments, is not to be read as based upon the theory of implied promise: and it is difficult to see why S. 20, which deals with payments, should be regarded as based upon a theory of acknowledgment. The Indian Legislature may well have thought that a payment if made on account of the debt and evidenced by writing gave the creditor some excuse for further delay in suing, or was sufficient new proof of the original debt to make it safe to entertain an action upon it at a later date than would otherwise have been desirable."

The section is also not based on any fiction of implied *promise to pay*, and a payment of interest or principal accompanied by a *refusal* to pay the balance may still give a fresh starting point of limitation for recovering the debt.³

3. Distinction between Section 19 and Section 20. — See Note 5 to Section 19.

4. Section applies only to debts and legacies.—The section is restricted to suits for *debts* and *legacies*.¹ Thus, it has no application to the following cases :

- (1) Suit for redemption.²
- (2) Suit for possession of property.³

3. ('38) 25 A I R 1938 Cal 129 (131) : 176 Ind Cas 191 (D B), *Azizur Rahiman v. Upendra Nath*.

('21) 8 A I R 1921 Mad 704 (706) : 44 Mad 971 : 68 Ind Cas 100 (D B), *Govindasami Pillai v. Desai Goundan*.

Section 20 — Note 4

1. ('48) 35 AIR 1948 P C 36 (38) : 74 Ind App 285 : I L R (1947) Lah 727 : I L R (1947) Kar (PC) 422 (PC), *Mohd. Akbar Khan v. Mt. Motai*. (Suit for redemption of a mortgage — Receipt of rent or produce of mortgaged property by mortgagee in possession will not extend limitation.)
- ('39) 26 A I R 1939 Lah 212 (214), *Abdullah v. Ishaq Mohammad*. (Also applies to case of mortgage with possession.)
2. ('48) 35 AIR 1948 P C 36 (38) : 74 Ind App 285 : I L R (1947) Lah 727 : I L R (1947) Kar (PC) 422 (PC), *Mohd. Akbar Khan v. Mt. Motai*.
- ('50) 37 A I R 1950 East Punj 157 (Pr 5) : 52 Pun L R 75, *Bharat v. Des Raj* (AIR 1948 P C 36, Applied.)
- ('26) 13 AIR 1926 All 85 (86) : 89 Ind Cas 161, *Bhagwan Din v. Sri Kishen*.
- ('24) 11 AIR 1924 Lah 484 (485) : 78 Ind Cas 617, *Firoze Khan v. Kanhaiya Ram*.
- ('28) 110 Ind Cas 560 (560) (DB) (All), *Markunday v. Mahabir Pandey*.
- ('03) 26 All 167 (170) : 1903 All W N 223 (DB), *Anwar Hussain v. Lalmir Khan*.
- ('96) 18 All 295 (297) : 1896 All W N 68, *Kallu v. Halki*. (See critical note on this case in 6 Mad L Jour 458 (Jour).)
- ('17) 4 AIR 1917 Oudh 124 (125, 126) : 42 Ind Cas 119, *Didar Hussain v. Gaya Prasad*.
- [See ('93) 1893 Bom P J 318 (DB), *Ganu v. Krishnaji*. (Only acknowledgment can extend the period.)
- ('22) 9 AIR 1922 Bom 356 (357) : 46 Bom 1000 : 70 Ind Cas 906 (DB), *Bhagwan Ganpat v. Madhav Shankar*.
- ('93) 1893 Bom P J 346 (DB), *Chinto Vinayak v. Balkrishna Narhar*.]
3. ('10) 7 Ind Cas 567 (567) : 13 Oudh Cas 179, *Kanhaya Bakhsh Pande v. Sheo-nandan Singh*.
- ('09) 4 Ind Cas 921 (921) : 1908 Pun Re No. 91, *Bishen Lal v. Kaushali*. (Suit by mortgagee for possession.)

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(3) Suit for a share of mortgage money received by the defendant mortgagor on the allegation that the mortgaged property was undivided ancestral property in which plaintiff had a right.⁴

The Section contemplates debts of *all* kinds whether secured or unsecured.⁵ A claim to recover the mortgage amount under S. 68 of the Transfer of Property Act is a suit for the recovery of mortgage debt and is, therefore, for the recovery of a "debt".⁶

In *Pangudaya v. Uthandiya*,⁷ the Madras High Court expressed the opinion that the joint liability of the members of an undivided Hindu family for a family debt is not a "debt" within the meaning of this section. It is submitted that this view is obviously wrong as it leads to the result that limitation cannot be extended by means of a part payment or payment of interest in respect of a joint family debt.

5. Distinction between paying interest and paying principal. — As seen in Note 1 the present sub-section (1) has been substituted by the Amending Act of 1942. The Amendment has been made with a view to abolish the distinction made by the old sub-section (1) between payment of interest *as such* and part payment of principal. The words 'as such' occurring after the words interest. . . . paid' have now been omitted and the sub-section has been framed so as to apply to any payment on account of a debt by the debtor without any distinction as to whether the payment was made towards principal or towards interest *as such* and without any necessity on the part of the creditor to appropriate an open payment towards principal

4. ('13) 22 Ind Cas 959 (959) : (1913) 1 Upp Bur Rul 178, *Nga Ya Baw v. Nga Bya*. (Such suit is not maintainable.)

5. ('48) 35 AIR 1948 P C 36 (38) : 74 Ind App 285 : I L R (1947) Lah 727 : I L R (1947) Kar (P C) 422 (PC), *Mohd. Akbar Khan v. Mt. Motai*. (Section applies to mortgage debts.)

('41) 28 AIR 1941 Mad 6 (14) (DB), *Thinnappa Chettiar v. Krishna Rao*.

('38) 25 A I R 1938 Cal 129 (131) : 176 Ind Cas 191 (DB), *Azizur Rahaman v. Upendra Nath*. (It is not necessary to import the doctrine of implied promise.)

6. ('22) 9 A I R 1922 Oudh 102 (104) : 65 Ind Cas 408, *Mahadeo Tewari v. Sitla Baksh Singh*.

7. ('38) 25 A I R 1938 Mad 774 (778) : I L R (1938) Mad 968 : 178 Ind Cas 243 (DB). (The question in this case was whether after partition in a joint family, the senior member can extend limitation for a pre-partition debt by means of a part payment — It was contended that though in such a case the senior member may not be the manager for the time being under S. 21 (3) (b), yet, the members of the family are co-debtors and as under S. 20, a payment by one co-debtor will save limitation against all, (see S. 21 Note 6) the payment by the senior member would extend limitation against all the members of the family apart from S. 21 (3) (b) — In negating this contention, their Lordships expressed the opinion that the debt due by a Hindu joint family is not a debt within the meaning of this section and that the members of the family are not co-debtors in respect of the debt — It is submitted that though the decision is correct the reason is not — The true reason for holding that the principle that payment by one co-debtor extends limitation against all does not apply to the members of a joint Hindu family with regard to a joint family debt is that S. 21 (3) (b) is a *special* provision which prevails over the general provisions of this section.)

or interest.^{1a} The amended section will apply to suits filed after the amendment has come into operation.^{1b} But if the suit has already been barred under the old law the amended section will not apply retrospectively to save limitation.^{1c} So also, the amendment cannot apply to suits already instituted and pending at the time of the coming into force of the amendment.^{1d} [See also Preamble Note 15.]

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1a. Report of the Select Committee.

('49) 36 A I R 1949 Orissa 64 (67) : I L R (1949) 1 Cut 281 (DB), *Pitambar v. Lakshmidhar*. (Present sub-section (1) requires no discrimination as to whether any payment was made towards principal or towards interest as such.)

('45) 32 AIR 1945 Pat 368 (368) : 24 Pat 249 (DB), *Baleswar Prasad v. Latafat Karim*.

('44) 31 AIR 1944 Bom 37 (40) : 215 Ind Cas 12 (DB), *Harkubai v. Shankerbhai*.

('44) 31 A I R 1944 Mad 398 (400) : (1944) 1 Mad L Jour 347, *Avudayammal v. Ambasankar*. (The amendment was intended to supersede the law as expounded in A I R 1940 P C 63 : I L R (1940) Kar (P C) 134 : 67 Ind App 160 : I L R (1940) Lah 470 (PC), *Rama Shah v. Lal Chand*, and to make a payment "on account of a debt" sufficient for the purposes of the section.)

1b. ('49) 36 AIR 1949 Orissa 64 (66) : I L R (1949) 1 Cut 281 (DB), *Pitambar v. Lakshmidhar*.

('46) 33 A I R 1946 All 58 (61) : I L R (1945) All 896 : 223 Ind Cas 175, *Pearey Lal v. Solu Gir*. (In the absence of anything to the contrary, if a claim is within limitation according to the old Act on the date when the new Act comes into force and a proceeding is commenced after the coming into force of the new Act, it is the new Act which would govern all decisions on the point of limitation.)

('46) 33 AIR 1946 Pat 60 (62) : 24 Pat 391 (DB), *Jagdish Prasad v. Saligram Lal*.

('45) 32 AIR 1945 Pat 368 (368) : 24 Pat 249 (D B), *Baleswar Prasad v. Latafat Karim*. (The law of limitation which governs an action is the law which prevails on the date when the suit is instituted, though the cause of action might accrue before the change in the law. S. 20 of the Limitation Act (as amended by the Amending Act XVI of 1942) therefore applies to a suit instituted in 1943 on a handnote executed in 1934.)

1c. ('49) 36 AIR 1949 Orissa 64 (66) : I L R (1949) 1 Cut 281 (DB), *Pitambar v. Lakshmidhar*.

('46) 33 A I R 1946 All 58 (61) : I L R (1945) All 896 : 223 Ind Cas 175, *Pearey Lal v. Solu Gir*.

('46) 33 AIR 1946 Mad 72 (73) : (1945) 2 Mad L Jour 405, *S. Venkatappayya v. Y. Venkatappayya*.

('44) 31 A I R 1944 Mad 398 (400) : (1944) 1 Mad L Jour 347, *Avudayammal v. Ambasankar*.

[See however ('45) 32 A I R 1945 Pat 368 (368) : 24 Pat 149 (DB), *Baleswar Prasad v. Latafat Karim*. (The provisions of S. 28 apply only when the right in question was a right to recover property and not to a debt or legacy.)]

1d. ('46) 33 AIR 1946 Pat 59 (60) : 219 Ind Cas 159 (D B), *Sarabdeva Prasad v. Dwarka Prasad*.

('44) 20 Luck 43 (44) : 1944 Oudh W N 154 (D B), *Jagdish Narain v. Gajadhar*. (An applicant in revision cannot benefit by a change in the law made during the pendency of his application.)

('43) 30 AIR 1943 Nag 178 (181) : I L R (1943) Nag 422 : 207 Ind Cas 214 (DB), *Prabhakar Nilkanth v. Chandrakant Narayanrao*.

('42) 29 A I R 1942 Oudh 508 (508, 509) : 18 Luck 241 : 202 Ind Cas 750 (DB), *Durga Prasad v. Kishuni*. (Suit decided in 1939—Revision—Subsequent amendment—Amendment cannot defeat right of successful party.)

[See also ('44) 31 A I R 1944 Bom 37 (40) : 215 Ind Cas 12 (D B), *Harkubai v. Shankerbhai*. (Amendment not retrospective.)]

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Note 5

The discussion of the effect of the words 'as such' occurring in the old sub-section (1), in this note and in other notes on this section is thus of academic interest in cases governed by the amended sub-section and must be taken as subject to the above consideration. The rest of this Note which deals with the sub-section as it stood before the above amendment is given in smaller type, to distinguish it from above portion of the Note which deals with the sub-section in its present form.

The old section makes a distinction between a payment of interest and a payment of principal. In order that a payment of interest may give a fresh period of limitation, the payment must be a payment for interest *as such*.¹ A payment for principal need not be a payment *as such*,² but it is necessary that it should be a payment of *part* only of the principal.

The words "as such" used in relation to the payment of interest have reference to the *intention of the debtor* in paying it. An amount may be paid by the debtor to the creditor without any specification by the former whether it is to be appropriated for the interest or for the principal of the debt. In such cases the creditor will, under Ss. 59 and 60 of the Contract Act, be entitled to appropriate the money either for the interest due or for principal, at his option.³ Where he appropriates the amount for interest, it may be regarded *in law* as a payment of interest. But it cannot be said that the debtor *intended* to pay it for interest and consequently it cannot be said that the interest was paid "as such."⁴ The section, therefore, would not apply to cases where a debtor makes a payment without any specification and the creditor appropriates it, as he is entitled to do under the law, towards interest.⁵ The High Court of Patna has, however, held in

1. ('40) 27 A I R 1940 P C 63 (66) : I L R (1940) Lah 470 : I L R (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah v. Lal Chand*.
(40) 27 A I R 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand v. Bulaqi Ram*.
- (39) 26 A I R 1939 Bom 237 (241) : 183 Ind Cas 225 (D B), *Bhalchandra Dattatraya v. Chanbasappa Mallappa*.
- (37) 24 A I R 1937 Pat 410 (413) : 16 Pat 27 : 170 Ind Cas 130 (D B), *Bagha Co-operative Society v. Debi Mangal Prasad*.
- (34) 21 AIR 1934 Mad 656 (656) : 153 Ind Cas 462 (DB), *Failesatha Banu v. Md. Rashidhuddin*.
- (35) 22 A I R 1935 Rang 473 (476) : 160 Ind Cas 314, *U Sin v. U Tun Si*. (('29) AIR 1929 Rang 339, *U Ba Gyi v. U Than Kyauk*, referred to.)
- (15) 2 AIR 1915 Cal 459 (460) : 20 Ind Cas 857 (DB), *Bitari Ram v. Kunji Singh*. (There must be express or implied intention by debtor.)
- (34) 21 AIR 1934 Pat 244 (245) : 146 Ind Cas 1033, *Rajmani Bibi v. Baldeo Das*. [See ('10) 6 Ind Cas 16 (17) (DB) (Cal), *Rai Mohan Shaha v. Lakshu Karikar*.]
2. ('40) 27 A I R 1940 P C 63 (66) : I L R (1940) Lah 470 : I L R (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC). *Rama Shah v. Lal Chand*.
(37) 24 A I R 1937 Pat 410 (413) : 16 Pat 27 : 170 Ind Cas 130 (DB), *Bagha Co-operative Society v. Debi Mangal Prasad*.
(30) 17 A I R 1930 All 392 (394, 395) : 52 All 459 : 127 Ind Cas 581 (DB), *M. B. Singh & Co. v. Sircar & Co*. (('21) A I R 1921 All 335 (DB), *Curlender v. Abdul Hamid*, relied on.)
3. ('40) 27 A I R 1940 P C 63 (68) : I L R (1940) Lah 470 : I L R (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah v. Lal Chand*, (There is no obligation upon creditor to make appropriation at once.)
(81) 1881 All W N 119 (120) (DB), *Nirpat v. Shadi*.
4. ('40) 27 A I R 1940 P C 63 (67) : I L R (1940) Lah 470 : I L R (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah v. Lal Chand*.
5. ('49) 36 AIR 1949 Nag 394 (397) : ILR (1949) Nag 478 (DB), *Govindram v. Gulab Rao*.

- (146) 33 AIR 1946 Pat 404 (405, 406) : 224 Ind Cas 65 (DB), *Ajodhya Prasad v. Gobind Missir*.
- (144) 31 AIR 1944 Bom 37(38, 39):215 Ind Cas 12(DB), *Harkubai v. Shankerbhai*.
- (144) 31 AIR 1944 Lah 88 (89) : ILR (1944) Lah 528 : 213 Ind Cas 253 (DB), *Dial Singh v. Mohammad Ali*.
- (144) 31 AIR 1944 Mad 398 (399) : (1944) 1 Mad L Jour 347, *Aradayammal v. Ambasankar*.
- (141) 28 AIR 1941 Oudh 56 (57) : 16 Luck 113 : 190 Ind Cas 334, *Khat Khata Nand v. Surajpal Singh*.
- (140) 27 AIR 1940 Lah 513 (514): 191 Ind Cas 802, *Kesar Chand v. Bulaqi Ram*.
- (139) 26 AIR 1939 Oudh 141 (142) : 14 Luck 588 : 180 Ind Cas 15 (DB), *Zamen Khan v. Ram Asre*. (Words "paid as such" in the section are not superfluous.)
- (137) 24 AIR 1937 Pat 583 (584) : 167 Ind Cas 244, *Idan Sadagar v. Firm Prem-sukdas Ramchandra*.
- (125) 12 AIR 1925 Cal 1030 (1030) : 87 Ind Cas 746 (DB), *Muhammad Kamel v. Ahmad Ali*.
- (129) 16 AIR 1929 Mad 811 (811) : 117 Ind Cas 790, *Chinnasamy v. Periatthambi*. (Mere appropriation by creditor is not indication that payment was made towards interest.)
- (126) 13 AIR 1926 Mad 902 (902) : 97 Ind Cas 384, *Musal Naidu v. Viraswamy Reddi*. (Words of this section are mandatory.)
- (127) 14 AIR 1927 Mad 110 (111) : 98 Ind Cas 281, *Venkanna v. Chendrammao*. (Intention of debtor to pay towards interest must be proved—Appropriation by creditor not sufficient.)
- (128) 15 AIR 1928 Mad 509 (512) : 51 Mad 549 : 111 Ind Cas 210 (DB), *Ammalamma v. Narayanan Nair*.
- (127) 14 AIR 1927 Mad 284 (285) : 99 Ind Cas 694 (DB), *Perraju v. Bapireddi*. (In this case however there was a covenant that any payment made should first be appropriated towards interest due—Hence this section was applied.)
- (135) 22 AIR 1935 All 946 (964) : 159 Ind Cas 387 : 58 All 261 (FB), *Udeypal Singh v. Lakshmi Chand*.
- (129) 16 AIR 1929 Oudh 479 (480) : 120 Ind Cas 825 : 5 Luck 519 (DB), *Narain Das v. Chandrawati Kuer*. (Payment on general account — Not payment for interest—Ordinary law of appropriation does not apply.)
- (179) 3 Bom 198 (200) (DB), *Hanmantmal Motichand v. Ramba Bai*. (There was no intimation by the defendant that any payment made by him was to be appropriated towards interest.)
- (103) 5 Bom L R 350 (352, 353), *Damodar v. Jankibai*. (Payment towards the debt without specifying the mode of appropriation — (102) 4 Bom L R 231 (DB), *Subraya v. Pakaya*, dissented from.)
- (115) 2 AIR 1915 Lah 275 (276) : 31 Ind Cas 782, *Muinuddin v. Muhammad Ahmad*. (Payment made in reduction of a general balance of account but without intimating that it is to be appropriated towards interest is not payment towards interest and does not save limitation.)
- (127) 14 AIR 1927 Sind 268 (268):101 Ind Cas 736 (DB), *Khimanmal v. Asa Mal*. (General payment towards debt.)
- (129) 16 AIR 1929 Rang 339 (340) : 7 Rang 522 : 120 Ind Cas 897, *U Ba Gyi v. U Than Kyauk*. (Appropriation of payments by creditor in particular manner — Act of judgment-debtor necessary to save limitation.)
- (130) 17 AIR 1930 Oudh 287 (288) : 6 Luck 7 : 128 Ind Cas 276 (DB), *Lalji v. Ghashi Ram*. (Payment towards general account—No appropriation by debtor — Payment not towards interest as such.)
- (102) 15 C P L R 29 (33), *Gopalrao v. Chindhu*.
- (192 96) 2 Upp Bur Rul 466 (468, 469), *Maung Hlaing v. Maung Et Gyi*.
- (107) 1 Sind L R 252 (254) (DB), *Jethanand Topandas v. Lalamal Sitalmal*. (A general payment is not sufficient.)
- (110) 7 Ind Cas 7 (8) (DB) (Cal), *Maheswar Panda v. Baidya Nath Jana*.
- (109) 2 Ind Cas 379, (379, 380):31 All 495, *Muhammad Abdullah Khan v. Bank Instalment Co.*

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the cases noted below⁶ that a payment by the debtor without any specification and appropriated by the creditor towards interest would amount to a payment of interest as such. The ground on which this view proceeds is that the words "as such" are redundant since the amendment of this section by the amending Act of 1927, in respect of payments made after 1st January 1928 and that these words are material only when the Court has to consider a payment made before that date. But this view has been rejected by the Privy Council in *Rama Shah v. Lal Chand*⁷ where it was held that in the absence of an intention on the part of the debtor a payment does not amount to a payment of interest as such by reason of the rule that it is the right of the creditor to have payments treated in account as liquidating the interest before the principal. As regards the effect of the amending Act of 1927 their Lordships in the same case observed :

"The words 'as such' had long been given a settled meaning importing the intention of the debtor that his payment should go towards interest as distinct from principal. Though the amendment raised in a pointed manner the question whether the words 'as such' should be retained, it is clear that the Legislature decided to retain them; and it is not reasonable as a matter of construction of a statute to suggest that they can be ignored; or that their meaning has changed; or that they can be given their meaning but only as regards payments made before 1st January 1928."

In view of the Privy Council decision the above Patna cases are no longer good law. The payment of interest must thus be viewed from the standpoint of the debtor and the determining factor is the intention of the debtor in making the payment and not that of the creditor in appropriating it.⁸ A made a payment

('37) 24 AIR 1937 Lah 820 (822) : 172 Ind Cas 455 (DB), *Lal Chand v. Raman Shah*. (Conceded.)

[See ('94) 1894 Pun Re No. 124, p. 477, *Diwan Buta Singh v. Hukam Chand*.

('70) 1870 Pun Re No. 75, *Gyan Chand v. Kurm Bhaggun*.]

[But see ('19) 6 AIR 1919 Mad 100 (100) : 51 Ind Cas 240, *Sankaram Aiyar v. Thiraviya Nadan*. (Following ('12) 14 Ind Cas 580 (DB), *Soumia Narayana v. Alagirisawmy* and ('10) 8 Ind Cas 81 (DB), *Hingu Miya v. Heramba Chandra*.)

('36) 23 AIR 1936 Mad 616 (617) : 163 Ind Cas 803, *Chandukutti Nambiyar v. Kunhi Kalandan*. (Payment without indicating whether it is towards interest or principal — Such payment can be taken as payment of interest as such — *Obiter*.)]

6. ('39) 26 AIR 1939 Pat 389 (389 to 391) : 18 Pat 253 : 183 Ind Cas 330 (DB), *Santa Prasad v. Harkishore Prasad*.

('38) 25 AIR 1938 Pat 183 (184, 185) : 16 Pat 294 : 174 Ind Cas 1005 (DB), *Bankanidhi v. Godipatna Co-operative Society*.

[See also ('37) 24 AIR 1937 Pat 410 (411, 412) : 16 Pat 27 : 170 Ind Cas 130 (DB), *Bagha Co-operative Society v. Debi Mangal Prasad*. (Debtor has the first option to state whether the deposit is to be appropriated towards payment of interest or principal and if he does not exercise the option and creditor appropriates it towards interest the debtor must be presumed to have consented to such appropriation and the payment is one on account of interest and can be held to have been paid as such within the meaning of Section 20.)]

7. ('40) 27 AIR 1940 P C 63 (66, 67) : I L R (1940) Lah 470 : I L R (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC).

8. ('41) 28 AIR 1941 All 132 (133) : 193 Ind Cas 854 (DB), *Sitaram Babu Ram v. Sitaram Lalman*.

('27) 14 AIR 1927 Mad 110 (111) : 98 Ind Cas 281, *Venkanna v. Chendramma*. (('09) 2 Ind Cas 379 (DB), *Abdullah v. Bank Instalment Co., Ltd.* followed.)

('15) 2 AIR 1915 Upp Bur 11 (11) : 2 Upp Bur Rul 80 : 31 Ind Cas 101, *Nga Twe v. Nga Ba*. (Do.)

('29) 16 AIR 1929 Mad 811 (811) : 117 Ind Cas 790, *Chinnasamy Kavirayar v. Periathambi Butler*. (The debtor must have paid the amount with the intention that it should be paid towards interest and there must be something to indicate that intention; mere appropriation by the creditor is not such an indication.)

to B of a sum of money without any specification. B appropriated it, as he was entitled to do, for interest. It was held by the Full Bench, in *Udeypal Singh v. Lakshmi Chand*,⁹ that the payment was not for interest as such inasmuch as A never intended to pay it as interest, though under the law it could be treated by B as a payment for interest. It was also held that it could not be treated as a payment for principal inasmuch as the sum was actually appropriated by B for interest and, therefore, could not be regarded as a payment for principal. The reason is that where once a creditor appropriates a payment by the debtor either to the principal or to the interest and communicates it to the debtor, he has no right to appropriate it otherwise.¹⁰ See also the undermentioned cases to the same effect.¹¹

It has been held that where there is no option to any party at all and the payment has to be appropriated first towards interest under the provisions of the law, it must be taken as having been made towards interest as such.^{11a}

A payment for principal, in order to save limitation, need not, as has been seen already, be a payment *as such* but it must be of a *part* of the principal. Does this mean that in making the payment the debtor must have *intended* to pay it as a *part* or is it sufficient that irrespective of the intention of the debtor, the amount paid happens to be a part of the amount due to the creditor and the creditor appropriates it for principal? There was a conflict of decisions on the point and several views were expressed.

The *first* view was that it was necessary that the debtor should have *intended* to pay the amount as *part* payment of the principal amount due.¹² Thus, where a payment for principal which happened to be only a part of the amount due was made by the debtor accompanied by a statement that the payment was in *full discharge* of the debt, it was held that the payment would not save limita-

(37) 24 AIR 1937 Nag 165 (167, 168) : 169 Ind Cas 513 : I L R (1937) Nag 360, *Lakhanlal Ramsaran v. Sitaram Gulabchand*. (Intention of debtor and not particular formula of words is material.)

(13) 20 Ind Cas 857 (858) (DB) (Cal), *Bitari Ram v. Kunji Singh*. (There must be some express or implied declaration by debtor.)

9. (35) 22 AIR 1935 All 946 (954, 957, 958, 964) : 159 Ind Cas 387 : 58 All 261 (FB). ((33) AIR 1933 All 453 (DB), *Ram Prasad v. Binaek* and (35) AIR 1935 All 47, *Kirpa Ram v. Balak Ram*, relied on.)

10. (44) 31 AIR 1944 Bom 37 (38, 39) : 215 Ind Cas 12 (DB), *Harkubai v. Shankerbhai*.

(40) 27 AIR 1940 P C 63 (68) : I L R (1940) Lah 470 : I L R 1940 Kar (PC) 134 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah v. Lal Chand*.

11. (46) 33 AIR 1946 All 58 (59) : ILR (1945) All 896 : 223 Ind Cas 175, *Pearey Lal v. Solu Gir*. (Where a debtor believes that principal and interest are both payable and makes a payment merely on account, it cannot save limitation.)

(40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand v. Bulaqi Ram*. (If the appropriation is once made by the creditor towards interest, he cannot transfer it subsequently towards principal.)

(38) 25 AIR 1938 Bom 467 (468) : 178 Ind Cas 844 (DB), *Havabu Bai v. Isuf Musa Patil*. (Payment made by debtor without specifying whether it is towards interest or principal — Creditor appropriating it towards interest — There is neither payment of interest as such nor part payment of principal.)

(35) 22 AIR 1935 Rang 473 (476) : 160 Ind Cas 314, *U Sin v. U Tun Si*.

11a. (44) 31 AIR 1944 Bom 37 (39, 40) : 215 Ind Cas 12 (DB), *Harkubai v. Shankerbhai*. (A I R 1943 Bom 115, relied on.)

(48) 30 AIR 1943 Bom 115 (116) : 206 Ind Cas 390, *Lachhia Limji v. Nagindas Chhotalal*. (Payment under S. 13 (f) Dekkhan Agriculturists' Relief Act.)

12. (94) 1894 Pun Re No. 124, p. 477, *Diwan Buta Singh v. Hukam Chand*. (Appropriation must be by the debtor—If it is made by the creditor no admission of liability on the part of the debtor can be implied.)

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tion under this section as there was no implied admission of any debt outstanding.¹³ Similarly, where a payment was made by the debtor to the creditor to whom he owed several debts and the creditor appropriated it to a part of the principal of one of them, it was held that it could not be considered to be a payment for *that* debt, as the intention of the debtor in making the payment is the guiding test even in regard to the part payment of the principal.¹⁴ Thus, according to this view a payment under this section whether for interest or for part of principal must be a *conscious* act on the part of the debtor,¹⁵ i. e., it must be an appropriation by the *debtor*.

The *second* view was that, independent of the intention of the debtor, where the creditor appropriated a payment without specification towards the principal by virtue of his right under Ss. 59 and 60 of the Contract Act, such appropriation would make the payment a part payment within the meaning of this section so as to extend the time in favour of the creditor.¹⁶ Thus, where a payment was made without specification and there were several debts due, the creditor was held entitled in law to appropriate it for the principal of all the debts so as to save imputation for all.¹⁷ Similarly, where the debtor sent to his bank a cheque for Rs. 600 to be placed to the credit of his loan account, and the bank thereafter charged interest on the principal sum less Rs. 600, it was held that the payment of Rs. 600 operated as a part payment of the principal debt.¹⁸

The *third* view was that, no appropriation, either by the debtor or by the creditor, was necessary. Thus, where money was paid by the debtor without any specification and there was no other indication as to the intention with which the amount was paid, and the creditor did not also make any appropriation for principal or interest, it was held that the payment must be regarded as a part payment of principal which would save time.¹⁹ On similar facts it was held in

13. ('35) 22 AIR 1935 Mad 371 (372) : 157 Ind Cas 259, *Appasamy Pillai v. Morangam Muthirian*.

14. ('29) 16 AIR 1929 Lah 288 (289) : 10 Lah 750 : 119 Ind Cas 549 (DB), *Pannalal v. Ram Singh*. (Payment is viewed from standpoint of debtor.)

15. ('18) 5 AIR 1918 Mad 1332 (1334) : 37 Ind Cas 756 (DB), *Athan v. Sutarjanam*. (Per Ayling, J.)

16. ('40) 27 AIR 1940 All 338 (339) : 189 Ind Cas 686, *Girdhari Lal v. Kishore Lal*. (Payment not towards interest as such — It does not follow that it was towards principal.)

('40) 27 AIR 1940 Lah 106 (107) : 189 Ind Cas 264 (DB), *Bur Singh v. Sikri Brothers*.

('35) 22 AIR 1935 All 946 (957) : 159 Ind Cas 387 : 58 All 261 (FB), *Udeypal Singh v. Lakshmi Chand*. (The words "as such" do not occur in second paragraph of the section.)

('37) 24 AIR 1937 Lah 820 (822) : 172 Ind Cas 455, *Lal Chand v. Raman Shah*. (Conceded.)

17. ('25) 12 AIR 1925 Cal 937 (939) : 87 Ind Cas 508, *Maurice Mayahas v. W. Morley*.

18. ('96) 23 Cal 592 (598), *In re Ambrose Summers*.

19. ('38) 25 AIR 1938 Rang 280 (280) : 1938 Rang L R 591 : 176 Ind Cas 865 (DB), *Khan Sahib v. Uchil Ahmed Lebbay*.

('38) 25 AIR 1938 Lah 347 (348) : 181 Ind Cas 82, *Jawahar v. Ghulam Hassan*.

('30) 17 AIR 1930 All 392 (394) : 52 All 459 : 127 Ind Cas 581 (DB), *M. B. Singh & Co. v. Sircar & Co.* (This view is opposed to the Privy Council decision in ('22) AIR 1922 P C 233 (PC), *Appa Rao v. R. P. Appa Rao*, where it was held that the amount must be appropriated for interest and not for principal.)

('18) 5 AIR 1918 Cal 891 (891, 892) : 44 Cal 567 : 35 Ind Cas 638 (DB), *Hemchandra Biswas v. Purnachandra Mukerjee*.

[See ('40) 27 AIR 1940 Oudh 179 (180) : 15 Luck 524 : 187 Ind Cas 94, *Bachchu Lal v. Bhagawati*. (Payments whether made in respect of interest not known — Court can find out on evidence for what purpose payments were made.)]

the undermentioned cases²⁰ that, since there was a writing, it made no difference if the payment was for interest or for principal or for both.

This conflict has now been set at rest by their Lordships of the Privy Council in *Rama Shah v. Lal Chand*²¹ upholding the second view. Their Lordships in that case observed as follows :

"On the other hand, it remains true that the section when dealing with part payment of principal contains no similar stipulation as to the debtor's intention. The words "as such" are not repeated and the contrast between the two classes of payments is too marked to be mistaken or overlooked. Of course a payment may be shown to have been intended by the debtor to go—in part at least—towards the reduction of the principal debt by direct proof or e.g., by the fact that the amount of the payment exceeded the interest then due. But the intention of the debtor is not made the sole test whether a payment was made towards the principal of the debt. . . . In numerous cases it has been held that a payment made without appropriation by the debtor will if it be appropriated by the creditor towards the principal debt be sufficient to give rise to a fresh period of limitation. Their Lordships cannot accept the contention of learned counsel for the respondent that appropriation by the creditor can have no effect under the section as it now stands. . . ."

As regards the first view stated above, their Lordships pointed out that it is not necessary that the payment should be made of part as such inasmuch as the section does not prescribe that the payment should be intended by the debtor to go towards the principal debt at all, the words "as such" having no place in this part of the section.

Their Lordships also rejected the third view, namely, that a payment on general account, i.e., an "open payment" is either a payment of interest as such or a part payment of principal. In this connexion they pointed out four possibilities as to the debtor's intention —

- (1) intention that the sum paid should go against interest,
- (2) that it should go against principal,

[See also ('12) 14 Ind Cas 580 (582) (DB) (Mad), *Sowmia Narayana v. Alagiri Swami*. (It might be taken either towards interest or towards principal.)

('10) 8 Ind Cas 81 (86) (DB) (Cal), *Hingu Miya v. Heramba Chandra*. (Where there is more than one debt and a payment has been made without specification, such payment can save all the debts from limitation, where the attendant circumstances are such that the amount paid by way of interest is sufficient to pay up in full all the interest due, except one, and when the balance of the amount paid as interest partially discharges the last interest due.)

('81) 3 Mad 61 (63) : 4 Ind Jur 557 (DB), *Sri Raja Satracherla Jogi Razu v. Sri Raja Setarama Razu*. (Payment not made either on account of principal or of interest expressly—Creditor not appropriating it to either—It must be taken as a payment on account of both.)]

20. ('39) 26 AIR 1939 Nag 156 (158) : ILR (1939) Nag 235 : 182 Ind Cas 573 (DB). *Narain Chouthmal v. Rama Jago*. (Once payment is shown to be towards debt it is not necessary to show whether it is towards principal or interest.)

('35) 22 AIR 1935 Mad 101 (104) : 58 Mad 418 : 154 Ind Cas 1053 (DB), *Lakshmi Naidu v. Gunnamma*. (('18) AIR 1918 Cal 891 (DB), *Hemchandra v. Purnachandra* and 14 Ind Cas 580 followed.)

('17) 4 AIR 1917 Mad 460 (464) : 34 Ind Cas 417 (DB), *Chokkalingam v. Annamalai*. (('12) 14 Ind Cas 580 (DB) (Mad), *Sowmia Narayana v. Alagiri Swami* relied on.)

21. ('40) 27 AIR 1940 P C 63 (67) : ILR (1940) Lah 470 : ILR (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC). (To evidence a definite appropriation to the principal debt made by the creditor within the prescribed period, the manner in which the payment has been dealt with by the creditor in his own books of account will ordinarily be sufficient.)

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- (3) that it should go against both interest and principal,
 (4) no intention of appropriation as between interest and principal.

See also the undermentioned cases²² which follow the Privy Council decision referred to above.

If the debtor at the time of payment specifies that the payment is towards the principal, there is clearly a part payment of the principal and limitation will be saved under this section.²³ Where neither the debtor specifies that the payment is towards the principal, nor the creditor appropriates it, within limitation, towards the principal, the payment cannot save limitation.²⁴

Where no interest is payable under a document and the payment by the debtor does not refer to any interest, the payment cannot be regarded as one made for interest but must be regarded as part payment of the principal.²⁵

6. Intention of debtor to pay interest or principal, how ascertained. — The subject-matter of this Note also cannot arise

22. ('45) 32 AIR 1945 Pat 271 (272) : 24 Pat 96 : 220 Ind Cas 255 (DB), *Firm Ram Chandra v. Firm Shaikh Shitu*.
- ('44) 31 AIR 1944 Bom 37 (38, 39) : 215 Ind Cas 12 (DB), *Harkubai v. Shanker bhai*.
- ('43) 30 AIR 1943 All 289 (291) : ILR (1943) All 598 : 208 Ind Cas 367, *Muslim Bank of India v. Mohd. Ateeq*. (To evidence a definite appropriation to the principal debt made by the creditor within the period prescribed, the manner in which the payment has been dealt with by the creditor in his own books of account will ordinarily be sufficient—Adjustment of accounts by creditor in which amount paid by debtor was shown to his credit held proved appropriation by creditor towards principal.)
- ('43) 30 AIR 1943 Nag 178 (181) : ILR (1943) Nag 422 : 207 Ind Cas 214 (DB), *Prabhakar Nilkanth v. Chandrakant Narayanrao*.
- ✓ ('41) 28 AIR 1941 All 132 (133) : 193 Ind Cas 854 (DB), *Sitaram Babu Ram v. Sitaram Lalman*. (The execution of a sarkhat by the debtor in the creditor's books of account, maintained on katauti system, on the credit side amounts to a part payment of principal within the meaning of S. 20.)
- ('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand v. Bulaqi Ram*.
23. ('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand v. Bulaqi Ram*.
24. ('45) 32 AIR 1945 Pat 271 (272) : 24 Pat 96 : 220 Ind Cas 255 (DB), *Firm Ram Chandra v. Firm Shaikh Shitu*.
- ('42) 29 AIR 1942 Mad 146 (147) : ILR (1942) Mad 405 : 201 Ind Cas 182 (DB), *Ramayya v. Anjayya*.
- ('42) 29 AIR 1942 Pat 395 (397) : 200 Ind Cas 306 (DB), *Shyam Ballav Nandi v. Dologobind Sahu*.
- ('40) 27 AIR 1940 P C 63 (69) : ILR (1940) Lah 470 : ILR (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah v. Lal Chand*. (The appropriation by the creditor need not be immediate but it must be within limitation—But it need not be communicated to the debtor within limitation—Manner in which the payment has been dealt with in creditor's own books will be sufficient to show appropriation towards principal.)
- ('40) 27 AIR 1940 All 338 (339) : 189 Ind Cas 686, *Girdhari Lal v. Kishore Lal*.
25. ('40) 27 AIR 1940 Lah 442 (446) : 191 Ind Cas 817, *Kesar Singh v. Wazir*.
- ('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand v. Bulaqi Ram*.
- ('35) 22 AIR 1935 All 605 (606) : 156 Ind Cas 748 (FB), *Nageshar Misir v. Mt. Batuka Kunwari*.
- ('29) 16 AIR 1929 Cal 432 (432) : 122 Ind Cas 294, *Kali Kumar Poddar v. Pranballav Banikya*. (But the payment must be in the handwriting of or signed by the person making it.)
- ('18) 5 AIR 1918 Cal 982 (983) : 35 Ind Cas 177 (DB), *Harendra Chandra v. Gagan Chandra*. (Do.)

under sub-section (1) as it stands. But the Note is retained and given in smaller type as being useful for cases to which the old sub-section is applicable.

Where the debtor *expressly* states at the time of the payment that it is for interest, or that it is for part of the principal and interest, there is, of course, no difficulty in finding that he paid interest as such within the meaning of this section.¹ But it is not necessary that the debtor should expressly make any such statement at the time of payment.² In *National Bank of Upper India v. Bansidhar*,³ a case decided by the Privy Council, A had to make payments for interest on 31st December 1917 in respect of several accounts with a Bank X. It was the practice of the Bank to send out notices of the interest that would be due on particular accounts at the end of each half year, and there was nothing to rebut the presumption that A also had received such notice. A paid a lump sum of Rs. 6000 to X on the 23rd December 1917 and X allocated different portions thereof to the interest due on the different accounts and communicated the allocations to A who ratified them by entering the same in his own account books. It was held by their Lordships that, under the circumstances the amount of Rs. 6000 was paid by A as and for interest which was due, and that such payment saved limitation under the section. The principle that the intention of the debtor may be proved not only by statements made by him at the time of payment but in any other manner and may appear from the circumstances of the case, has again

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1. ('35) 22 AIR 1935 Rang 473 (475) : 160 Ind Cas 314, *U Sin v. U Tun Si*. ('02) 4 Bom L R 231 (232), *Subraya v. Pakaya*. (In a case arising under Act of 1877, the payments were evidenced by endorsements signed (but not written) by the defendant. The endorsement ran thus : "I paid Rs. 4 out of the entire amount payable on account of principal and interest in respect of this bond." It was held that there had been a payment of interest as such by the person liable.)
[See also ('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand v. Bulaqi Ram*. (Debtor specifying at time of payment that it is towards principal —Limitation is saved.)]
2. ('47) 34 AIR 1947 Pat 275 (275) : 228 Ind Cas 231 (DB), *Bichitranand v. Mir Mahebab Ali*. ('45) 32 AIR 1945 Pat 271 (272) : 24 Pat 96 : 220 Ind Cas 255 (DB), *Firm Ram Chandra v. Firm Shaikh Shitu*. ('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand v. Bulaqi Ram*. ('39) 26 AIR 1939 Bom 237 (241) : 183 Ind Cas 225 (DB), *Bhalchandra Dattatraya v. Chanbasappa Mallappa*. (There must either be express intimation or proof of existence of circumstances showing that payment was on account of interest.) ('38) 25 AIR 1938 Rang 401 (402) : 1938 Rang L R 594 : 178 Ind Cas 869 (DB), *U Tun Maung v. L Ah Choy*. (Per Mackney, J. in his Order of Reference — The trend of the order suggests that according to His Lordship a payment without any specification as to its application would be one either towards interest as such or towards principal.) ('27) 14 AIR 1927 Mad 284 (286) : 99 Ind Cas 694 (DB), *Perraju v. Bapireddi*. (Per Venkatsubba Rao, J.) ('37) 24 AIR 1937 Pat 583 (584) : 167 Ind Cas 244, *Idan Sadagar v. Premasukdas Ramchandra*. (It is not necessary to state each time explicitly that payment is towards interest—It is sufficient if circumstances warrant it.) ('18) 5 AIR 1918 Cal 477 (479) : 43 Ind Cas 812 (DB), *Charu Chandra v. Karam Bux Sikhdar*. (Do.)
[See also ('24) 11 AIR 1924 Lah 611 (613) : 5 Lah 317 : 82 Ind Cas 96 (DB), *Thakur Das v. Mt. Putli*.]
3. ('29) 16 AIR 1929 P C 297 (299) : 121 Ind Cas 193 : 57 Ind App 1 (PC).

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been affirmed by the Privy Council in *Rama Shah v. Lal Chand*.^{3a} It was also pointed out in that case that the change in the proviso (under the amending Act of 1927) from "the fact of the payment appears" to "an acknowledgment of the payment appears" does not mean that the character of the payment as intended to go towards interest or towards principal, must appear by the writing, still less that it must be ascertainable or ascertained at the date of the payment. The under-mentioned decisions,^{3b} in so far as they hold that, in order to constitute a payment, a payment for interest as such, it is necessary that the debtor must expressly specify at the time of payment that it was for interest, are, in view of the Privy Council decisions referred to above, not good law.

The question whether a payment was intended to be for interest, and therefore a payment of interest as such, is thus a question of fact which may be determined from the facts and circumstances of the particular case⁴ and not

- 3a. ('40) 27 AIR 1940 P C 63 (66) : I L R (1940) Lah 470 : I L R (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC). (('09) 31 All 285 (DB), *Gopi Nath v. Hardeo* and AIR 1918 Cal 477 (DB), *Charu Chandra v. Karam Bux* approved.)
- 3b. ('40) 27 AIR 1940 Oudh 179 (179, 180) : 15 Luck 524 : 187 Ind Cas 94, *Bachchu Lal v. Bhagwati*. (No doubt it is necessary that at the time of the payment it must be clearly mentioned that the payment was being made on account of interest but it is not necessary that the payment of interest "as such" must be mentioned in the endorsements themselves.)
- ('39) 26 AIR 1939 Oudh 141 (142) : 14 Luck 588 : 180 Ind Cas 15 (DB), *Zaman Khan v. Ram Asre*.
- ('35) 22 AIR 1935 All 58 (59) : 154 Ind Cas 1070 (DB), *Rambohor Misir v. Chaturghun Rai*.
- ('30) 17 AIR 1930 All 392 (394) : 52 All 459 : 127 Ind Cas 581 (DB), *M. B. Singh & Co v. Sircar & Co*. (Interest when paid without writing must be avowedly paid as such.)
- ('26) 13 AIR 1926 Bom 423 (424) : 96 Ind Cas 311 (DB), *Hormasji Bezonji v. Hajrat Yarkhan*. (The words "as such" mean that there must be at the time of payment some mention that the payment is wholly or partly for interest.)
- ('25) 12 AIR 1925 Cal 1030 (1030) : 87 Ind Cas 746 (DB), *Mahomed Kamel v. Ahmad Ali*.
4. ('46) 33 AIR 1946 Pat 404 (405, 406) : 224 Ind Cas 65 (DB), *Ajodhya Prasad v. Gobind Missir*.
- ('45) 32 AIR 1945 Pat 271 (272) : 24 Pat 96 : 220 Ind Cas 255 (DB), *Firm Ram Chandra v. Firm Shaikh Shitu*. (Where there was merely a brief endorsement on the hand-note in these words: "December 26, 1937—Rs. 4": Held, that upon such an endorsement, it could not be held that there was any payment of interest "as such".)
- ('43) 9 Cut L T 14 (15), *Jujisthi Patnaik v. Magata Misra*.
- ('42) 29 AIR 1942 Pat 166 (169) : 198 Ind Cas 3 (DB), *Ram Lagan v. Ram Bilochan*. (Subsequent mortgagee to pay off prior mortgage with the amount left with him—Subsequent mortgagee making payment on account of principal and interest in full—Held interest was paid as such within S. 20.)
- ('40) 27 AIR 1940 Oudh 179 (180) : 15 Luck 524 : 187 Ind Cas 94, *Bachchu Lal v. Bhagwati*.
- ('26) 13 AIR 1926 All 329 (330) : 93 Ind Cas 295 (DB), *Bandhu Singh v. Kayastha Trading and Banking Corporation, Gorakhpur*.
- ('26) 13 AIR 1926 Cal 150 (151) : 90 Ind Cas 774 (DB), *Achola Sundari v. Doman Sundari*. (Court can find on evidence whether payment made was for principal or interest.)
- ('34) 21 AIR 1934 Mad 45 (46) : 148 Ind Cas 126, *Janaki Ammal v. Srinivasan*.
- ('27) 14 AIR 1927 Mad 110 (111) : 98 Ind Cas 281, *Venkanna v. Mudragada Chendramma*. ('18) AIR 1918 Cal 891 (DB), *Hemchandra v. Purnachandra* followed.)
- ('21) 8 AIR 1921 Mad 102 (103) : 44 Mad 544 : 62 Ind Cas 393 (DB), *Askaram Sowcar v. Venkataswami Naidu*. (It cannot be raised in second appeal.)

only by statements made by the debtor at the time of payment.^{4a} Evidence *aliunde* may be let in to show what the intention of the debtor was when he made the payment.^{4b} The facts that interest was due and owing and that the amount paid was less than the interest, may be a circumstance showing that the debtor must have intended to pay the amount for interest.⁵ But there must be something to indicate that the debtor had such intention. The mere fact that the creditor appropriated the amount for interest is not sufficient to show the intention.⁶ Either some acknowledgment must be given by the payer that the money paid is intended by him to be towards a payment of interest or part principal, or there must be sufficient evidence from which it can be inferred that the debtor *intended* that the amount should be appropriated in a particular

('21) 8 AIR 1921 Nag 94 (95) : 59 Ind Cas 709, *Jago v. Mahadeo*.

('18) 5 AIR 1918 Oudh 152 (153) : 45 Ind Cas 613, *Mubarak Ali v. Gopinath*.

('19) 6 AIR 1919 Cal 1028 (1028) : 46 Ind Cas 532 (DB), *Siva Kumar Debi v. Biswambar Roy*.

('18) 5 AIR 1918 Cal 477 (479) : 43 Ind Cas 812 (DB), *Charu Chandra v. Karam Buxa Sikdar*.

('15) 2 AIR 1915 Cal 459 (460) : 20 Ind Cas 857 (DB), *Bitari Ram v. Kunji Singh*.

('09) 1 Ind Cas 137 (139) : 31 All 285 (DB), *Gopi Nath Singh v. Hardeo Singh*.

[See ('95) 19 Bom 663 (668) (DB), *Venkaji Babaji Naik v. Shidramapa Balapa*.]

4a. ('40) 27 AIR 1940 P C 63 (66) : ILR (1940) Lah 470: ILR (1940) Kar P C 134: 67 Ind App 160 : 187 Ind Cas 233 (P C), *Rama Shah v. Lal Chand*.

('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand v. Bulaqi Ram*.

4b. ('49) 36 AIR 1949 Nag 394 (398) : ILR (1949) Nag 478 (DB), *Govindram v. Gulab Rao*.

('48) 35 AIR 1948 Mad 155 (156) : ILR (1948) Mad 351 (DB), *Rajarajeswarai v. Sankaranarayana*. (Interest due on pronotes A and B — Endorsement acknowledging payment of interest due on pronote A by mistake made on pronote B and like endorsement in respect of pronote B made on pronote A — Evidence is admissible to show that the endorsement made on pronote A was an acknowledgment of the payment of interest due in respect of pronote B and likewise in respect of the other endorsement.)

('47) 34 AIR 1947 Pat 275 (275, 276) : 228 Ind Cas 231 (DB), *Bichitranand v. Mir Maheeb Ali*. (Where there is no evidence on the point, the plaintiff must succeed on the pleadings if it is clearly asserted in the plaint that a sum of money was paid towards interest and this has been nowhere specifically denied in the written statement.)

[But see ('44) 20 Luck 43 (45) : 1944 Oudh W N 154 (DB), *Jagdish Narain v. Gujadar*. (Oral evidence is not admissible to show whether payment under a bond was made towards principal or interest — AIR 1939 Oudh 141 : 14 Luck 588, *Zamankhan v. Ram Asre*, followed.)]

5. ('35) 22 AIR 1935 Rang 473 (476) : 160 Ind Cas 314, *U Sin v. U Tun Si*. (Fact that the payment made was less than the interest due is a relevant fact — The fact that the creditor appropriated it towards interest is not relevant.)

[See ('26) 13 AIR 1926 All 329 (330) : 93 Ind Cas 295 (DB), *Bandhu Singh v. Kayastha Trading and Banking Corporation, Gorakhpur*.]

6. ('09) 2 Ind Cas 379 (379, 380) : 31 All 495 (DB), *Mahammad Abdullah Khan v. Bank Instalment Co. Ltd.*

('15) 2 AIR 1915 Upp Bur 11 (11) : 2 Upp Bur Rul 80 : 31 Ind Cas 101, *Nga T'we v. Nga Ba*.

('21) 8 AIR 1921 Nag 94 (95) : 59 Ind Cas 709, *Jago v. Mahadeo*. (Mere fact that interest was due at the time of payment is not such an indication.)

('35) 22 AIR 1935 Rang 473 (476) : 160 Ind Cas 314, *U Sin v. U Tun Si*. (Evidence of intention necessary.)

('13) 19 Ind Cas 849 (849) : 9 Nag L R 78, *Gopal v. Govind*. (In this case there was express contract determining method of appropriation.)

('13) 19 Ind Cas 825 (826) (Oudh), *Chunder Pal Kunwar v. Dunia Pershad*.

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manner.⁷ The mere fact that the money paid is less than the interest due, though relevant, is not sufficient by itself alone to make it a payment of interest *as such*.⁸ The contrary view⁹ is not correct. Where the method of appropriation is determined at the outset by *express contract*, the law does not require a specific appropriation on the occasion of each payment.¹⁰ Thus, where a mortgage document provides that any money paid by the mortgagor should first be credited for the interest due and the balance for the principal, and a payment is made without specification, at a time when interest is actually due, it may be inferred that the parties must, when making and receiving the payment, have intended that the payment was to be treated as interest, and that therefore the interest was paid as such.¹¹ Where, however, such contract is required to be registered and is not registered, it cannot be admitted in evidence, and the mere payment of the amount would be insufficient to prove a payment of interest.¹² In the undermentioned case,¹³ the decretal amount was made payable by instalments under terms of a compromise. The first instalment of Rs. 13,000 was to be paid on 27th January 1929 with one year's interest ending on that date. The last payment made in respect of the first instalment and interest was a sum of Rs. 825 paid on 15th February 1929. It was held that the payment was

7. ('39) 26 AIR 1939 Bom 237 (241) : 183 Ind Cas 225 (DB), *Bhalchandra Dattatraya v. Chanbasappa Mallappa*.

('38) 25 AIR 1938 Bom 467 (469) : 178 Ind Cas 844 (DB), *Havabu Bai v. Isup Musa Patil*. (Payment made by debtor to creditor appropriated by latter towards interest and consented to by debtor—It is payment on account of interest as such.)

('35) 22 AIR 1935 Rang 473 (476) : 160 Ind Cas 314, *U Sin v. U Tun Si*.

('37) 24 AIR 1937 Pat 410 (412, 413) : 16 Pat 27 : 170 Ind Cas 130 (DB), *Liquidator Bagha Co-operative Society v. Debi Mangal Prasad Sinha*. (Payment made by debtor to creditor appropriated by the latter towards interest and consented to by debtor — It is payment on account of interest as such.)

[See ('41) 28 AIR 1941 Oudh 56 (57) : 16 Luck 113 : 190 Ind Cas 334, *Khat Khata Nand v. Surajpal Singh*. (It must be shown that payment was made towards principal or appropriated by creditor towards principal.)]

8. ('35) 22 AIR 1935 Rang 473 (476) : 160 Ind Cas 314, *U Sin v. U Tun Si*.

[See also ('21) 8 AIR 1921 Nag 94 (95) : 59 Ind Cas 709 (709), *Jago v. Mahadeo*. (Mere fact that interest was due is not sufficient.)]

9. ('38) 25 AIR 1938 Rang 401 (402) : 1938 Rang L R 594 : 178 Ind Cas 869 (DB), *U Tun Maung v. L Ah Choy*. (Per Mackney, J. in the Order of Reference.)

('34) 21 AIR 1934 Mad 45 (46) : 148 Ind Cas 126, *Janaki Ammal v. Srinivasan*.

10. ('49) 36 AIR 1949 Nag 394 (398) : 1 L R (1949) Nag 478 (DB), *Govindram v. Gulabrao*.

('13) 19 Ind Cas 849 (849, 850) : 9 Nag L R 78, *Gopal v. Govind*.

('14) 25 Ind Cas 933 (934) : 7 Low Bur Rul 138, *Maung Kyan v. Maung Po*. (Suit by the plaintiff for a debt for the interest of which, he was put in possession of land by the defendants — The taking of the profits by the plaintiff amounted to payment of interest under S. 20 of the Act.)

('09) 1 Ind Cas 137 (138) : 31 All 285 (DB), *Gopinath Singh v. Hardeo Singh*. (Express agreement that any payment by debtor would first go to interest.)

[See ('33) 20 AIR 1933 Cal 90 (93) : 141 Ind Cas 716 (DB), *Wazed Ali Khan v. Brojendra Kumar*. (Money sent upon admitted obligation to meet interest and with knowledge that the creditor would apply it for interest.)]

11. ('27) 14 AIR 1927 Mad 284 (285) : 99 Ind Cas 694 (DB), *Perraju v. Bapireddi*. (('09) 1 Ind Cas 137 (DB), *Gopinath v. Hardeo* distinguished.)

12. ('13) 21 Ind Cas 281 (282) : 9 Nag L R 140, *Balaprasad v. Bhola Nath*. (Receipt of produce of land held under a deed of mortgage required to be registered, but not registered, cannot be deemed to be a payment of interest for the purpose of S. 20, Limitation Act.)

13. ('37) 172 Ind Cas 999 (1002) : 32 Sind L R 415 (PC), *Firm Het Ram Bodh Raj v. Firm Aya Ram-Tola Ram*.

necessarily made in respect of principal and interest and was, therefore, a payment of interest as such.

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Where no interest is payable at all under a document, a payment by the debtor without specification cannot be regarded as one for interest,¹⁴ though if there is an agreement between the parties subsequent to such document for payment of interest, and the payment is made for interest, such payment would extend time.¹⁵ The section does not require that the interest paid should be for any particular period or that the acknowledgment of payment should itself mention that the payment is for interest for any particular period. Thus, where by mistake interest was mentioned as paid for a particular period for which in fact no interest was payable but the interest which was due on the date of payment was considerably more than the amount actually paid it was held that the debtor would get credit for his payment towards the balance of interest still due and payable by him.^{15a}

Where the sum paid in discharge of the debt is more than the principal amount, the excess over the principal must be held to have been paid by the debtor for interest as such.¹⁶

Conversely, where a payment is made of a sum larger than the amount due as interest at the time of the payment, a part of it must necessarily be presumed to have been made towards the principal.¹⁷

7. "Interest" includes part of interest due. — The word "interest" in this section means interest or any *part* of the interest due. Where the lower Court had held that a suit on a mortgage was barred holding that the payment of a *part* of the interest due could not operate to extend time, it was held by the Allahabad High Court that a part payment of interest will operate to save limitation in the same manner as the payment of the whole of the interest.¹

8. Payment expressed to be made for principal and interest generally. — The following note is only applicable to sub-section (1) as it stood before amendment of 1942 :

A payment expressed to be made for principal and interest generally without specifying what part of it is to be appropriated in satisfaction of interest or of principal, is a payment of interest 'as such' and operates to extend the

14. ('35) 22 AIR 1935 All 605 (606) : 156 Ind Cas 748 (FB), *Nageshar Misir v. Mt. Batuka Kunwari*.

15. ('33) 20 AIR 1933 Mad 251 (252) : 141 Ind Cas 169, *Vancheswara Sastri v. Narayana Aiyar*.

15a. ('48) 35 AIR 1948 Mad 155 (156):ILR (1948) Mad 351 (DB), *Rajarajeswari v. Sankaranarayana*.

16. ('26) 96 Ind Cas 309 (309) (Mad), *Sobhanadri v. Venkanna*.

('40) 27 AIR 1940 P C 63 (65) : ILR (1940) Lah 470 : ILR (1940) Kar P. C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah v. Lal Chand*.

17. ('40) 27 AIR 1940 P C 63 (65) : ILR(1940) Lah 470:ILR (1940) Kar P C 134: 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah v. Lal Chand*.

('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand v. Bulaqi Ram*.
[See however ('46) 33 AIR 1946 Pat 404 (405, 406) : 224 Ind Cas 65 (DB), *Ajodhya Prasad v. Gobind Missir*. (Plaintiff not appropriating portion of amount paid towards principal — Amount paid exceeding interest due on date of payment — Part of amount cannot be held to have been paid towards principal.)]

Section 20 — Note 7

1. ('13) 20 Ind Cas 258 (258) : 35 All 378 (DB), *Abdul Ahad v. Mahatab Bibi*.

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period of limitation under the section.¹ In other words, when the debtor pays an amount with the intention that part of it is to be in payment of interest, the requirements of the section are satisfied. It is not necessary that the *exact amount* of the interest should be specified.

9. "Payment without prejudice." — Where a payment for part principal or for interest as such appears in the handwriting of the person liable to pay, it will save limitation, even though the words "without prejudice" were added. Such words cannot override the words of the statute that a part payment of principal shall extend limitation.¹

10. "Before the expiration of the prescribed period." — It has been held that the words "prescribed period" refer to the period prescribed by the *Limitation Act* and not to the period fixed by other enactments such as S. 48 of the Civil Procedure Code.¹ A period fixed by the contract between the parties is not a period prescribed within the meaning of this section as refers to a period of limitation prescribed by law.^{1a} The period within which a suit or application may be filed by reference to S. 4 of the Act is not a "prescribed period" within this section as S. 4 does not *extend* the period fixed by the schedule but merely enables a suit to be filed notwithstanding the expiry of the limitation period.² See also Notes 12 to 15 under S. 19.

Section 20 — Note 8

1. ('42) 29 AIR 1942 Pat 363 (364) : 21 Pat 330 : 202 Ind Cas 54 (DB), *Ramswarup v. Harihar*. (A payment by the mortgagor towards the principal, interest and costs of the decree so far as the interest is concerned amounts to a payment of interest as such.)
- ('02) 4 Bom L R 231 (232) (DB), *Subrayya Kamati v. Pakaya Narayan*.
- ('10) 6 Ind Cas 16 (17) (DB) (Cal), *Mohan Shaha v. Lakshu Karikar*. (('79) 3 Bom 198 (DB), *Hanmantmal v. Ramabai* and ('03) 5 Bom L R 350, *Damodar v. Jankibai*, distinguished.)
- ('24) 11 AIR 1924 Mad 123 (124) : 74 Ind Cas 777, *Ramakrishna Annavi v. Pichandi Chettiar*.

Section 20 — Note 9

1. ('36) 23 AIR 1936 Lah 629 (636):165 Ind Cas 723:14 Lah 737 (DB), *Municipal Committee Amritsar v. Ralia Ram*.

Section 20 — Note 10

1. ('22) 9 AIR 1922 Mad 268 (271):70 Ind Cas 396:45 Mad 785 (DB), *Subbarayan v. Natarajan*.
 - ('34) 21 AIR 1934 Oudh 465 (471) : 10 Luck 208:151 Ind Cas 541 (DB), *Narendra Bahadur Singh v. Oudh Commercial Bank Ltd.* (Sections 19 and 20 of the Limitation Act cannot be applied to S. 48, Civil Procedure Code, because that would render the provisions of S. 48 nugatory.)
- See also Note 6a under Section 29.
- 1a. ('81) 6 Cal 815 (826): 8 Cal L R 457 (DB), *Ramsebuk v. Ramlal Koondoo*. (It does not mean period prescribed for payment of debt.)
 - ('83) 12 Cal L R 277 (279), *Mongola Koiburto v. Annoda Ram*. (('81) 5 Bom 688 (DB), *Chunilal v. Tribhovan*, followed.)
 - ('88) 11 Mad 218 (219) : 12 Ind Jur 176 (DB), *Venkataratnam v. Kamayya*.
 2. ('47) 34 AIR 1947 Oudh 3 (4) : 21 Luck 447 : 225 Ind Cas 497, *Ram Manorath v. Ram Bhulawan*.
 - ('40) 27 AIR 1940 Nag 401 (402) : 188 Ind Cas 585, *Laxman Krishnaji v. Yadao Raghoba*. (('28) AIR 1928 Nag 192, *Jhanaklal v. Gulabchand*, held no longer good law.)

The payment must be before the expiry of the "prescribed period."³ A payment made after such period will not avail to save limitation.⁴

Section 20
Note 10

As has been seen in Note 5, (relating to sub-s. (1) before amendment of 1942), a payment without specification may be appropriated by the creditor as a part payment towards the principal. But, in order that such payment may extend the time in favour of the creditor, he must in the exercise of his right of appropriation do, within the prescribed period, something which treats the payment as made on account of the principal.⁵ It is, however, not necessary to show that the fact of appropriation should also be communicated to the debtor within the prescribed period.⁶ The fact that a definite appropriation

('39) 26 AIR 1939 All 252 (252):181 Ind Cas 899 (DB), *Mt. Shayam Peare v. Ram Autar Singh*.

('38) 25 AIR 1938 All 606 (609) : ILR (1938) All 861 : 178 Ind Cas 668 (DB), *Puran Chand v. Abdullah*. (Endorsement of payment after limitation but during holidays of Court does not give fresh start of limitation.)

('38) 25 AIR 1938 Mad 683 (683):177 Ind Cas 759, *Pattabhiramayya v. Krishna*.

('29) 16 AIR 1929 Cal 68 (68) : 55 Cal 1210 : 114 Ind Cas 483, *Debendra Nath Roy v. Kartic Prasad Das*. (Considerations of S. 4 cannot be brought in wording of Ss. 19 and 20.)

('31) 18 AIR 1931 Cal 785 (786) : 58 Cal 1148 : 134 Ind Cas 1132, *Anisuddin Ahmad v. Kalipada Roy Chawdhary*. (Case under Section 19.)

[See ('81) 5 Bom 688 (689) (DB), *Chunilal Ichharam v. Tribhovan Laldas*. ("Prescribed period" means period prescribed by the then Limitation Act.)]

See also Note 8 to Section 4 and Note 12 to Section 19.

3. ('49) 36 AIR 1949 All 764 (766):I L R (1950) All 701, *Chheda v. Baldeo*. (Instalment bond — In case of default of anyone instalment whole sum to become due — Default on 14th October 1938 — Endorsement of payment on 21st December 1941 — Institution of suit prohibited U. P. Act 10 of 1937 which remained in force till 31st December 1940 — Suit on bond filed on 14th September 1944 — Article 75 applies — Payment made on 21st December 1941 being within prescribed period suit was within time.)

('41) 28 AIR 1941 Oudh 56 (58) : 16 Luck 113 : 190 Ind Cas 334, *Khat Khata Nand v. Surajpal Singh*.

('40) 27 AIR 1940 Oudh 340 (342) : 15 Luck 573 : 189 Ind Cas 481 (FB), *Rishi Kishan v. Krishno Kumar*.

('31) 18 AIR 1931 All 375 (376) : 131 Ind Cas 867 (DB), *Ganesh v. Mallu Mal Girdhar Das*.

[See ('78) 2 Cal L R 346 (347) (DB), *Tariney Churn Nundy v. Shaikh Abdur Rohoman*.]

4. ('35) 22 AIR 1935 Bom 213 (214):156 Ind Cas 531, *Percy F. Fisher v. Ardeshir Hormasji*.

('92-96) 2 Upp Bur Rul 466 (469), *Maung Hlaing v. Maung Et Gyi*.

5. ('46) 33 AIR 1946 Pat 59 (60) : 219 Ind Cas 159 (DB), *Sarabdeva Prasad v. Dwarka Prasad*.

('41) 28 AIR 1941 All 132 (133) : 193 Ind Cas 854 (DB), *Sitaram Babu Ram v. Sitaram Lalman*.

('40) 27 AIR 1940 P C 63 (69) : I L R (1940) Lah 470 : I L R (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 283 (PC), *Rama Shah v. Lal Chand*.

('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand v. Bulaqi Ram*.

('40) 27 A I R 1940 Oudh 340 (342) : 15 Luck 573 : 189 Ind Cas 481 (F B), *Rishi Kishan v. Krishno Kumar*.

6. ('40) 27 AIR 1940 P C 63 (69) : I L R (1940) Lah 470 : 67 Ind App 160 : 187 Ind Cas 283 : ILR (1940) Kar (PC) 134 (PC), *Rama Shah v. Lal Chand*.

Section 20
Notes 10-11

has been made within the period prescribed may ordinarily be gathered from the account books of the creditor.⁷ If, however, until after the expiry of the prescribed period the creditor treats the sum as paid on account of interest or does nothing to treat it as paid on account of principal, the payment cannot be regarded as part payment of principal.⁸

11. "Payment" meaning of.—In order to constitute a payment it is not necessary that it should be in *cash or currency*.¹ It may be made in any form.² But it is necessary that there must be something which is tantamount to payment.³ A fictitious entry of payment in the handwriting of the debtor is not a payment and cannot operate to save time under this section.⁴ An endorsement of payment without any date is very suspicious.^{4a} Where a creditor receives money for

7. ('41) 28 AIR 1941 All 132 (133, 134): 193 Ind Cas 854 (DB), *Sitaram Baburam v. Sitaram Lalman*.

('40) 27 AIR 1940 P C 63 (69) : ILR (1940) Lah 470 : I L R (1940) Kar (PC) 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah v. Lal Chand*.

8. ('40) 27 AIR 1940 P C 63 (69) : I L R (1940) Lah 470 : I L R (1940) Kar (P C) 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah v. Lal Chand*.

Section 20 — Note 11

1. ('50) 37 AIR 1950 Ajmer 11 (2) (Pr 2), *Sheoji v. Motilal*. (Actual payment not necessary. It is enough that it is intended to operate as a payment.)

('38) 25 AIR 1938 Cal 538 (539) : I L R (1938) 2 Cal 320 : 177 Ind Cas 508 (DB), *Prafulla Chandra v. Jatindra Nath*.

('38) 25 AIR 1938 Mad 579 (580): 182 Ind Cas 468 (DB), *Parthasarathi Ayyangar v. Ekambara*.

('26) 13 AIR 1926 Cal 1042 (1045) : 96 Ind Cas 474 (DB), *Bhutnath v. Shashimukhi*. (Per Page, J.)

('25) 12 AIR 1925 Sind 144 (146) : 81 Ind Cas 834 : 20 Sind L R 335, *Kishindas Pursumal v. Menghraj Khaildas*. (It may be made by settlement of accounts between the parties.)

2. ('38) 25 A I R 1938 Mad 601 (601) : I L R (1938) Mad 1090 : 177 Ind Cas 743 (DB), *Kandaswami Mudaliar v. Thevammal*. (Payment may be made either in cash or by execution of promissory note.)

('36) 23 AIR 1936 Mad 848 (849): 165 Ind Cas 225, *Kandaswami v. Thevammal*. (Pronote can be given by way of payment.)

('98) 25 Cal 844 (852) : 25 Ind App 95 : 2 Cal W N 402 : 7 Sar 294 (P O), *Sukhamoni Choudharani v. Ishan Chunder Roy*. (Section does not specify any particular mode or form of payment.)

3. ('37) 24 AIR 1937 All 260 (261) : 168 Ind Cas 152, *Soudagar v. Joti Prasad*. (Merely entering fictitious payment does not amount to payment.)

(1900) 24 Bom 493 (496): 2 Bom L R 378 (DB), *Kariyappa v. Rachappa*. (In order to satisfy the requirements of S. 20, the payment need not be in money but may be in goods or even by a statement of accounts between the parties, provided the payment must be of such a nature that it would be a sufficient answer to a suit. While the forms of payment may differ, the payment must be one made as interest by the debtor to the creditor.)

('36) 23 AIR 1936 Pat 386 (387): 163 Ind Cas 915, *Maheshwar Charan v. Dineshwari Charan*. (In this case there was an attempt to adjust. However, it was held that there was no payment.)

('16) 3 A I R 1916 Pat 411 (415) : 36 Ind Cas 77 (DB), *Bhagela Koer v. Abdul Rahman*. (Setting off of decrees by mutual consent.)

4. ('37) 24 AIR 1937 All 260 (261) : 168 Ind Cas 152, *Soudagar v. Joti Prasad*.

4a. ('41) 28 AIR 1941 Pat 372 (377): 20 Pat 735 : 193 Ind Cas 501 (DB), *Rampal Singh v. Mansukh Rai*.

the debt due to him not from the debtor or his agent but from a source which is *independent of the volition of the debtor*, it cannot be said that the debtor has made any payment. Thus, where a pledgee of jewels sells the jewels and appropriates the amount to the debt, it cannot be said that the pledgor made any payment either for interest or for principal.⁵ Similarly, where the creditor levies execution against the debtor and recovers money, it would not amount to a payment within this section.⁶ So also, where a payment is made by the judgment-debtor in obedience to the order of the Court.⁷

Payment in kind.—A payment may be made in kind.⁸ But the party alleging such payment must prove that there was an agreement between the parties that the payment should be in that manner.⁹

Payment by cheque.—The giving of a cheque and its receipt by the creditor does not necessarily constitute a payment, though it may amount to a payment; it depends upon the facts of each case whether it was accepted as a payment or not.¹⁰ If it is delivered by way of payment and is received as such by the creditor, it will operate as a payment, but not if it is received by the creditor without regarding it as a payment.¹¹ Where it is received as a payment, the date of

5. ('34) 21 AIR 1934 Mad 549 (551) : 152 Ind Cas 299 (DB), *Valliappa Chettiar v. Maruda Pandian Pillai*.
6. ('75) 24 Suth W R 20 (20) (DB), *Raghoonath Doss Cookman v. Shircmonee Pal Mohadebee*.
- ('82) 6 Bom 626 (627, 628) (DB), *Ram Chandra Ganesh v. Devbi*.
7. ('12) 14 Ind Cas 335 (339) (Lah), *Ram Das v. Kanshi Ram*.
8. ('26) 13 A I R 1926 Cal 1042 (1045) : 96 Ind Cas 474 (DB), *Bhutnath Deb v. Shashimukhi*.
- ('06) 29 Mad 234 (235) : 16 Mad L Jour 99 (DB), *Mylan v. Annavi Madan*. (('96) 19 Mad 340 (DB), *Kallipara Pullamma v. Maddula Tatayya*, followed.)
- ('35) 22 AIR 1935 Rang 473 (475) : 160 Ind Cas 314, *U Sin v. U Tun Si*.
[See also ('11) 12 Ind Cas 23 (23) (Low Bur), *Maung Aung Do v. Esoof Ali*.]
9. ('26) 13 A I R 1926 Cal 1042 (1045) : 96 Ind Cas 474 (DB), *Bhutnath Deb v. Shashimukhi*. (Per Page, J.)
- (1900) 24 Bom 619 (621) : 2 Bom L R 452 (DB), *Ragho v. Hari*. ((1835) 43 R R 306, *Hooper v. Stephens*, followed.)
10. ('30) 17 A I R 1930 All 392 (394) : 52 All 459 : 127 Ind Cas 581 (DB), *M. B. Singh & Co. v. Sircar & Co.*
- ('33) 20 AIR 1933 Lah 741 (742) : 144 Ind Cas 641 (DB), *Dial Singh v. Davindar Singh*. (Cheque signed by debtor and accepted by creditor duly honoured—Payment is sufficient for purposes of Section 20.)
- ('97) 1897 Pun Re No. 1, *Sardar Bachittar Singh v. Jagannath*. (A cheque is a mere order for payment and not a payment itself.)
- ('31) 18 A I R 1931 Sind 28 (29, 30) : 25 Sind L R 360 : 129 Ind Cas 909, *Chotirmal v. Rupchand*. (Cheque delivered to payee by way of payment and received as such—('16) AIR 1916 Cal 580 (DB), *Kedar Nath v. Denobhandhu*, followed.)
[See also ('45) 32 AIR 1945 Mad 515 (516) : (1945) 2 Mad L Jour 202, *Krishnaswami v. Ramakrishna*. (A payment by a cheque made by the debtor in favour of the creditor is a payment which satisfies the conditions of S. 20.)]
11. ('41) 28 A I R 1941 Rang 344 (345) : 14 Rang 207 : 198 Ind Cas 564 (DB), *Fatima Bee Bee v. Official Trustee*.
- ('38) 25 A I R 1938 Cal 538 (539, 540) : 1 L R (1938) 2 Cal 320 : 177 Ind Cas 508 (DB), *Prafulla Chandra v. Jatindra Nath*.
- ('25) 12 AIR 1925 Cal 937 (940) : 87 Ind Cas 508, *Maurice Mayahas v. W. Morley*.

Section 20
Note 11

the payment for the purpose of giving a fresh period of limitation is the date on which the cheque is given and not the date on which the cheque is cashed.¹²

Payment by giving promissory note. — A promissory note may be given by way of payment.¹³

Payment by labour. — The continuance in service of a servant to whom wages have been advanced may amount to a payment of interest. Thus, in a suit to recover balance of wages advanced to a servant under an agreement executed more than three years before the date of suit, it was held that his continuance in service within three years before suit was a payment of interest as such contemplated by this section.¹⁴

Addition of interest to principal. — The addition of the interest to the principal in the accounts of the debtor is not necessarily a payment for interest : it will be a payment where both parties agree to wipe out the previous balance and add the amount of the interest to the principal so as to make it a new debt,¹⁵ in other words, the addition must be the result of an agreement between the parties on the date of the payment.^{15a} The mere fact that the debtor or the

(16) 3 AIR 1916 Cal 580 (580) : 42 Cal 1043 : 31 Ind Cas 626 (DB), *Kedar Nath Mitter v. Denobhandhu Saha*.

(33) 20 AIR 1933 Lah 341 (341) : 14 Lah 580 : 141 Ind Cas 611 (DB), *Jagtu Mal Sadasukh Rai v. Charanji Lal Fakir Chand*.

(33) 20 A I R 1933 Lah 741 (742) : 144 Ind Cas 641, *Dial Singh v. Davindar Singh*. ((86) 9 Mad 271 (DB), *Mackenzie v. Tiruvengadathan* and (97) 19 All 307 (DB), *Ram Chandar v. Chandi Prasad*, dissenting from.)

(37) 24 A I R 1937 Sind 95 (96) : 31 Sind L R 68 : 168 Ind Cas 820 (DB), *Firm Hariram Dowlatram v. Firm Ram Singh Gopal Singh*. ((30) AIR 1930 All 392 (DB), *Singh & Co. v. Sircar & Co.*, relied on.)

12. (25) 12 AIR 1925 Cal 937 (940) : 87 Ind Cas 508, *Mourice Mayahas v. W. Morley*.

(33) 20 AIR 1933 Lah 341 (341) : 14 Lah 580 : 141 Ind Cas 611 (DB), *Jagtu Mal Sadasukh Rai v. Charanji Lal Fakir Chand*. (Cheque accepted by creditor before expiry of limitation but cashed subsequently—Limitation extended.)

13. (38) 25 A I R 1938 Mad 601 (601) : I L R (1938) Mad 1090 : 177 Ind Cas 743 (DB), *Kandaswami Mudaliar v. Thevammal*.

(36) 23 AIR 1936 Mad 848 (849) : 165 Ind Cas 225, *Kandasamy v. Thevawmal*.

14. (17) 4 A I R 1917 Mad 542 (542) : 33 Ind Cas 134, *Muthukrishna Iyer v. Pakkiri Voikaran*. ((05) 29 Mad 234 (DB), *Myland v. Annavi* and (1900) 24 Bom 493 (DB), *Kariyappa v. Rachappa*, followed.)

(17) 4 AIR 1917 Mad 653 (653) : 35 Ind Cas 480, *Swaminatha Pillai v. Mondaiyan*. (29 Mad 234, followed.)

[See also (18) 5 AIR 1918 Mad 917 (918) : 40 Ind Cas 235, *Soari Aiyangar v. Subbarayyar*. (Assumed.)]

15. (30) 17 A I R 1930 All 467 (468, 469) : 52 All 480 : 123 Ind Cas 820 (DB), *Raj Narain Rao v. Ram Sarup*.

(16) 3 AIR 1916 Mad 697 (697) : 30 Ind Cas 777 (DB), *Subramaniam Chettiar v. Somasundaram Chettiar*. ((05) 29 Mad 234 (DB), *Myland v. Annavi*, relied on.)

15a. (1900) 24 Bom 493 (496) : 2 Bom L R 378 (DB), *Kariyappa v. Rachappa*. (Where a debtor consents that some money due by him for interest should be credited to the account of the principal in favour of the creditor, and the interest balance reduced to that amount, such a consent is tantamount to

creditor goes on adding interest to the principal in his own books is not a payment,¹⁶ even if it has been in pursuance of an *original* agreement between the parties to calculate compound interest.¹⁷

Payment by adjustment of accounts. — It would follow that it is not necessary to constitute a payment that money should actually pass;¹⁸ if the parties agree that an amount due previously by the creditor to the debtor shall be treated as amount paid by the latter to the former, it is in substance identical with a transaction where the debtor receives actual payment and pays the amount back to the creditor.¹⁹

a payment of interest — Where all the parties agree to such a settlement, the adjustment operates as a payment of interest under Section 20.)

('06) 9 Oudh Cas 221 (224), *Mohan Lal v. Lachman Das*.

('11) 11 Ind Cas 552 (553) (Bom), *In re Tricumdas Mills Co. Ltd.*

('30) 17 A I R 1930 All 467 (468, 469) : 52 All 480 : 123 Ind Cas 820 (DB), *Raj Narain Rao v. Ram Sarup*.

16. ('30) 17 A I R 1930 All 467 (469) : 52 All 480 : 123 Ind Cas 820 (DB), *Raj Narain Rao v. Ram Sarup*.

('88) 13 Bom 338 (343) (DB), *Ichha Dhanji v. Natha*. (The mere carrying forward of the amount of a loan with the interest due thereon in the debtor's books though such entry of interest is made in the presence of the creditor does not amount to a payment of interest.)

('15) 2 A I R 1915 Lah 275 (276) : 31 Ind Cas 782 (DB), *Muin-ud-din v. Muhammad Ahmed*. (Mere debiting of interest in the books of the creditor without express agreement cannot be regarded as payment of interest.)

('16) 3 A I R 1916 Mad 1213 (1214) : 29 Ind Cas 422 (DB), *Nagappa v. Ramanaathan*. (Creditor's books.)

('07) 29 All 773 (779) : 4 All L Jour 628 : 1907 All W N 263 (DB), *Dharam Das v. Genga Devi*. (Do.)

('06) 1906 All W N 212 (212) (DB), *Prag Das v. Baldeo Pershad*. (Entry of balance due for principal and interest in creditor's book.)

('80) 6 Bom 103 (106), *Narronji Bhimji v. Mugniram Chandaji*. (Defendant credited with surplus proceeds of goods and of a hundi.)

('34) 21 A I R 1934 Nag 219 (221) : 152 Ind Cas 319, *Yadosa v. Narayansa*. (Interest credited in defendant's accounts.)

('96) 19 Mad 340 (342) : 6 Mad L Jour 177 (DB), *Pullamma v. Tatayya*.

('18) 5 AIR 1918 Mad 238 (239) : 41 Mad 446 : 44 Ind Cas 466 (DB), *Palaniappa v. Veerappa*.

17. ('30) 17 A I R 1930 All 467 (469) : 52 All 480 : 123 Ind Cas 820 (DB), *Raj Narain Rao v. Ram Sarup*.

18. (38) 25 A I R 1938 Mad 579 (580) : 182 Ind Cas 468 (DB), *Parthasarathi Ayyangar v. Ekambara*. (Any facts which would prove plea of payment of interest would be payment sufficient to bar statute.)

('38) 25 AIR 1938 Pat 139 (140) : 174 Ind Cas 585, *Ramprabha Ojha v. Bishunath Ojha*.

('29) 16 A I R 1929 Mad 432 (439) : 117 Ind Cas 124 (DB), *Marina Ammayi v. Sundayya*.

('23) 10 AIR 1923 Cal 71 (73) : 72 Ind Cas 692 (DB), *Guljar Mandal v. Sariman Mandalini*.

(1900) 10 Mad L Jour 25 (26) (DB), *Thesiga Iyengar v. Srinivasa Mudaliar*. (Where an endorsement of payment on a bond is sought to save the bond from limitation, it is not necessary that there should be an actual payment of money; it is enough if the transaction embodied in the endorsement has been intended to operate as payment.)

19. ('38) 25 A I R 1938 Pat 139 (140) : 174 Ind Cas 585, *Ramprabha Ojha v. Bishunath Ojha*.

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The payment must be for an *admitted debt*; a payment made as a matter of grace and not towards any admitted debt does not save limitation.²⁰ The payment must be of such a nature that it would be an answer in a suit brought by the plaintiff to recover the amount.²¹

12. Money need not belong to the person paying. — The section does not say anything about the origin or source of the money with which the payment is made. Where A and B are co-debtors, and A authorises B to make a payment on behalf of both A and B, and B makes such payment, it does not matter that the money paid does not belong to A but belongs to B.¹

13. Who must make the payment — General. — With reference to the payment of interest, the old section uses the words "person liable to pay the debt or legacy" (or his duly authorised agent) in describing the person by whom the payment is to be made and with reference to the payment of part of the principal of a debt, the person by whom the payment is required to be made is described as the "debtor." But no distinction is intended between payment of interest and that of part of the principal as regards the person by whom it is to be paid. In either case, the payment is to be made by a person liable to pay the money. This expression will include the legal representatives of the person who contracted the debt and in the case of money charged on land the person who has derived title from him. In other words, the liability need not be personal in the sense of being liable to be arrested; it may be proprietary, that is, a liability in respect of one's property.¹ The present sub-section (1) removes this distinction in language with reference to payment of interest and part of principal and simply uses the words, 'the person liable to pay the debt or legacy'.

('29) 16 A I R 1929 Mad 432 (439) : 117 Ind Cas 124 (DB), *Marina Ammayi v. Sundayya*.

[See also ('25) 12 A I R 1925 Sind 144 (146) : 81 Ind Cas 834 : 20 Sind L R 335, *Kishindas Pursumal v. Menghraj Khaildas*.]

20. ('34) 21 A I R 1934 Lah 475 (476) : 155 Ind Cas 238 (DB), *Sita Ram v. Mt. Mahmudi Begam*.

21. ('06) 29 Mad 234 (235) : 16 Mad L Jour 99, *Mylan v. Annavi Madan*.

Section 20 — Note 12

1. ('34) 21 AIR 1934 Mad 623 (624) : 151 Ind Cas 1087 (DB), *Narayana Iyer v. Official Assignee of Madras*.

Section 20 — Note 13

1. ('41) 28 AIR 1941 Mad 6 (14) (DB), *Thinnappa Chettiar v. Krishna Rao*. (No distinction between "person liable to pay" and "debtor"—The former expression is used with reference to payment of interest apparently for the purpose of having a common expression for both debts and legacies as it would be incongruous to use the expression 'debtor' with reference to a person liable to pay a legacy.)

[See ('41) 28 AIR 1941 Cal 643 (652):197 Ind Cas 869 (DB), *Sukumari Gupta v. Dhirendra Nath*. ("The person liable to pay the debt" is more comprehensive than "the debtor.")]

[See however ('18) 5 AIR 1918 Oudh 323 (324):47 Ind Cas 655, *Lachmi Narain v. Daya Shankar*. (In this case it was held that the expression "debtor" would only include the person who contracted the debt. It is submitted that the view is not correct.)]

But the liability must be to the *creditor*. Thus, where A owes a debt to B and C contracts with A to pay the debt to B, a payment by C will not be by a "person liable" within the meaning of this section.^{1a} The reason is that C's liability is to A and not to B, the creditor. In this connexion, the following observations of the Lord Chancellor in *Chinnery v. Evans*² may be quoted :

"Money paid — that is, money handed over by a stranger to the contract under which it was paid to the individual entitled to receive it — would not have the characteristics and the legal quality of payment. It would be a voluntary render, a gift or donation being made by a party not in any respect subject to liability, to the individual who would not be entitled to receive from the person so rendering any part of the money which it is supposed would be so paid."

See also the observations of Brett, L. J., in *Harlock v. Ashbury*.³

14. Person liable to pay the debt or legacy. — The section does not require that the person paying should be *personally* liable. The expression "person liable" will include persons like purchasers of mortgaged property or puisne mortgagees, whose liability is in respect of property.¹

A mortgagor can, by paying part of the principal or interest as such due on a prior mortgage without the consent and behind the back of the subsequent mortgagee, give a fresh start of limitation with respect to that mortgage.^{1a}

1a. ('41) 28 AIR 1941 Mad 6 (14, 16) (DB), *Thinnappa Chettiar v. Krishna Rao*. (A mortgaging certain land to B and afterwards selling certain other land to C — C undertaking in the contract of sale, to pay off the mortgage of B — Payment by C is not by person liable and unless C can be held to be A's agent authorised to make the payment, it will not save limitation under this section — *Bradshaw v. Widdington*, (1902) 2 Ch 430, explained.)

2. (1864) 145 R R 79 (84) : 11 H L C 115 : 4 N R 520 : 10 Jur (NS) 855 : 11 L T 68 : 13 W R 20.

3. (1882) 30 W R (Eng) 327 (328) : 19 Ch D 539 : 46 L T 356 : 51 L J Ch 394.

Section 20 — Note 14

1. ('43) 30 AIR 1943 Mad 395 (395, 396) : 209 Ind-Cas 300 (DB), *Narayana v. Venkatesa*. (A payment falling within S. 20 by a purchaser of a portion of the hypotheca will save the mortgagee's claim against the unsold properties.)

('26) 13 A I R 1926 Cal 1218 (1219) : 54 Cal 179 : 98 Ind Cas 204 (DB), *Bhuban Mohan v. Ramgobind*.

('41) 28 AIR 1941 Mad 6 (15) (DB), *Thinnappa Chettiar v. Krishna Rao*.

('38) 25 AIR 1938 Mad 579 (580) : 182 Ind Cas 468 (DB), *Parthasarathi Ayyangar v. Ekambara*.

('38) 25 A I R 1938 Cal 129 (131) : 176 Ind Cas 191 (DB), *Azizur Rahman v. Upendranath*.

('21) 8 AIR 1921 Mad 102 (103) : 44 Mad 544 : 62 Ind Cas 393, *Askaram Sowcar v. Venkatasami Naidu*. (Purchaser of mortgaged property at a court auction is a person 'liable to pay the mortgage-debt' within the meaning of this section.)

1a. ('45) 32 A I R 1945 All-239 (243, 244) : I L R (1945) All 733 (FB), *Munna Lal v. Chunni Lal*. (The subsequent mortgagee must be taken to have taken his mortgage with the knowledge that period of limitation with respect to the prior mortgage can be extended under S. 20.)

Section 20
Note 14-18

A mortgagor who has lost all interest in the mortgaged property and is not personally liable for the debt cannot keep alive the mortgage by a payment under this section.² But a mortgagor can after transferring only one of the items of the mortgaged property make payment to the mortgagee so as to give a fresh start of limitation as against the transferred item.³ So also a mortgagor who has sold the equity of redemption but who is liable on his personal covenant can by payment give a fresh start of limitation against the purchaser of the equity of redemption.⁴

The expression "person liable to pay the debt or legacy" must be interpreted in the light of S. 21, sub-s. (2). For a full discussion of the subject, see Note 6 to section 21.

14a. Debtor—Meaning of.—See Note 13.

15. Principal and surety.—See Note 12 to Section 21.

16. Payment by one of several joint debtors. — See Notes to Section 21.

17. Payment by one of several Muhammadan co-heirs. — See Note 10 to Section 21.

18. "Duly authorised agent." — The words used in the old sub-s. (1) were 'agent duly authorised in this behalf.' The present sub-section omits the words 'in this behalf.' The omission now makes it clear that the agent need not be specifically authorised to make the payment. A general authority would be sufficient. The question whether the person making the payment is an agent duly authorised by the person liable to pay the debt or legacy is one of fact to be determined on the circumstances of each case.¹ No formal or express

2. ('51) 38 AIR 1951 Assam 68 (Para 8) : ILR (1950) 2 Assam 275 (DB), *Pitram v. Lalit Chandra Dutta*.

('42) 29 AIR 1942 Pat 363 (364) : 21 Pat 330 : 202 Ind Cas 54 (DB), *Ramswarup v. Harihar*.

('40) 27 AIR 1940 Mad 470 (473) : I L R (1940) Mad 872 : 188 Ind Cas 603 (FB), *Pavayi v. Palanivela Goundan*.

3. ('47) 34 A I R 1947 Mad 329 (329) : (1947) 1 Mad L Jour 153, *Kempamma v. Racha Setty*.

4. ('42) 29 AIR 1942 Mad 200 (201, 202) : ILR (1942) Mad 308 : 201 Ind Cas 218 (DB), *Thayyanayaki Ammal v. Sundarappa*.

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1. ('42) 29 AIR 1942 Pat 166 (169) : 198 Ind Cas 3 (DB), *Ram Lagan v. Ram Bilochan*. (Subsequent mortgagee authorised to pay off prior mortgage with the amount left with him — Subsequent mortgagee paying amount on account of principal and interest in full — Held subsequent mortgagee was duly authorized to make the payment.)

('41) 28 AIR 1941 Mad 67 (69) : ILR (1941) Mad 191 (FB), *Ramchandra v. Shantarama*.

('34) 21 AIR 1934 Mad 623 (624) : 151 Ind Cas 1087 (DB), *Narayana Aiyar v. Official Assignee, Madras*. (Co-debtor can be agent.)

('03) 28 Bom 248 (251, 252) : 5 Bom L R 1020 (DB), *Gopal Daji Sathe v. Gopal Sonu*. (Payment of interest by the principal debtor is not payment of interest by the agent of surety. The relation of principal and surety does not give rise to any implied authority.)

('11) 11 Ind Cas 858 (858) (DB) (Low Bur), *Muthuveerappa Chetty v. Abdul Kadir*. (Burden is on plaintiff to prove authority.)

authorisation is required under the section.²

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Illustrations.

1. A executed a promissory note in favour of X in substitution of a promissory note that had been executed by B in favour of X, the understanding between A, B and X being that B would pay up the principal and interest due under A's note, in accordance with which arrangement A left it to B to make the payment and B made a payment for interest. It was held by their Lordships of the Privy Council that B must be regarded as an agent of A duly authorised to make the payment within the meaning of this section.³

2. A Burmese married couple X and Y of the cultivating class worked a land together. Y had to pay rent of the land but was temporarily incapacitated from paying it by his being in jail. X however went on cultivating the land and paid the rent. It was held that X must be taken to have authority to act for both and make payments.⁴ A Burmese Buddhist husband is, however, not necessarily the agent of his wife.^{4a}

3. One of the properties comprised in a mortgage deed was agreed to be sold by the mortgagor to one P. It was stipulated that out of the purchase money P should pay a certain amount to the mortgagee who

('10) 5 Ind Cas 539 (545, 546) : 37 Cal 526 (DB), *Sarurjigar Begam v. Baroda Kant Mittler*. (A person holding power-of-attorney from his wife and her sister is a duly authorised agent of both for paying interest under this section.)

[See ('15) 2 AIR 1915 Mad 307 (307) : 25 Ind Cas 927, *Annamalai Pattar v. Natesa Iyar*. (Authority to make payment may be inferred from circumstances or conduct.)]

2. ('47) 34 AIR 1947 Oudh 173 (174) : 229 Ind Cas 265, *Sukhdeo v. Sahdeo Singh*. (Authority of agent need not necessarily be in writing but can be inferred from conduct of parties.)

('41) 28 AIR 1941 Cal 643 (648, 653) : 197 Ind Cas 869 (DB), *Sukumari Gupta v. Dharendra Nath*. (Authority may be implied—Common manager appointed under Bengal Tenancy Act, authorized by proprietor to raise loan without undertaking personal liability and to repay loan out of share of profits—Payment of interest by manager and endorsements made on bond — Creditor receiving it as being paid on behalf of proprietor — Limitation is saved by such payment as against proprietor — Common manager held not liable.)

('39) 26 A I R 1939 Rang 287 (288) : 184 Ind Cas 622 (DB), *U So Maung v. J. Thom*. (But it must be shown that there was at least implied authority.)

('29) 16 AIR 1929 P C 297 (299) : 121 Ind Cas 193 : 57 Ind App 1 (PC), *National Bank of Upper India Ltd. v. Bansidhar*. (It can be implied.)

('90) 17 Cal 944 (950, 951) (DB), *Brij Mohan Lal v. Rudra Perakash Misser*. (Section does not require the agent to be authorised in writing. He may impliedly be so authorised.)

('11) 12 Ind Cas 23 (24) (Low Bur), *Maung Aung Do v. Esoof Ali*. (Express authority not necessary.)

[See ('31) 18 AIR 1931 All 998 (400) : 193 Ind Cas 155 (DB), *Kamta Rai v. Jaduraj Kunwari*. (Authority to agent need not be express.)]

3. ('29) 16 AIR 1929 P C 297 (299) : 121 Ind Cas 193 : 57 Ind App 1 (P C), *National Bank of Upper India Ltd. v. Bansidhar*.

4. ('11) 12 Ind Cas 23 (24) (Low Bur), *Maung Aung Do v. Esoof Ali*.

4a. ('41) 28 AIR 1941 Rang 37 (46) : 1940 Rang L R 603 : 194 Ind Cas 177 (DB), *Eusoof Karwa v. Mrs. Niemeyer*.

('39) 26 AIR 1939 Rang 287 (288) : 184 Ind Cas 622 (DB), *U So Maung v. J. Thom*.

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in his turn was to release the property sold from the mortgage security. The mortgagee consented to this arrangement. The amount was accordingly paid by P to the mortgagee. It was held that P could be regarded as the mortgagor's duly authorised agent to make the payment.^{4b}

But though no formal authorisation is necessary, there must be definite evidence showing that there was some authority on the part of the one to make the payment on behalf of the other.⁵ The mere fact that the payment of money by A enures also for the benefit of B, C and D does not constitute an authorisation to A to make the payment on their behalf.⁶ Similarly, the mere fact that an elder brother is allowed to a certain extent to act on behalf of the younger brothers in matters of executing mortgages, taking loans, and things of that sort does not necessarily mean that there is authority for the elder brother to make a payment so as to save limitation as against the others.⁷ Again, where A, B and C are liable to pay a debt and A makes a payment, the fact that B and C are present at the time of payment does not make the payment necessarily one by A on behalf of B and C.⁸ But where they are not only present but sign underneath, authority by them may be presumed.^{8a}

A member of a joint Hindu family cannot, by reason of his being such a member, make a payment or an endorsement of payment on behalf of another member of the family. Hence, an endorsement of payment by the father on a pronote executed by the son cannot be presumed to have been made by an agent duly authorized by the son.^{8b} Where, however, the debtor sent the amount for payment through his son, it was held that the son must be deemed to be his authorized agent.^{8c}

A Mahomedan brother is not as such the agent of his sister even if the sister is a pardanashin lady, in the absence of proof of authority.^{8d}

4b. ('38) 25 AIR 1938 Mad 579 (581) : 182 Ind Cas 468 (DB), *Parthasarathy Ayyangar v. Ekambara*.

5. ('39) 26 AIR 1939 Rang 287 (288) : 184 Ind Cas 622 (DB), *U So Maung v. J. Thom*. (It must be shown that there was at least implied authority.)

('33) 20 AIR 1933 Cal 268 (269, 270) : 143 Ind Cas 472 (DB), *Dharanidhar Ghose v. Indranarayana Sinha*.

('14) 1 AIR 1914 All 114 (115) : 23 Ind Cas 863, *Ramchandra Singh v. Mt. Durga Devi*.

6. ('29) 16 AIR 1929 Mad 881 (882) : 121 Ind Cas 858 : 53 Mad 119 (DB), *Thayammal v. Muthukumaraswamy*.

7. ('33) 20 AIR 1933 Cal 268 (270) : 143 Ind Cas 472 (DB), *Dharanidhar Ghose v. Indranarayana Sinha*.

8. ('35) 22 AIR 1935 Cal 648 (649) : 158 Ind Cas 512, *Annada Charan v. Jhatu Charan*.

8a. See ('29) 10 AIR 1923 Bom 369 (369) : 74 Ind Cas 302 (DB), *Devichand v. Jamshetji Shapurji*.

8b. ('40) 27 AIR 1940 Mad 954 (955) : 191 Ind Cas 853 (DB), *Kannayya Naidu v. Appala Naidu*.

8c. ('47) 34 AIR 1947 Oudh 173 (174) : 229 Ind Cas 265, *Sukhdeo v. Sahdeo Singh*.

('40) 27 AIR 1940 Lah 513 (514) : 191 Ind Cas 802, *Kesar Chand v. Bulaqi Ram*.

8d. ('41) 28 AIR 1941 Rang 37 (46) : 1940 Rang L R 603 : 194 Ind Cas 177 (DB), *Eusoo Karwa v. Mrs. Niemeyer*.

The authority need not be a *special* authority in respect of the particular loan in question; it may be a *general* authority in respect of a number of loans.⁹ A general authority to pay the total amount due under a bond, will include authority to pay the interest also due on the bond, or to make part payments¹⁰ though, when the authority is specific only to pay towards principal, the agent has no authority to pay for interest.¹¹

To constitute a person a duly authorised agent it is not necessary that the exercise of the authority should be obligatory. It is sufficient even if the exercise of it is optional.¹²

A payment made by an agent in *excess* of his authority will not have the effect of extending the time under this section. An agent who can give the creditor the benefit of this section has to act within the terms of his authority; if he exceeds his authority or does something not actually covered by his authority, he cannot bind the principal so as to give the creditor the benefit of this section.¹³ Thus, where A executed a mortgage in favour of B directing him to pay the mortgage amount immediately to X who had obtained a decree against A and to obtain a receipt, but B paid the money into *Court* more than a year thereafter, it was held that the payment was in excess of his authority and did not have the effect of extending the time.¹⁴ Similarly, where A mortgaged his property to B asking him to pay off the debt due by A to C, but B merely paid the interest thereon two years thereafter, it was held that B exceeded his authority and could not be considered as the agent of A for the purpose of making the payment

9. ('33) 20 AIR 1933 Cal 826 (827) : 147 Ind Cas 459 (DB), *Jiban Krsta v. Hari*.

10 ('25) 12 AIR 1925 Rang 30 (32) : 2 Rang 367 : 84 Ind Cas 391 (DB), *Rala Singh v. Bhagwan Singh & Sons*. (('19) AIR 1919 P C 120 (PC), *Braja Sundar v. Bhola Nath* followed.)

('98) 25 Cal 844 (852) : 25 Ind App 95 : 2 Cal W N 402 : 7 Sar 294 (P C), *Sukhamoni Chowdhuri v. Ishan Chunder Roy*.

[See ('95) 18 Mad 456 (457), *Kailas Padayachi v. Ponnukannu*. (Held, authority to manage affairs included authority to pay interest.)]

11. (26) 13 AIR 1926 Mad 1176 (1177) : 98 Ind Cas 162 (DB), *Karuppan Chetti v. Maruthanayagam Pillai*.

[See ('14) 1 AIR 1914 Mad 381 (381) : 23 Ind Cas 810 (DB), *Alagappa Chettiar v. Subramania Pandia Thevan*. (Mortgagee authorised to pay debt due by mortgagor to third person — Mortgagee paying interest only after two years — Held he had no authority.)]

12. ('14) 1 AIR 1914 Mad 381 (381) : 23 Ind Cas 810 (DB), *Alagappa Chettiar v. Subramania Pandia Thevan*.

13. ('25) 12 AIR 1925 Mad 703 (705) : 87 Ind Cas 989 (DB), *Balaguruswami Naicken v. Guruswami Naicken*. ((1835) 2 Bing (N C) 241, *Linsell v. Bensor*, followed; ('21) AIR 1921 Mad 704 (DB), *Govindasami v. Dasai Goundan*, distinguished.)

[See also ('38) 25 AIR 1938 Mad 579 (581) : 182 Ind Cas 468 (DB), *Parthasarathi Ayyangar v. Ekambara*. (Payment made by agent later than warranted by his authorisation would be an act detrimental to his principal, for, the result of such payment is to extend the period of limitation.)]

14. ('25) 12 AIR 1925 Mad 703 (706) : 87 Ind Cas 989, *Balaguruswami Naicken v. Guruswami Naicken*.

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of interest.¹⁵ The same principle would apply where a *vendee* is asked to pay such a debt, and the latter makes only a part payment.¹⁶ The question as to the extent of an agent's authority is a question of fact to be decided on the facts of each case.^{16a}

The words "authorised in this behalf" meant "authorised to make the payment." But an authority to pay carries with it the authority to make an endorsement for the payment made. No specific authority to make the endorsement itself is necessary.¹⁷

The words "agent duly authorised" include authority given by law as well as authority given by *act of parties*.¹⁸

Can a Court be regarded under any circumstances as an agent of the party for the purpose of this section? It has been held in the undermentioned cases¹⁹ that it can be an agent, provided the assets of the party are so placed by his own act or by operation of law that the Court can operate upon the assets and make payments, the volition of the party being immaterial.

The person making the payment must be an agent of the person liable to pay *at the time of the payment*. Under the provisions of S. 201 of the Contract Act, the death of the principal terminates the agency. Therefore, a payment made by the *quondam* agent *after the death* of the principal will not give a fresh start of limitation under this section.²⁰ Similarly, where an order of adjudication is annulled under S. 37 of the Provincial Insolvency Act, 1920, and an appointee of the insolvent's property is placed in charge of the property, such

15. ('41) 28 AIR 1941 Mad 67 (69) : ILR (1941) Mad 191 (FB), *Ramachandra v. Shantarama*. (AIR 1914 Mad 381 approved—AIR 1929 P C 297 (PC), *National Bank v. Bansidhar*, distinguished.)

('14) 1 AIR 1914 Mad 381 (381) : 23 Ind Cas 810 (DB), *Alagappa Chettiar v. Subramania Pandia Thevan*.

16. ('41) 28 AIR 1941 Mad 6 (8) (DB), *Thinnappa Chettiar v. Krishna Rao*. (It was also held that the vendee in such a case is not a 'person liable' to pay within the section.)

('22) 9 AIR 1922 Mad 401 (401) (DB), *Ramachandra Raju v. Purushottam*. (('14) AIR 1914 Mad 381, *Alagappa v. Subramania* followed.)

16a. ('38) 25 AIR 1938 Mad 579 (581) : 182 Ind Cas 468 (DB), *Parthasarathy Ayyangar v. Ekambara*.

17. ('27) 14 AIR 1927 Mad 959 (959, 960) : 105 Ind Cas 475 (DB), *Venkateswarlu v. Suryaprakasam*.

('07-08) 4 Low Bur Rul 1 (1), *Babu Chimanbux Bhowsinha v. Surju Banniah*.

18. ('19) 6 AIR 1919 Cal 7 (8) : 52 Ind Cas 436 (DB), *Chandra Kanta v. Behari Lal*.

19. ('21) 8 AIR 1921 Mad 704 (707, 708) : 44 Mad 971 : 68 Ind Cas 100 (DB), *Govindasamy Pillai v. Desai Goundan*.

('27) 14 AIR 1927 Mad 80 (81) : 98 Ind Cas 571, *Venkatasubbayya v. Seshayya* (But not so when money belongs to debtor's father.)

('24) 11 AIR 1924 Mad 638 (639) : 78 Ind Cas 832, *Sabapathy Chetty v. Shunmugappa Chetty*.

[See also ('40) 27 AIR 1940 Nag 354 (357) (DB), *Gajadharprasad Ramlal v. Udaichand Kapurchand*. (If the person making the payment is a Judge of the Court, and an acknowledgment of the payment appears in his handwriting or is signed by him, then that is enough.)]

20. ('80) 1880 Pun Re No. 78, *Sirdharini Kishen Koer v. Munna Lal*.

an appointee is not an agent of the insolvent and therefore a payment made by him does not save limitation.²¹ Where a *Chagla Kanungo* attached certain movables of the judgment-debtor, sold them and paid the proceeds of the sale to the decree-holder it was held that the *Kanungo* was acting as an agent of the Court and not of the judgment-debtor.^{21a}

Where a payment is made by A on behalf of B without the latter's authority but B subsequently ratifies the payment it will have the same effect against him as if it had been made with his authority. Such ratification may be express or implied. But, such ratification cannot affect the rights of third parties. Thus, suppose A executes a mortgage of certain properties to B and then alienates various items of the mortgaged properties to C, D and E. Afterwards F, an unauthorised person makes payments towards the mortgage debt on behalf of A who subsequently ratifies his action. Though such ratification will make the payments binding on A and will extend the period of limitation against A, it will not extend the period of limitation against C, D and E.²²

See also S. 19 Note 50.

19. Payment by Court.—See Note 18.

20. Payment by husband or wife.—See Note 18.

21. Payment by pleader. — A payment by a pleader duly authorized to make the payment will give a fresh starting point of limitation.¹

22. Payment by receiver. — In *Chinnery v. Evans*,¹ M, who was the owner of three counties, Cork, Kerry and Limerick, mortgaged them to F. Interest having fallen due, F applied and got a receiver appointed in respect of the properties. The receiver took possession of the property in the county of Limerick and from out of the rents received paid F towards the interest on his mortgage. It was held that the receiver must be considered to be the agent of M and that the payment would save limitation against F. The Lord Chancellor observed as follows :

"Upon that point, I think no reasonable doubt can be entertained that, under the Statute (S. 40, 3 & 4 Will. IV, Chap. 27) the receiver in the receipt of the rents of the Limerick estate is, in point of fact as well as of law, the receiver of the mortgagor, the owner of the estate subject to the mortgage, and that any

21. ('35) 22 AIR 1935 Rang 152 (154) : 156 Ind Cas 783 (DB), *Maung Po Gyi v. R. K. Banerjee*. (Because the insolvent has no control over the property.)

21a. ('46) 33 A I R 1946 Pat 131 (132) : 11 Out L Tim 54, *Brajamohan v. Ramendra*.

22. ('41) 28 AIR 1941 Mad 6 (16) (DB), *Thinnappa Chettiar v. Krishna Rao*.

Section 20 — Note 21

1. ('16) 3 AIR 1916 Cal 173 (174): 32 Ind Cas 358 (DB), *Basdeo Narain v. Bachan Choudhurani*.

Section 20 — Note 22

1. (1864) 145 R R 79 (85): 11 H L C 115:10 Jour (N S) 855: 13 W R 20: 11 L T 68.

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payment made by the receiver *in pursuance of the order* is payment in law by the legal agent of the person liable to pay. I have no doubt, therefore, and I submit to your Lordships that no reasonable doubt can be entertained as to the mortgagee's security affecting all the lands originally comprised in it in those three separate counties of Cork, Kerry and Limerick."

This decision was followed by the Madras High Court in *Venkataramayya v. Subramaniam*.² In that case a receiver who was appointed in a suit for partition and administration and who was authorized by the order of appointment to pay interest on debts, made such a payment. It was held that the payment was sufficient to keep the debt alive against all the parties who were bound by the debts. But where a receiver appointed in a suit for a dissolution of partnership was not authorised to keep any debt alive, his powers being limited to collecting outstandings and doing all things necessary for the realisation and preservation of the assets, it was held by the Chief Court of Lower Burma that the receiver had no authority to keep the debt alive by an acknowledgment.³

23. "Fresh period" — Computation of. — Since it is the *payment* that saves limitation, the fresh period must be computed from the date of payment and not from the date of the writing evidencing such payment.¹

24. Proviso — "Appears in the handwriting of, or in a writing signed by." — The proviso requires that the fact of the payment must appear in the handwriting of or in a writing signed by the person making the payment. The object of this requirement is to exclude fraudulent oral testimony as to payment.¹

2. ('15) 2 AIR 1915 Mad 197 (143) : 26 Ind Cas 393.

[See also ('37) 24 AIR 1937 Mad 764 (765) : 174 Ind Cas 22, *Krishnayya v. Seetha Ramayya*. (Receiver appointed in suit for dissolution of partnership—Receiver given authority to pay debts of firm — Part payment by receiver is within his authority.)]

3. ('15) 2 AIR 1915 Low Bur 63 (64) : 29 Ind Cas 27 : 8 Low Bur Rul 159 (DB), *S. M. A. Chetty v. M. L. R. M. A. Chetty*.

Section 20 — Note 23

1. ('42) 29 AIR 1942 Pat 395 (395) : 200 Ind Cas 306 (DB), *Shyam Ballav v. Dologobind Sahu*.

('10) 8 Ind Cas 349 (349) (DB) (Mad), *Lakshiminarasimham v. Bharata*.

[See ('29) 16 AIR 1929 Mad 432 (438) : 117 Ind Cas 124 (DB), *Ammayi v. Sundayya*.]

[See also ('38) 25 AIR 1938 Lah 570 (571) : 178 Ind Cas 597, *Bhagat Ram v. Ralla Ram*. (Mortgage bond providing that in case of default of payment of interest for three years, the mortgagee would become entitled to realise the whole amount — Default made for more than three years — Subsequent payment of entire arrears of interest — Held there was no waiver of the default clause and that the payment would only give the plaintiff a fresh period of limitation under this section from the date of payment but would not postpone the starting point of limitation till there was again default for three years in payment of interest.)]

Section 20 — Note 24

1. ('21) 8 AIR 1921 Mad 704 (706) : 68 Ind Cas 100 : 44 Mad 971 (DB), *Govindasamy Pillai v. Desai Goundan*.

Before the Limitation (Amendment) Act I of 1927, the proviso to the section ran as follows :

"Provided that, in the case of a part payment of a principal of a debt the fact of the payment appears in the handwriting of the person making the same.

A payment of interest as such was not required to be in the handwriting of the person making the payment.² Thus, where money was paid by the judgment-debtor to the decree-holder for interest and was certified by the decree-holder, such payment would extend the time even though there was no writing in the handwriting of, or signed by, the judgment-debtor evidencing the payment. As regards a part payment of a principal of a debt, the proviso required the fact to appear in the *handwriting* of the person making the payment.^{2a} This requirement gave rise to a difference of opinion as to whether, where a payment was written by one person and signed by the person making the payment, it could be said that the fact of payment appeared "in the handwriting of the person making the payment."³ There was

2. ('15) 2 AIR 1915 Mad 726 (726) : 26 Ind Cas 507, *Muthu v. Sandanam*.
(97) 1 Cal W N cexxix (cexxx), *Amrita Shaha v. Panchkoni Shaha*.

2a. ('86) 1886 Pun Re No. 61, *Chajju v. Gulab*. (Part payment towards decree debt—No record.)

('80) 6 Bom 103 (106), *Narronji Bhimji v. Mugniram Chandaji*. (Defendant credited with surplus proceeds of goods and of a hundi.)

('22) 9 AIR 1922 Pat 446 (447), *Ambika Prasad v. Gaya Loan Office Ltd*.

('25) 12 AIR 1925 Pat 806 (807) : 88 Ind Cas 747, *Dansfor v. Shaw & Co*.

('12) 14 Ind Cas 335 (339) (Lah), *Ram Das v. Kanshi Ram*. (Unsigned deposition alleging part payment — Fact of payment did not appear in the handwriting.)

('23) 10 AIR 1923 Bom 207 (207, 208) : 72 Ind Cas 275 (DB), *Hansraj v. Bapu Krishnaswami*.

('25) 12 AIR 1925 Oudh 34 (35):79 Ind Cas 848 (DB), *Mt. Mohanya v. Panna Lal*.

('17) 4 AIR 1917 Cal 12 (12) : 38 Ind Cas 293 (DB), *Kunja Behari v. Jogendra*.

((18) AIR 1918 Cal 982 : 35 Ind Cas 177 (DB), *Harendra v. Gagan*, followed.)

3. No. It did not.

('15) 2 AIR 1915 Mad 726 (726) : 26 Ind Cas 507, *Muthu Pillai v. Sandanam Pillai*.

('18) 5 AIR 1918 Cal 49 (50) : 47 Ind Cas 800 (DB), *Baliram Koch v. Sabha*. (There was neither signature nor mark.)

('17) 4 AIR 1917 Mad 805 (805) : 40 Mad 698 : 36 Ind Cas 240 (DB), *Venkatakrishniah v. Subbrayudu*. (But it may serve as acknowledgment under S. 19.)

('16) 3 AIR 1916 Bom 125 (125) : 41 Bom 166 : 38 Ind Cas 359 (DB), *Nivajkhan Nathakhan v. Dadabhai Mussee Valli*.

('30) 17 AIR 1930 Rang 64 (65) : 126 Ind Cas 540 (DB), *Maung Tun Hlaing v. U Aung Gyaw*.

('21) 8 AIR 1921 Nag 46 (48) : 17 Nag L R 40 : 62 Ind Cas 297 (DB), *Bisheshwar Das v. Madho Rao*.

('08) 35 Cal 813 (818) : 4 Ind Cas 321 (DB), *Santishwar v. Lakhikanta*.

('15) 2 AIR 1915 Mad 101 (102, 103) : 21 Ind Cas 302 (305) : 38 Mad 438 (DB), *Lodd Govinda Das Krishna Das v. Rukmani*.

('09) 4 Ind Cas 374 (375) : 5 Low Bur Rul 108, *Arunachellam v. Ismail*. (1884 Pun Re No. 99 dissented from.)

('96) 23 Cal 546 (552, 553) (FB), *Haji Rahmattulla v. Cooverji Bhujja*.
Yes. It did.

('84) 7 Mad 55 (56) (DB), *Sesha v. Seshaya*.

('84) 7 Mad 76 (80) : 7 Ind Jur 596 (DB), *Ellappa v. Annamalai*.

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also room for doubt on the question whether in the case of *illiterate* persons who had made their mark below the entry of the fact of payment in the handwriting of a third person, it could be considered to be in the handwriting of the person making the payment, though it was held that it could be so considered.⁴

The amendment of the proviso has now set the matter at rest. Every payment must now appear in the handwriting of, or in a writing signed by, the person making the payment.^{4a} Thus, the mere fact that a decree-holder certifies a payment for interest made by the judgment-debtor will not now extend the time in favour of the decree-holder unless the payment is evidenced by a writing or signature as aforesaid.⁵ The amendment making it sufficient that the writing should be *signed* by the debtor is, to that extent, in favour of the creditor who is not able to prove the writing of the debtor relating to the fact of payment.⁶

Under s. 3, cl. (52) of the General Clauses Act, 1897 "signature" includes mark and consequently, if a writing evidencing the fact of payment is subscribed to by the mark of an illiterate person making the payment, it would be a writing signed by him within the meaning of this section.⁷ It has been held by the High Court of Calcutta that

('28) 15 AIR 1928 Bom 417 (418): 52 Bom 356 : 109 Ind Cas 702 (DB), *Harigovind v. Gangubai Balwant*.

('23) 10 AIR 1923 Bom 369 (369) : 74 Ind Cas 302 (DB), *Devichand v. Jamshedji*. (Two joint debtors — Fact of payment recorded in handwriting of one but signed by both — *Held*, it was sufficient acknowledgment.)

('03) 28 Bom 262 (264) : 5 Bom L R 1031 (DB), *Jamna v. Jaga Bhana*.

('30) 17 AIR 1930 Pat 372 (375) : 126 Ind Cas 898 : 9 Pat 851 (DB), *Kesarichand Johr Mull v. Mukteswar Trigunait*. (Signature of person making payment on cheque is sufficient compliance with the proviso.)

('17) 4 AIR 1917 All 465 (466) : 35 Ind Cas 199 : 39 All 33 (DB), *Bank of Multan Ltd. v. Kamta Prasad*. (Deposition of debtor signed by him is not evidence of part payment so as to save limitation.)

('84) 1884 Pun Re No. 99, *Narasingh Das v. Bachatar Singh*. (Proviso is satisfied by attaching signature.)

4. ('28) 15 AIR 1928 Bom 417 (417, 418) : 52 Bom 356 : 109 Ind Cas 702 (DB), *Hari Gobind v. Gangubai Balwant*. (Yes.)

('21) 8 AIR 1921 Pat 476 (477): 62 Ind Cas 644, *Sri Ram Singh v. Kashi Mollah*. (Yes.)

('11) 12 Ind Cas 23 (23, 24) (Low Bur), *Maung Aung Do v. Esoof Ali*. (Yes.)

[See ('74) 7 Mad H C R 358 (358), *Bheemangowda v. Eeranah*. (Yes.)]

4a. ('42) 29 AIR 1942 Pat 47 (48) : 196 Ind Cas 392, *Gobind Ram v. Firm Chunni Ram*. (But the acknowledgment must appear on its face to be on account of the debt.)

('34) 21 AIR 1934 Rang 227 (228) : 151 Ind Cas 426, *P. S. A. Alagan v. Maung Po Peck*.

5. ('33) 20 AIR 1933 All 49 (49) : 143 Ind Cas 324 (DB), *Jai Karan v. Panchaiti Akhara Chota Naya Udasi Nanak Shahi*.

6. ('39) 26 AIR 1839 Rang 112 (113) : 181 Ind Cas 393, *U Paw Tint v. U Than Daing*. (Creditor writing endorsement and debtor signing it.)

('33) 20 AIR 1933 Lah 341 (342) : 14 Lah 580 : 141 Ind Cas 611, *Jagtu Mal Sada Sukhrail v. Charanji Lal Fakirchand*.

7. ('28) 15 AIR 1928 Bom 417 (418) : 52 Bom 356 : 109 Ind Cas 702 (DB), *Hari Govind v. Gangubai*. (('16) A I R 1916 Bom 125 (DB), *Nivajkhan v. Dadabhai*, followed.)

where it is customary for the scribe to write the payment and to sign it also on behalf of the illiterate person making the payment who touches the pen, the writing would be regarded as being signed by him even though not even a mark had been made by the illiterate person.⁸ The High Court of Lahore⁹ and the Judicial Commissioner's Court of Peshawar^{9a} have, however, held that an endorsement by another person at the instance of the person making the payment does not comply with the words of this section. Where S, an illiterate person, touched a pen and passed it to B who wrote "22nd March 1930; S paid rupee one," and then wrote his own signature as scribe but not on behalf of S, it was held by the High Court of Madras that the endorsement could not be considered to be signed by S and did not save limitation.¹⁰

In the undermentioned case,^{10a} it was doubted whether a single signature in regard to endorsements referring to a series of payments made at different times would suffice to comply with the provisions of the proviso.

The same document can be treated as evidence of the fact of payment as well as an acknowledgment of the payment.¹¹ Thus, where a debtor sends a money order to the creditor and writes in the coupon that the amount should be credited to the debt, the fact of payment can be said to "appear in the handwriting of the person making the payment" within the meaning of this section.^{11a} Where a cheque signed by the debtor is given as a payment, it must be deemed that by reason of the signature on the cheque, the fact of payment appears in the handwriting of or signed by the person making the payment.¹² It was, however, held in the undermentioned

[See ('18) 5 AIR 1918 Cal 49 (50) : 44 Ind Cas 516, *Baliram Koch v. Sabha Sheikh*, (('03) 28 Bom 262 (DB), *Jamna v. Jaga*, referred to.)]

8. ('32) 19 AIR 1932 Cal 440 (441) : 137 Ind Cas 788, *Rajani Mandal v. Digindra*. (Provision in General Clauses Act that definition of "sign" includes "mark" does not limit the possible ways of signing documents—('21) A I R 1921 Pat 476, *Sri Ram v. Kashi*, followed; ('18) A I R 1918 Cal 49, *Baliram v. Sabha*, not followed.)

9. ('28) 15 AIR 1928 Lah 157 (157) : 108 Ind Cas 727, *Ganga Ram v. Nikka-singh*. (('18) A I R 1918 Cal 49, *Baliram v. Sabha*, followed; ('21) A I R 1921 Pat 476, *Sri Ram v. Kashi*, not followed.)

9a. ('43) 30 AIR 1943 Pesh 36 (37) : 207 Ind Cas 61, *Faizur Rahman v. Feroz Shah*.

10. ('35) 22 AIR 1935 Mad 1047 (1048) : 159 Ind Cas 158, *Karuppayya v. Sub-bayya*. (('32) A I R 1932 Cal 440, *Rajani v. Digindra*, distinguished.)

10a. ('39) 26 AIR 1939 Rang 118 (120) : 181 Ind Cas 765, *U Po Nyun v. Ma Ah Ma*.

11. ('38) 25 AIR 1938 Cal 538 (541) : I L R (1938) 2 Cal 320 : 177 Ind Cas 508 (DB), *Prafulla Chandra v. Jotindra Nath*. (Cheque may be payment as well as acknowledgment of payment.)

11a. ('80) 17 AIR 1930 All 123 (124) : 124 Ind Cas 22, *Ram Sarup v. Muhammad Ubaidullah Khan*. (('26) AIR 1926 Cal 510, *Ram Kumar v. Nanuram*, followed.) ('05) 27 All 575 (579) : 2 All L Jour 287 (DB), *Ashanullah v. Dakkhini Din*.

12. ('33) 20 AIR 1933 Lah 741 (742) : 144 Ind Cas 641 (DB), *Dial Singh v. Davindar*.

('33) 20 AIR 1933 Lah 341 (341) : 14 Lah 580 : 141 Ind Cas 611, *Jagtu Mal-Sada Sukhrat v. Charanji Lal-Fakirchand*.

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case¹³ that the mere endorsement of a *hundi* by the debtor in favour of the creditor is not sufficient to give a fresh starting point of limitation. But the decision proceeded on the view that it was necessary under the section that the writing must itself show that the payment was *for part* of principal. As has been shown below, this view has generally been dissented from.

A part payment made and endorsed by the judgment-debtor on the decree will give a fresh starting point of limitation.^{13a}

It is only the fact of *payment* that must appear in the handwriting of, or under the signature of the person making the payment; it is not necessary to state that such payment is towards principal or interest.¹⁴ In *Rama Shah v. Lal Chand*,^{14a} their Lordships of the Privy Council observed as follows :

"Stress was laid on the change in the proviso from 'the fact of the payment appears' to 'an acknowledgment of the payment appears,' but neither expression affords, in their Lordships' opinion, any ground for holding that the character of the payment, as intended to go towards interest or towards principal, must appear by the writing. . . ."

Hence, evidence *aliunde* to show that the payment was stated at the time of the payment by the debtor to be for interest or for principal, may be let in and is not prohibited by Ss. 91 and 92 of the

[See ('38) 25 AIR 1938 Cal 538 (540) : I L R (1938) 2 Cal 320 : 177 Ind Cas 508 (DB), *Prafulla Chandra v. Jatindra Nath*. (Cheque accepted by payee operates as payment as well as acknowledgment of payment in the handwriting of the person making the payment.)

('16) 3 AIR 1916 Cal 580 (580) : 42 Cal 1043 : 31 Ind Cas 626 (DB), *Kedar Nath v. Denobhandu Shaha*.]

13. ('97) 19 All 307 (307) : 1897 All W N 49 (DB), *Ram Chandar v. Chandi Prasad*. (('86) 9 Mad 271 (DB), *Mackenzie v. Tiruvengadathan*, followed.)

13a. ('82) 5 All 201 (207) : 1882 All W N 221 (DB), *Janki Prasad v. Ghulam Ali*. (('81) 7 Cal 56 (DB), *A. Dalal v. Kallychurn*, distinguished.)

14. ('38) 25 A I R 1938 Cal 538 (540) : I L R (1938) 2 Cal 320 : 177 Ind Cas 508 (DB), *Prafulla Chandra v. Jatindra Nath*. (Cheque accepted by payee operates as payment as well as acknowledgment of payment in the handwriting of person making payment.)

('38) 25 AIR 1938 Lah 347 (348) : 181 Ind Cas 82, *Jawahir Singh v. Ghulam Hasan*.

('38) 25 AIR 1938 Mad 601 (601, 602) : I L R (1938) Mad 1090 : 177 Ind Cas 743 (DB), *Kandaswami Mudaliar v. Thevammal*. (Creditor can show by extrinsic evidence that payment made was payment towards interest as such.)

('83) 6 Mad 281 (283) (DB), *Ankamma v. Rama Sastrulu*.

('30) 17 AIR 1930 All 392 (394, 395) : 52 All 459 (DB), *Singh & Co. v. Sircar & Co.*

('36) 23 AIR 1936 Mad 848 (851) : 165 Ind Cas 225, *Kandaswamy v. Thevammal*.

('21) 8 A I R 1921 All 335 (337) : 43 All 216 : 59 Ind Cas 941 (DB), *Curlendar v. Abdul Hamid*. (Only fact of payment should appear in the handwriting.)

('20) 7 A I R 1920 Bom 413 (414) : 44 Bom 392 : 56 Ind Cas 429 (DB), *Sakaram Manchand Gujar v. Keval Padmasi Gujar*. (Do.)

('96) 23 Cal 592 (599), *In the matter of Ambrose Summers*. (Do.)

('02) 6 Cal W N 218 (222, 223) (DB), *Mandardar Aitch v. Secy. of State*.

('04) 1904 Pun Re No. 84, *Buta v. Parma Nand*.

14a. ('40) 27 AIR 1940 P C 63 (67) : ILR (1940) Lah 470 : I L R (1940) Kar P C 134 : 67 Ind App 160 : 187 Ind Cas 233 (PC).

Evidence Act.¹⁵ The fact that there was a debt and that such debt exceeded the amount paid may be proved *aliunde* in order to show a part payment of principal.¹⁶

The undermentioned decisions¹⁷ which held the contrary view, namely that the fact that the payment was a *part payment* or one towards interest should also appear in the handwriting of the person making the payment, are not good law in view of the Privy Council decision cited above.

It is only for the purposes of section 20 that a payment towards a debt should be in the handwriting, etc., of the person making it; the creditor is not debarred from proving by evidence that a payment was made of his debt for other purposes such as that he had waived default of instalments due under an instalment bond.¹⁸

A part payment of the principal of a debt must appear in the handwriting of the person *making the part payment* and not in that of any other person, however authorised. Thus, where A makes a payment and B, under A's authority, makes an entry of the payment, such entry will not give a fresh starting point of limitation.¹⁹

15. ('37) 24 A I R 1937 All 640 (640) : I L R (1937) All 732 : 171 Ind Cas 422, *Pearey Lal v. Muhammad Yusuf*. (Fact that endorsement does not mention what debtor said at the time may be ground for disbelieving such evidence.)

('32) 19 A I R 1932 Lah 212 (213) : 13 Lah 448 : 135 Ind Cas 673 (DB), *Bharat National Bank, Ltd. v. Bhishan Lal*. (Writing need not show the character of the payment.)

('36) 23 AIR 1936 Mad 848 (851) : 165 I.C. 225, *Kandaswamy v. Therammal*. (Do.) [See ('38) 25 AIR 1938 Mad 601 (601) : ILR (1938) Mad 1090 : 177 Ind Cas 743 (DB), *Kandaswami Mudaliar v. Therammal*. (Evidence to prove that payment was towards interest may be oral or documentary.)]

16. ('36) 23 AIR 1936 Lah 629 (636) : 165 Ind Cas 723 : 17 Lah 737 (DB), *Municipal Committee, Amritsar v. Ralia Ram*.

17. ('42) 29 AIR 1942 Pat 47 (48) : 196 I.C. 392, *Gobind Ram v. Firm Chuni Ram*. ('41) 28 A I R 1941 Oudh 56 (57) : 16 Luck 113 : 190 Ind Cas 334, *Khat Khata Nand v. Surajpal Singh*. (Creditor cannot establish by evidence *aliunde* that payment was made towards interest.)

('39) 26 A I R 1939 Oudh 142 (143) : 14 Luck 456 : 180 Ind Cas 121 (DB), *Zaman Khan v. Ganga*. (Oral evidence is not admissible to prove that payment was towards interest.)

('37) 24 AIR 1937 Sind 95 (96) : 31 Sind L R 68 : 168 Ind Cas 820 (DB), *Hariram Dowlatram Firm v. Firm Ram Singh Gopal Singh*. (Payment of interest as such must be in writing—But not payment of principal as part principal.)

('86) 9 Mad 271 (273), *Mackenzie v. Tiruvengalathan*.

('97) 19 All 307 (307) : 1897 All W N 49 (DB), *Ram Chandar v. Chandi Prasad*.

('07) 9 Bom L R 1329 (1331), *Ranchordas v. Pestonji*.

('19) 6 AIR 1919 Mad 952 (953) : 43 Ind Cas 20 (DB), *Muthia Chettiar v. Kut-tayyan*. (Not following ('83) 6 Mad 281 (DB), *Jada Ankamma v. N. Rama Sastrulu*.)

('94) 1894 Pun Re No. 124, p. 479, *Diwan Bhuta Singh v. Hukam Chand*. (Do.)

('97) 1897 Pun Re No. 1, *Sardar Bachattar Singh v. Jagan Nath*.

18. ('31) 18 AIR 1931 Cal 157 (158) : 58 Cal 615 : 130 Ind Cas 571 (DB), *Probhat Chandra v. Mohesh Chandra*. (AIR 1925 Lah 394, followed.)

('25) 12 AIR 1925 Lah 394 (395) : 6 Lah 163 : 89 Ind Cas 294 (DB), *Nand Lal v. Akki*. (1913 Pun Re No. 35 (DB), *Jawand Lal v. Sharf Din*, not followed.)

19. ('96) 23 Cal 546 (553) (FB), *Mukhi Haji Rahmatulla v. Cooverji Bhuja*.

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Under the proviso, acknowledgment is not of the debt but of the payment. Hence, if once limitation is saved by the part payment made by the debtor, he is liable for any sum which the Court after investigation finds to be due.²⁰

The proviso applies only to sub-s. (1) and not to sub-s. (2).²¹ In a suit brought under S. 65, Contract Act, to recover money on the failure of a mortgage which was void ab initio the plaintiff must, in order to succeed, prove that the defendant acknowledged the liability arising under S. 65 as the mortgage being void receipt of rents and produce under S. 20 (2) would not be sufficient to give a fresh start of limitation.²²

25. Payment and writing need not be simultaneous. — The word "acknowledgment" does not imply that the acknowledgment of the payment must be made *after* the payment — both may be simultaneous.¹ At the same time, it is not necessary that the writing acknowledging the payment *must* be *simultaneous* with the payment. It may be made later.² The acknowledgment is a mere matter of evidence³ and provided it is signed before the suit is commenced, it is sufficient.⁴ It is the *payment* and not the acknowledgment that

(1907) 29 All 773 (779) : 1907 All W N 263 : 4 All L Jour 628 (DB), *Dharam Das v. Ganga Devi*.

(1916) 3 AIR 1916 Pat 326 (327) : 35 Ind Cas 375 : 1 Pat L Jour 474 (DB), *Bishun Parkhash Narain Singh v. Muhammad Sadique*.

(1901) 26 Bom 246 (249, 250) : 3 Bom L R 834 (DB), *Bhaishankar v. Bai Parvathi*.

(1918) 5 AIR 1918 Pat 95 (96) : 48 Ind Cas 728 : 4 Pat L Jour 365 (DB), *Manindra Nath Roy v. Kanhairam Marwari*.

(1920) 7 AIR 1920 Pat 445 (446) : 54 Ind Cas 802, *Banwari Lal v. Ramchandra*.
(Part payment by agent must appear in his hand — Principal's writing is not required — Agent's authority to pay must be proved.)

20. (1938) 25 A I R 1938 Cal 538 (540) : 1 L R (1938) 2 Cal 320 : 177 Ind Cas 508 (DB), *Prafulla Chandra v. Jatindra Nath*.

21. (1940) 27 AIR 1940 Pat 512 (513) : 187 Ind Cas 484 (DB), *Mathura Singh v. Palakdhari Rai*.

22. (1943) 30 AIR 1943 All 294 (295) : ILR (1943) All 604 : 209 Ind Cas 10, *Panchoo v. Ram Sunder*.

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1. (1938) 25 AIR 1938 Cal 538 (539) : ILR (1938) 2 Cal 320 : 177 Ind Cas 508 (DB), *Prafulla Chandra v. Jatindra Nath*.

2. (1940) 27 AIR 1940 Oudh 177 (178) : 186 Ind Cas 163, *Mahabali v. Ram Das*.
(But should be made before the time when an application for execution or a suit is filed.)

(1994) 17 Mad 92 (94) (DB), *Venkatasubba v. Appasundaram*.

(1931) 18 AIR 1931 All 375 (376) : 131 Ind Cas 867 (DB), *Ganesh v. Mallu Mal*.
(1923) AIR 1923 Nag 117 (DB), *Ram Prasad v. Mohan*, followed.)

(1933) 20 AIR 1933 Bom 252 (253) : 57 Bom 453 : 144 Ind Cas 990 (DB), *Viswanath v. Mahadeo*.

(1937) 24 A I R 1937 Cal 284 (288) : 172 Ind Cas 362 : 1 L R (1937) 2 Cal 137 (DB), *Md. Moizuddin v. Nalini Bala Devi*.

(1929) 16 AIR 1929 Cal 714 (715) : 56 Cal 556 : 121 Ind Cas 741, *Bengal National Bank, Ltd. v. Jatindra Nath Mazumdar*.

3. (1933) 20 AIR 1933 Bom 252 (253) : 57 Bom 453 : 144 Ind Cas 990 (DB), *Viswanath v. Mahadeo*.

4. (1937) 24 AIR 1937 Cal 284 (288) : 172 Ind Cas 362 : ILR (1937) 2 Cal 137 (DB), *Md. Moizuddin v. Nalini Bala Devi*. ((1933) AIR 1933 Bom 252 (DB), *Viswanath v. Mahadeo*, followed.)

extends the time and, therefore, if the payment is made within the time fixed, it is sufficient to extend time though the acknowledgment is made after such period.⁵ But an acknowledgment of a payment in the written statement filed in the suit itself cannot be called in aid for the purpose of this section, the reason being that the suit must be tried on the cause of action as laid in the plaint and an inherent defect, such as the suit being out of time (nothing being said in the plaint as to how it is not barred), cannot be supplied by the written statement.⁶

26. Signature must have reference to the acknowledgment of payment. — It is the *acknowledgment* of the payment that must be signed by the person making the payment. Where therefore a person making a payment signs his name and afterwards, another person, without either consulting the person making the payment or getting his authorisation, writes the endorsement of payment over the signature, such a writing with the signature will not save limitation under the proviso.¹

27. Proviso—"Person making the payment." — The words "the person making the payment" do not necessarily mean the person who *physically* hands over the money. Thus, where A sends money by his servant or through post to B, it is not the servant or the postman who makes the payment, but A.¹ N was the officer of S and a payment

5. ('40) 27 AIR 1940 P C 63 (69) : ILR (1940) Lah 470 : ILR (1940) Kar P C 134: 67 Ind App 160 : 187 Ind Cas 233 (PC), *Rama Shah v. Lal Chand*.

('40) 27 AIR 1940 Oudh 177 (177) : 186 Ind Cas 163, *Mahabali v. Ram Dass*.

('39) 26 AIR 1939 Rang 118 (119) : 181 Ind Cas 765, *U Po Nyun v. Ma Ah Ma*.

('37) 24 A I R 1937 Cal 284 (288) : 172 Ind Cas 362 : I L R (1937) 2 Cal 137 (DB), *Md. Moizuddin v. Nalini Bala Devi*.

('23) 10 A I R 1923 Nag 117 (118) : 71 Ind Cas 17 : 19 Nag L R 6 (DB), *Ram Prasad v. Mohan*.

('33) 20 AIR 1933 All 363 (364) : 55 All 280 : 146 Ind Cas 510, *Lal Singh v. Gulab Rai*. (('29) AIR 1929 Mad 432 (DB), *Marina v. Sundayya*; ('93) 17 Mad 92 (DB), *Venkatashubba v. Appusundram* and ('23) AIR 1923 Nag 117 (DB), *Ram Prasad v. Mohan*, followed.)

[See ('86) 9 All 108 (111) : 1886 All W N 310 (FB), *Jiwan Ali v. Basa Mal*.]

6. ('35) 22 AIR 1935 Cal 255 (256) : 155 I. C. 721, *Debji Ghelabhai v. Mehta & Co*.

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1. ('34) 21 A I R 1934 Rang 287 (288) : 152 Ind Cas 501, *Talok Theingan v. Sevugan Chettyar*.

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1. ('40) 27 AIR 1940 Mad 691 (693) : ILR (1940) Mad 913 (DB), *Vasireddi Balachandrasekhara v. Lakshminarasimham*. (Debtor sending money to his friend for payment to creditor — Friend sending same to creditor through messenger with letter to the effect that amount was sent by debtor for payment to him — Payment operates as acknowledgment within the meaning of S. 20.)

('39) 26 AIR 1939 Rang 118 (119) : 181 Ind Cas 765, *U Po Nyun v. Ma Ah Ma*. (But payment made by daughters of promisor not merely as his messengers but as independent persons — To save limitation, endorsements must each be written or signed by that one of them who made each payment.)

('26) 13 AIR 1926 Cal 510 (511) : 53 Cal 163 : 94 Ind Cas 657, *Ramkumar Sewchand v. Nanuram Poddar*. (The postman or peon is merely conduit pipe through which money passes to creditor.)

('21) 8 AIR 1921 Oudh 29 (30) : 61 Ind Cas 918, *Ram Kishan Das v. Shyam Sundar*. (A payment really made by an agent of the debtor does not cease to be

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was made towards a debt when the creditor, N and S were all present, and an endorsement was written by N purporting to be by S. It was held that it was needless to investigate whether the money was handed over by S to the creditor, or through the hand of his officer N, and that the payment must be held to have been made in such a manner that the entry might, if necessary, be made by N.²

28. Sub-section (2) — Mortgagee in possession. — Under the Act of 1871, there was no provision corresponding to sub-section (2) of the present section and it was held that a receipt of rents and profits by a mortgagee was not a *payment* of interest within the meaning of the section and could not save limitation.¹ Under the present sub-section, it is now provided that a receipt of rents or produce of land by a mortgagee thereof in possession shall be *deemed* to be a payment for the purposes of sub-section (1).² This does not mean, however, that such payment is subject to the conditions of sub-section (1) as to handwriting and signature.³ The reason is that, in fact, there is no person at all making any payment in such a case. In *Erasa Menon v. Abdul*

made by debtor because the actual handing over of the money was done by some menial servant under his orders.)

('19) 6 AIR 1919 Cal 144 (147) : 50 Ind Cas 862 (DB), *Sarajubala Debi v. Saradanath Bhattachajee*. (Payment through messenger.)

('20) 7 AIR 1920 Mad 352 (353) : 54 Ind Cas 318, *Duraisamy v. Krishnier*. (Payment through agent's servant.)

2. ('23) 10 AIR 1923 Cal 71 (74) : 72 Ind Cas 692 (DB), *Guljar Mandal v. Sariman*.

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1. ('74) 1874 Pun Re No. 74, *Ram Kishen v. Nawab*. (In this case the produce was *not* received by a mortgagee *as such*.)

('80) 3 Mad 57 (59) : 2 Mad 165 (DB), *Ummar Kutti v. Abdul Kadar*. (Payment of rent under agreement independent of original mortgage.)

[See however ('13) 19 Ind Cas 238(238) : 35 All 270 (DB), *Indrajit v. Gajadhar Sahai*. (Mortgage of 1850 — Realization of rents and profits in lieu of interest was treated as equivalent to receipt of interest *as such*.)]

2. ('38) 25 AIR 1938 All 188 (191) : ILR (1938) All 218 : 174 Ind Cas 292 (DB), *Ram Kumar v. Mahpal Singh*, (Mortgagor in possession as tenant of mortgagee — Receipt of rent by mortgagee amounts to payment of interest *as such*.)

('22) 9 AIR 1922 Oudh 102 (104) : 65 I C 408, *Mahadeo v. Sitla Bakhsh*.

('30) 17 AIR 1930 Oudh 178 (182) : 118 Ind Cas 835 : 5 Luck 53 (DB), *Mata Din v. Iftikhar Hnssain*. (Receipt of rent relating to portion of mortgaged property saves limitation against entire property — ('21) AIR 1921 Bom 437 (DB), *Vithoba v. Balkrishna* and ('22) AIR 1922 Cal 114 (DB), *Bamacharan v. Nimai*, relied on.)

('24) 11 AIR 1924 Pat 169 (171) : 72 Ind Cas 492, *Foujdar Singh v. Baiju*. (Ijara lease — Ijardar allowed to hold over after expiry of lease and to receive produce in lieu of interest — Limitation is extended.)

[See also ('41) 28 AIR 1941 Mad 406 (407), *Kesavan Chettiar v. Ramaswami Chettiar*. (Receipt of rent is deemed to be payment because mortgagor himself consents to it in his contract with the mortgagee. It is thus acknowledgment, continually repeated so long as contract is in form, by mortgagor of mortgagee's claim under mortgage.)]

3. See ('40) 27 AIR 1940 Pat 512 (513) : 187 Ind Cas 484 (DB), *Mathura Singh v. Palakdhari Rai*. (Proviso to sub-section (1) of this section does not apply to sub-section (2).)

Rahiman,⁴ their Lordships of the Madras High Court observed as follows :

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"We cannot accept the construction suggested that the receipt of rent mentioned in sub-section (2) is subject to the conditions mentioned in sub-section (1). If the argument put forward were sound, it would follow that if rent or produce received is appropriated towards the principal of the debt, the part payment must appear in the handwriting of the person making the payment. Is there a person that makes a payment at all? *Ex hypothesi* there is no such person. Granting that the receipt of the rent by the mortgagee is to be treated as a payment by the mortgagor, is it reasonable to expect that such a payment should appear in the handwriting of the debtor? The object of the section is clearly to benefit the mortgagees in possession who receive the rent or produce from the land. This object will be clearly frustrated by adopting the construction suggested. Sub-section (1) contains four paragraphs and when in sub-section (2) it is said that the receipt shall be deemed to be a payment for the purpose of sub-section (1), it does not follow that the payment referred to must necessarily be that indicated in the first and second paragraphs alone of the first sub-section. We shall be giving effect to the intention of the Legislature by holding that the payment referred to is the payment mentioned in paragraph 3.

The section really refers to three things : (1) payment of interest on a debt or legacy by the debtor or his agent; (2) part payment of principal of a debt by the debtor or his agent; (3) receipt by mortgagee in possession of the rent or produce on the land. The meaning of the section is that a fresh period of limitation shall be computed from the time of such payment or receipt. This is the effect of the section, but as this idea is expressed in it in a somewhat different order, it has been found necessary to say that the receipt under sub-section (2) shall be deemed to be payment under sub-section (1)."

Where under a usufructuary mortgage the mortgagee is to take the usufruct for interest, the receipt of the usufruct will be deemed to be a payment only in respect of *that* mortgage and not in respect of any other simple mortgage which the mortgagee may have.⁵ The Madras High Court has, however, held that the *intention* of the mortgagee is immaterial under sub-s. (2). Hence, according to the Madras High Court, where a usufructuary mortgagee has been subrogated to a simple mortgage on the property, the receipt of rent or produce of the property by the mortgagee during the subsistence of the rights under the simple mortgage will extend the period of

4. ('26) 13 AIR 1926 Mad 1061 (1064) : 97 Ind Cas 941.

5. ('27) 14 AIR 1927 All 417 (418) : 100 Ind Cas 670 : 49 All 430 (DB), *Mt. Anpurna Kunwar v. Ram Padarath*.

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limitation for the enforcement of such rights.^{5a}

Where H was a simple mortgagee and the mortgagor leased the property to G who was a son of H, H and G being members of a joint family, and G was authorised to pay the rents to H, it was held that the lease must be deemed to be in favour of the joint family and that the receipt of rents was tantamount to a payment of interest and principal as provided in the lease.⁶

A executes a usufructuary mortgage in favour of B providing that B shall pay Government revenue on the lands and appropriate the balance of the rents and profits towards interest. B leases it back to A for a certain rent and directs A to pay the Government revenue from out of the rent and pay the balance to him. A makes the payment. It must be held that the revenue paid by A must be treated as rent received by the landlord B within the meaning of sub-section (2).⁷

In order that sub-section (2) may apply, it is not necessary that the mortgage should be a *usufructuary* one. It will apply whenever mortgaged land is, in fact, in the possession of the mortgagee whether the mortgage is a simple one or a usufructuary one,⁸ but the receipts of rents and profits must be by "a mortgagee" i. e., by a mortgagee *as such*.

Illustrations.

1. A, the first mortgagee of a property sues on the mortgage without impleading B, the second mortgagee, buys the property at the execution sale which follows and enters into possession. Thereafter, B brings a suit on his mortgage, buys the property in the execution proceedings in such suit and obtains possession of the property. A, on thus being dispossessed, brings a suit for the enforcement of his mortgage against B. On a question of limitation, it was held by a single Judge of the Madras High Court that the rents and profits received by A while in possession were not received by him as a mortgagee as he had entered into possession as a purchaser.⁹ The learned Judge distinguished this case from that in *Bama Charan v. Nimai*^{9a} (on which the next illustration is based) on the ground that in that case the sale under which the mortgagee had entered into possession was inoperative. This view was, however, disapproved in a Division Bench ruling of the same High Court in a later case^{9b} in

5a. ('51) 38 AIR 1951 Mad 802 (Para 5): (1949) 2 Mad L Jour 829 (DB), *Palani-swami v. Ramasami*. (('27) AIR (14) 1927 All 417 : 49 All 430 : 100 Ind Cas 670 (DB), *Anpurna Kunwar v. Ram Padarath*, Disting.)

6. ('28) 15 AIR 1928 All 387 (388): 110 Ind Cas 561 (DB), *Gaya Pd. v. Baburam*.

7. ('26) 13 AIR 1926 Mad 1061 (1063): 97 I. C. 941 (DB), *Eressa Menon v. Abdul*. (Receipt of rent in sub-s. (2) is not subject to conditions mentioned in sub-s. (1).)

8. ('22) 9 AIR 1922 Cal 114 (115): 64 Ind Cas 903 (DB), *Bama Charan v. Nimai*. (Sub-s. (2) does not refer expressly to the intention of party receiving the rent or produce.)

9. ('37) 24 AIR 1937 Mad 642 (643, 644): 172 Ind Cas 576, *Mahomed Yusuf v. Narayana Pillai*.

9a. ('22) 9 AIR 1922 Cal 114 (115, 116): 64 Ind Cas 903 (DB).

9b. ('41) 28 AIR 1941 Mad 475 (476) (DB), *Doraisami Naicken v. Peria Karuppan Chettiar*.

which it was held that there was no distinction in principle between the above case and the Calcutta case referred to. Their Lordships seemed to think that both were cases of a mortgagee going into possession as an owner under an invalid title.

2. A, a simple mortgagee, obtains possession from the mortgagor in pursuance of an agreement of sale which is inoperative and invalid in law. In this case, the receipt of rents and profits can only be in the capacity of a mortgagee as such.¹⁰

3. A is in possession of land under a deed of usufructuary mortgage which is invalid for want of registration. A is not a mortgagee at all and his receipt of rents and profits is not one in the capacity of a mortgagee.¹¹

4. A, a usufructuary mortgagee, receives the rents and profits after a decree has been passed in his favour for sale of the mortgaged property. He must be taken to have received such profits as a mortgagee.¹²

5. On 21st August 1897, a *vatandar* executed a mortgage of his *vatan* land with possession in lieu of interest for a period of ten years; the mortgage deed contained also a personal covenant to pay the mortgage money. The mortgagor died on 24th February 1912, and in 1914 the mortgagee was dispossessed under the Bombay Hereditary Offices Act. In 1917 the mortgagee brought a suit to recover the money due on the mortgage under the personal covenant from the son of the deceased mortgagor. By virtue of the provisions contained in the Bombay Hereditary Offices Act, 1874, a mortgage of a *vatan* land comes to an end *at the death* of the mortgagor. It was held that the receipt of produce up to February 1912 was by the *mortgagee as such* and gave a fresh start of limitation.¹³ But if the mortgagee were to bring his suit for enforcing the personal covenant on a date more than six years from the death of the mortgagor though within a short period of his dispossession, the receipt of the produce by him while he was in possession after the death of the mortgagor *will not give a fresh start of limitation*, as such receipt is not that of a mortgagee but is that of a trespasser.¹⁴

10. ('22) 9 AIR 1922 Cal 114 (115): 64 Ind Cas 903 (DB), *Bama Charan v. Nimai*. [See also ('41) 28 AIR 1941 Mad 475 (476) (DB), *Doraisami Naicken v. Peria Karuppan Chettiar*. (Mortgagee in possession, after preliminary decree, under invalid contract of sale—Receipt of rents and profits saves limitation for application for final decree—This is a Letters Patent Appeal from and reversing ('40) AIR 1940 Mad 461, *Karuppan v. Doraiswamy*.)]

11. ('84) 7 Mad 539 (540) (DB), *Pichandi v. Kandasami*.

12. ('05) 28 Mad 473 (478) : 15 Mad L Jour 126 (FB), *Vaidhinathasamy Iyer v. Somasundaram Pillai*.

('41) 28 AIR 1941 Mad 737 (739), *Ramaswami Chettiar v. Kesavan Chettiar*. (After decree, though rights of parties are governed by decree and not by contract, the parties do not cease to be mortgagor and mortgagee till sale or redemption. Reversing on Letters Patent Appeal ('41) AIR 1941 Mad 406, *Kesavan v. Ramaswami*.)

13. ('21) 8 AIR 1921 Bom 437 (438): 45 Bom 1206: 63 Ind Cas 234 (DB), *Vithoba Mahipati v. Balkrishna Sakharani*. (Kulkarni vatan.)

14. ('20) 7 AIR 1920 Bom 48 (49) : 44 Bom 500 : 57 Ind Cas 76 (DB), *Krishnaji Sakharani v. Kashim Mohideen*.

See also the undermentioned case.¹⁵

The sub-section applies only when the mortgagee is *in possession* and receives the rents and profits.¹⁶ The mere receipt of the rents and profits by the mortgagee will not give a fresh start of limitation if he is not *in possession*. A mortgage deed provided that possession should be given to the mortgagee and that the mortgagee was to credit towards interest any rent realized from the mortgaged property. He was not given possession, but he received rent from tenants of the mortgaged property. It was held that such receipt did not save limitation under this section, as the condition as to *possession* under the mortgage deed was not satisfied.¹⁷

The sub-section does not apply to a charge.¹⁸

29. Explanation. — Before the explanation was added to the section in 1908, there was a conflict of opinion as to whether the word "debt" included a decree debt: the Allahabad High Court¹ and the Punjab Chief Court^{1a} holding that it did, the High Courts of Calcutta²

15. ('48) 35 AIR 1948 Mad 105 (108) : (1947) 1 Mad L Jour 373 (DB), *Sooryanarayana Rao v. Sarup Chand Rajaji*. (Sale in favour of mortgagee in satisfaction of debt — Mortgagee obtaining possession — Sale subsequently set aside as invalid — Possession of mortgagee and his receiving of rent held to be in capacity of mortgagee.)

('47) 34 AIR 1947 Oudh 91 (93) : 227 Ind Cas 577, *Ram Sukh v. Ram Pher*. (Ancestral land purported to be mortgaged for debt not taken for legal necessity — Mortgage is wholly void — Plaintiff obtaining possession under such mortgage is not in possession of land as mortgagee. The receipt of rent by the plaintiff cannot in such a case, extend the period of limitation.)

('44) 31 AIR 1944 Nag 37 (39) : ILR (1943) Nag 764 : 213 Ind Cas 23 (DB), *Girdharilal Houshilal v. Ranoo Raghoji*. (Possession as vendee of mortgaged property — Receipt of rent and produce could not be said to be payment within S. 20.)

('43) 30 AIR 1943 All 294 (295) : ILR (1943) All 604 : 209 Ind Cas 10, *Panchoo v. Ram Sunder*. (Where, in a suit brought under S. 65, Contract Act, to recover money on the failure of a mortgage which was void *ab initio*, the creditor, in reply to the plea of limitation, pleads an acknowledgment by the debtor under S. 20 (2), Limitation Act, he must, in order to succeed, show that the debtor acknowledged the liability arising under S. 65 of the Contract Act.)

('40) 27 AIR 1940 Pat 494 (496) : 19 Pat 507 : 187 Ind Cas 266 (DB), *Maksudan Lal Sahu v. Niranjana Nath*. (Usufructuary mortgage in violation of S. 46 of Chota Nagpur Tenancy Act is void after five years from execution of mortgage — Possession of mortgagee afterwards is that of *trespasser* and his enjoyment of the rents and profits of the land afterwards is not sufficient to save limitation for suit for money by him.)

16. See ('89) 1889 Bom P J 225 (DB), *Ramji v. Vaijanath*.

17. ('33) 20 AIR 1933 Lah 741(742) : 144 I. C. 641(DB), *Dial Singh v. Davindar*.

18. ('43) 30 AIR 1943 Oudh 211 (211) : 18 Luck 637 : 206 Ind Cas 238 (DB), *Gur Din v. Raj Kunwar*.

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1. ('03) 26 All 36 (39) : 1903 All W N 179 (DB), *Koshan Singh v. Mata Din*.
[See ('80) 3 All 247 (249, 250) (FB), *Rahmit Rai v. Satgur Rai*.]

1a. ('86) 1886 Pun Re No. 61, *Chajju v. Gulab*. (Assumed.)

2. ('79) 4 Cal 708 (709) (DB), *Mungol Prashad Dichit v. Shama Kanto Lahory*.
(It means liability to pay money for which a suit can be brought.)

('77) 2 Cal 468 (469) (DB), *Kally Prosonno Huzra v. Heera Lal Mundle*.

('02) 6 Cal W N 766 (768) (DB), *Kader Baksh Sarkar v. Gour Kishore Roy*.

and Madras³ holding that it did not. The conflict has now been set at rest by the addition of the explanation.

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Notes 29-30

The word "decree" does not mean only a final decree capable of execution; it will include also a *preliminary* decree for sale, and time for an application for final decree may be extended by a payment for interest towards the preliminary decree.⁴

Where an instalment decree provided for monthly instalments it was held that the decree created a single judgment-debt and when any instalment was paid it was a part of payment of the whole debt and it operated to start a fresh period of limitation for the whole amount remaining unpaid and not at the time barred by limitation.⁵

30. Decree-debt — Payment — Certification. — A payment towards a decree-debt, made out of Court, cannot be recognised by an executing Court for any purpose unless such payment has been certified to the Court under the provisions of O. 21, R. 2 of the Civil Procedure Code. Hence such uncertified payment cannot be recognised by the executing Court for the purpose of saving limitation under this section.^{1aa} Such certification may, however, be made even at the time of the execution petition and consequently the fact that the decree-holder has not certified that payment *earlier* is no obstacle to the application of this section.¹ But a certification cannot be made after

3. ('04) 28 Mad 40 (41) (DB), *Srinivasachariar v. Punnuswamy Nadar*.
('04) 27 Mad 608 (608, 609) (DB), *Kuppusamy Chetty v. Rangasamy Pillai*.
[See ('02) 25 Mad 431 (442) : 12 Mad L Jour 166 (FB), *Periasamy v. Krishna*.
(As judgment-creditor is one whose claim has been merged into a judgment against his debtor.)]
4. ('27) 14 AIR 1927 All 159 (160) : 49 All 147 : 98 Ind Cas 818 (DB), *Baldeo Sahai v. Jafar Hussain*.
5. ('43) 30 AIR 1943 Bom 260 (261) ; 209 Ind Cas 426, *Kantilal Shah v. Amratlal Shah*.

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- 1aa. ('43) 30 AIR 1943 Pat 7 (9) : 21 Pat 481 : 204 Ind Cas 318 (DB), *Ganjhoo Deo v. Hari Sahu*.
1. ('25) 12 AIR 1925 Cal 1012 (1014) : 54 Cal 143 : 86 Ind Cas 1051 (DB), *Jalim Chand v. Yusufali Choudhuri*.
('21) 8 AIR 1921 Cal 643 (643) : 64 I. C. 72 (DB), *Madan Mohan v. Haru Lal*.
('36) 23 AIR 1936 Nag 281 (281) : I L R (1937) Nag 106 : 165 Ind Cas 804, *Baijnath v. Kanhaiyalal*.
('25) 12 AIR 1925 Mad 131 (131) : 82 Ind Cas 743, *Narayana v. Raman*.
('19) 6 AIR 1919 Cal 677 (677) : 46 Cal 22 : 45 Ind Cas 903 (DB), *Jotindra Kumar Dass v. Gagan Chandra Pal*.
('19) 6 AIR 1919 Cal 181 (182) : 50 Ind Cas 242 (DB), *Bahuballav Roy v. Jogesh*.
('18) 5 AIR 1918 Cal 982 (983) : 35 Ind Cas 177 (DB), *Harendra v. Gagan*.
('16) 3 AIR 1916 Cal 451 (451, 452) : 43 Cal 207 : 34 Ind Cas 606 (DB), *Esuff v. Sanchialal*.
('18) 5 AIR 1918 Mad 620 (621, 622) : 41 Ind Cas 701 : 41 Mad 251 (DB), *Masilamany Mudaliar v. Sethuswami Aiyar*.
('16) 3 AIR 1916 Mad 958 (959) : 31 Ind Cas 318 (DB), *Rajam v. Anantharatnam*.
('15) 2 AIR 1915 Cal 235 (236) : 27 Ind Cas 11 (DB), *Lakhi Narain v. Felamani Dasi*.
('19) 6 AIR 1919 Sind 70 (72, 75) : 13 Sind L R 37 : 52 Ind Cas 804 (FB), *Shafi Mohamed v. Choithram*.

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Note 30

the judgment-debtor has raised an objection that the application is barred by limitation.^{1a} When certified the date of the payment for purposes of this section is not the date of the certification but the date of the actual payment.² A contrary view that a fresh period of limitation would run only from the date of *certification* has been held in the undermentioned case,³ the reason given being that to take it

- (20) 7 AIR 1920 Sind 23 (24): 60 Ind Cas 935: 14 Sind L R 198 (DB), *Pahlumal Tewanmal v. Sidik*. (Instalment decree — Payment of interest as such may be shown in execution application to extend period.)
- (24) 11 AIR 1924 Lah 676 (677): 75 Ind Cas 1029, *Fattu v. Nanakchand*. (Part payment of decree amount entered in execution petition amounts to certification.) [See also (33) 20 AIR 1933 Mad 674 (675): 147 Ind Cas 586, *Chathukutty v. Raman*.]
- (29) 16 AIR 1929 Mad 811 (811): 117 Ind Cas 790, *Chinnaswamy Kavirayer v. Periatthambi Butler*. (Avowal by decree-holder in affidavit may be accepted as certificate.)
- (15) 2 AIR 1915 Sind 48 (49): 30 Ind Cas 51: 9 Sind L R 27, *Narsoomal v. Thirathmal*.
- (35) 22 AIR 1935 Mad 922 (923): 159 Ind Cas 38, *Gangayya v. Seshagiri Rao*. (Material point is not when payment was certified but when it was made.)
- (18) 5 AIR 1918 Oudh 460 (461): 47 Ind Cas 177: 21 Oudh Cas 161, *Haider Mirza v. Kailash Narain Dar*.
- (21) 8 AIR 1921 Bom 411 (412): 45 Bom 91: 59 Ind Cas 399 (DB), *Pandurang Balkrishna v. Jagya Bhanu*.
- (19) 6 AIR 1919 Pat 136 (137): 50 Ind Cas 364: 4 Pat L Jour 159 (DB), *Elahi Bux v. Nawab Lall*.
- (27) 14 AIR 1927 Oudh 7 (11): 29 Oudh Cas 358: 1 Luck 428: 98 Ind Cas 353 (DB), *Parkash Singh v. Allahabad Bank Ltd*. (There is no limitation for certifying payment by decree-holder.)
- (19) 6 AIR 1919 All 211(212): 52 I. C. 362 (DB), *Qadam Singh v. Nathu Singh*.
- (16) 3 AIR 1916 Mad 795 (799): 30 Ind Cas 357, *Lodd Govinda Dass v. Rajah of Karvetnagar*. (No particular words are necessary for certification.) [But see (27) 14 AIR 1927 All 827 (828): 100 Ind Cas 574 (DB), *Jawala Sahai v. Bhim Singh*. (Application to certify payment must be made by prior and separate proceeding—Decision to be held not good law after (28) AIR 1928 All 629 (FB), *Joti Prasad v. Sri Chand*.)]
- 1a. (40) 27 AIR 1940 Pat 594 (594, 595): 190 Ind Cas 760, *Bhobani Naik v. Balaram Dhal*. ((28) AIR 1928 All 629 (FB), *Joti Prasad v. Sri Chand*, followed.)
2. (25) 12 AIR 1925 All 802 (804): 47 All 873: 89 Ind Cas 415 (DB), *Amar Singh v. Mt. Ram Dei*.
- (28) 15 AIR 1928 All 629 (632): 51 All 237: 112 Ind Cas 73 (FB), *Joti Prasad v. Sri Chand*. ((28) AIR 1928 All 55 (DB), *Peare Mohan v. Raghunath*, not followed.)
- (35) 22 AIR 1935 Mad 922 (923): 159 Ind Cas 38, *Gengayya v. Seshagiri Rao*. (Material point is not when payment was certified but when it was made.)
- (19) 6 AIR 1919 Sind 70 (72, 75): 13 Sind L R 37: 52 Ind Cas 804 (FB), *Shafi Muhammad v. Choithram*.
- (31) 18 AIR 1931 Cal 719 (721): 134 Ind Cas 922: 59 Cal 760 (FB), *Amar Krishna v. Jagat Bandhu*.
- [See also (25) 12 AIR 1925 Cal 1012 (1013): 86 Ind Cas 1051: 54 Cal 143 (DB), *Jalim Chand v. Yusufali Choudhury*.]
- (30) 17 AIR 1930 All 123 (124): 124 Ind Cas 22, *Ram Sarup v. Mahomed Obaidulla*.]
3. (24) 11 AIR 1924 Oudh 392 (392): 79 Ind Cas 799, *Janwanti Kunwar v. Mohan Dei*. (Certification after three years from date of decree —Section 20 does not apply—(14) AIR 1914 All 235, *Gokul v. Bhika*, followed.)

otherwise would be to recognise an uncertified payment. This means that according to this view, the *certification* as well as the payment must take place within three years from the date of the decree or the last starting point of limitation. This necessarily involves that the certification is made within three years from the payment. But even if it is held that time will run under this section from the date of *payment* and not certification and that consequently, the certification need not be made within three years from the decree or last starting point of limitation, the certification must be made within three years from the *payment*, as otherwise the execution application would itself be barred under Art. 182.⁴ See also Note 3 to Art. 174, Note 18 to Art. 181 and Note 124 to Art. 182.

See also A. I. R. Commentary on the Civil Procedure Code, 5th (1950) Edition, Order 21 Rule 2, Note 27.

31. Nature of liability affected by payment. — A payment by a mortgagor towards the mortgage debt keeps alive the *mortgage* itself as against him and not merely his personal liability.¹ A part payment of principal and interest due under a bond will not, however, give a fresh starting point of limitation in respect of a claim for *damages* for non-payment of principal and interest on the due date, inasmuch as the liability for damages forms no part of the original liability under the bond.² A promissory note executed contemporaneously with the loan or afterwards is only a collateral security for the original loan. A payment of interest on the promissory note, therefore, would be sufficient to save limitation in respect of the original loan.³ Where a mortgage is discovered to be void, a receipt of rent or produce by the mortgagee in possession will not save limitation for a claim under S. 65 of the Contract Act unless it is shown that such receipt was related to such claim.⁴

[See also ('25) 12 AIR 1925 Rang 26 (27) : 2 Rang 393, *Maung Law v. Maung Po*. (Certification within three years of payment made within three years of decree will afford fresh starting point of limitation under Art. 182 (5).)]

4. ('25) 12 AIR 1925 Rang 26 (27) : 2 Rang 393, *Maung Law v. Maung Po*. ('15) A I R 1915 Cal 235 (DB), *Lakhi Narain v. Felamani Dasi* and ('19) AIR 1919 Cal 677 (DB), *Jotindra v. Gagan Chandra*, followed.)

('19) 6 AIR 1919 Cal 181 (182) : 50 Ind Cas 242 (DB), *Bahuballav v. Jogesh Chandra*.

('25) 12 AIR 1925 Cal 1012 (1014) : 54 Cal 143 (DB), *Jalim v. Yusufali*.

('27) 14 AIR 1927 Cal 29 (29) : 98 Ind Cas 825 (DB), *Rebati Mohan v. Alauddin*.

[See ('33) 20 AIR 1933 Sind 365 (366) : 147 Ind Cas 30 (DB), *Kaliandas Balchand v. Mahomed Khan*.]

Section 20 — Note 31

1. ('29) 16 AIR 1929 All 380 (381) : 119 Ind Cas 437 (DB), *Ghasi Khan v. Kishori*. (Payment by one of two co-mortgagors.)

2. ('92) 1892 All W N 239 (239) (DB), *Gurdayal Singh v. Chatarbhuji*.

3. ('45) 32 AIR 1945 Cal 268 (276) : 49 Cal W N 37 (DB), *Jyoti Prosad v. Jahor Lal*.

4. ('43) 30 AIR 1943 All 294 (295) : I L R (1943) All 604 : 209 Ind Cas 10, *Panchoo v. Ram Sunder*.

Section 20
Notes 31-34

General Balance of Account.—When the customer of a bank draws a cheque on it knowing that the funds at his credit are insufficient to meet it but expecting the bank nevertheless to honour it, he impliedly applies to the bank for an overdraft or loan. Each such transaction is an independent loan and each payment by the customer goes to extend the limitation in regard to the particular overdraft which it goes to repay and which would be the earliest item outstanding on the debit side. Such payment would be of no avail to save limitation in respect of the general balance of account.⁵

32. Question, what a sum of money was paid for, is one of fact. — The question what a particular sum of money is paid for is *prima facie* a question of fact and not of law.¹

33. Second appeal. — The question whether money was paid for interest as such or for part payment of principal necessarily involves the determination of a question of fact and therefore cannot be allowed for the first time in second appeal.¹

34. Unregistered endorsement of payments. — Endorsements on mortgage documents acknowledging the payment of a part of the mortgage money fall within the scope of S. 17, sub-s. (2), clause (11), Registration Act and are admissible in evidence to prove the discharge of the mortgage *pro tanto* without registration.¹

5. ('48) 35 AIR 1948 Pat 18 (22) : 26 Pat 231 (DB), *Basanta Kumar v. Chota Nagpur Banking Asscn.*

[See however ('38) 25 AIR 1938 Nag 266 (267) : I L R (1939) Nag 137 : 178 Ind Cas 50, *Sukhdeo Prasad v. J. Michael*. (More than one debt due—Payment made not specifically appropriated—It is a question of fact in respect of which debt the payment was made—Appropriation need not be proved by any express declaration of the debtor at time of payment but may be inferred from his words and conduct and other circumstances—If evidence shows that payment was made on account of all, it will prevent any of the debts from becoming time-barred.)]

Section 20 — Note 32

1. ('28) 15 AIR 1928 P C 243 (245) : 111 Ind Cas 288 : 55 Ind App 380 (PC), *Narendra Nath Datta v. Abul Hakim*.

('26) 13 AIR 1926 Mad 183 (183) : 92 Ind Cas 687, *Subbayya v. Gangayya*. (Whether payment was made on account of interest.)

('26) 13 AIR 1926 Nag 245 (246) : 91 Ind Cas 200 (DB), *Gulam Abbas v. Govindrao*. (The finding that certain payments made by the mortgagors must be considered as payments towards interest as such is a question of fact.)

('09) 1 Ind Cas 137 (139) : 31 All 285 (DB), *Gopi Nath Singh v. Hardeo Singh*. (('03) 5 Bom L R 350, *Damodar v. Jankibai*, followed.)

[See ('82) 4 All 512 (514) (DB), *Surju Prasad Singh v. Khwahish Ali*.

('19) 6 AIR 1919 Cal 1028 (1028) : 46 Ind Cas 592 (DB), *Sivakumari v. Bishwambhar*. (Court can presume from facts whether payments were made towards interest.)]

Section 20 — Note 33

1. ('23) 10 AIR 1923 Bom 82 (83) : 76 Ind Cas 115 : 47 Bom 128 (DB), *Satappa v. Annappa*.

('21) 8 AIR 1921 Nag 94 (95) : 59 Ind Cas 709 (709), *Jago v. Mahadeo*.

Section 20 — Note 34

1. ('18) 5 AIR 1918 Mad 645 (645) : 40 Ind Cas 893 (DB), *Bommana v. Ankayya*. (('15) AIR 1915 Mad 914, *Peda v. Surya Rao*, distinguished.)

35. Burden of proof. — Where a suit is *prima facie* barred by limitation according to the period fixed in the first schedule, it is for the plaintiff to show that it is not barred by virtue of a payment made under this section.¹ Under O. 7, R. 6 of the Civil Procedure Code, where a suit is *prima facie* barred according to the period prescribed by the first schedule, the plaintiff has to state in his plaint the reasons why the suit is within time.² If there is no such statement the Court has to dismiss the suit.³

The admission made by the promisor on the back of a promissory note to the effect that part payment was made by him on a particular date, must be presumed to be true, for, it has been said that what a man admits to be true must reasonably be presumed to be true; the admission shifts the burden on the person making it of showing that this admission was untrue in fact or was under circumstances which did not make the admission binding upon him.⁴

It has been held in the undermentioned case⁵ that if a payment towards the debt is shown to have been made, it is not necessary to show whether it is towards the principal or interest. This view clearly goes against the decision of the Privy Council in AIR 1940 P.C. 63 (67)^{5a} and is not correct. It is for the plaintiff claiming extension of time to show that the payment by the defendant is of such a nature as would extend limitation under this section.⁶ He must therefore show not only that the payment was made within the prescribed period but also that it was made with the intention of paying it for interest or for part of the principal, or, where the debtor had not indicated his intention in

Section 20 — Note 35

1. ('34) 21 AIR 1934 Lah 475 (476) : 155 Ind Cas 238 (DB), *Sita Ram v. Mt. Mahmudi*.
- ('34) 21 AIR 1934 Mad 549 (550) : 152 Ind Cas 299 (DB), *Valliappa v. Maruda*.
- ('30) 17 AIR 1930 Mad 738 (740) : 127 Ind Cas 641, *Lokanadha v. Lokhono*.
- ('30) 122 Ind Cas 626 (627) (DB) (Cal), *Baradakanta Roy v. Jatindra Nath*.
- ('27) 14 AIR 1927 Rang 255 (256) : 104 Ind Cas 368 (DB), *Ahmedsa Rowther v. Maung San Nyen*. (Promissory note bearing two endorsements, as to same payments, on different dates — Plaintiff must prove correctness of date bringing his suit within time.)
2. ('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai & Bros. v. R. D. Mehta & Co.* (Written statement cannot be called in aid.)
- ('21) 8 AIR 1921 Nag 94 (95) : 59 Ind Cas 709 (710), *Jago v. Mahadeo*.
- ('35) 22 AIR 1935 Cal 648 (648) : 158 I. C. 512, *Ananda Charan v. Jhatu Charan*.
3. ('35) 22 AIR 1935 Cal 255 (256) : 155 Ind Cas 721, *Debji Ghelabhai & Bros. v. R. D. Mehta & Co.*
[See ('10) 7 Ind Cas 455 (456) : 34 Bom 540 (DB), *Ghulam Hussain v. Muhammadali*. (Plaint not in accordance with law.)]
4. ('37) 24 AIR 1937 Cal 284 (287) : ILR (1937) 2 Cal 137 : 172 Ind Cas 362 (DB), *Md. Moizuddin v. Nalini Bala Devi*. (('06) 29 All 184 (PC), *Chandra Kunwar v. Narpal Singh*, relied on.)
5. ('39) 26 AIR 1939 Nag 156 (158) : ILR (1939) Nag 235 : 182 Ind Cas 573 (DB), *Narain Chouthmal v. Rama Jago*.
- 5a ('40) 27 AIR 1940 P C 63 (67) : 187 Ind Cas 233 : I L R (1940) Kar P C 134 : 67 Ind App 160 : I L R (1940) Lah 470 (PC), *Rama Shah v. Lal Chand*.
6. ('13) 22 Ind Cas 959 (959) : (1913) 1 Upp Bur Rul 178, *Nga Ya Baw v. Nga Bya*.

Section 20
Notes 35-36

this respect, that the creditor had appropriated the payment towards the principal.⁷ He must also show, where the payment is made by a person other than the debtor, that such person was an agent duly authorised by the debtor to make the payment.⁸

36. Article 75 and this section. — Article 75 provides that in the case of suits on promissory notes or bonds payable by instalments which provide that if default be made in one or more instalments the whole shall become due, the suit should be filed within three years of the *date of default*, unless the payee or the obligee waives the benefit of the provision, in which case the suit should be filed within three years of the date when fresh default is made in respect of which there is no such waiver. Where payments of certain overdue instalments are made and are accepted by the creditor, time will run from the date of the default of the next instalment. There is no need in such a case to resort to S. 20 and show that by reason of earlier payments the limitation is extended under this section.¹⁻² But where the default has been waived and the claim is only for past instalments, a payment

[See also ('41) 28 AIR 1941 Oudh 56 (57) : 16 Luck 113 : 190 Ind Cas 334, *Khat Khata Nand v. Surajpal Singh*. (It must be shown that payment was made towards principal or appropriated by creditor towards principal.)]

7. See ('38) 25 AIR 1938 Rang 401 (402) : 1938 Rang L R 594 : 178 Ind Cas 869 (DB), *U Tun Maung v. L Ah Choy*.

('15) 2 AIR 1915 Lah 275 (276) : 31 Ind Cas 782 (DB), *Muinuddin v. Ahmad*.

('14) 1 AIR 1914 All 114 (115) : 23 Ind Cas 863, *Ramachandra v. Durgi*.

('09) 2 Ind Cas 524 (525) : 31 All 590 (DB), *Oudh Behari v. Mahabi*.

8. ('11) 11 Ind Cas 858 (858) (DB) (Low Bur), *Muthu Veerappa v. Abdul*,

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1-2. ('43) 30 AIR 1943 All 172 (177) : ILR (1943) All 210 : 207 Ind Cas 53 (DB), *Rup Narain v. Tirbeni Sahai*.

('25) 12 AIR 1925 Lah 394 (395) : 6 Lah 163 : 89 Ind Cas 294 (DB), *Nand Lal v. Akki*. (('12) 16 Ind Cas 961 (DB) *Jawand v. Sharf Din*, not followed)

('31) 18 AIR 1931 Cal 157 (158) : 58 Cal 615 : 130 Ind Cas 571 (DB), *Probhat Chandra v. Mohesh Chandra* (Do.)

('20) 7 AIR 1920 Lah 472 (472), *Ram Jawaya Shah v. Ram Singh*.

('24) 11 AIR 1924 Pat 439 (440) : 75 Ind Cas 98 (DB), *Mundo Singh v. Krishna Dayal Gir*. (Section 20 applies where the cause of action has already arisen and the plaintiff is seeking to have a fresh period of limitation computed from the time when a payment was made by the debtor.)

[See ('39) 26 AIR 1939 Lah 212 (215), *Abdullah v. Ishaq Mohammad*. (Case under Article 135 — Mortgage deed providing that on default in payment of interest, mortgagee should be entitled to possession — Payment and acceptance of overdue arrears of interest — Limitation for suit for possession by mortgagee runs from next default and no question of the applicability of S. 20 arises.)]

[See also ('34) 21 AIR 1934 Oudh 455 (457) : 151 I. C. 852 (DB), *Gaya Din v. Kiali Ram*.]

[See however ('38) 25 AIR 1938 Lah 570 (571) : 178 Ind Cas 597, *Bhagat Ram v. Ralla Ram* (Mortgage bond providing that in case of default of payment of interest for three years, the mortgagee would become entitled to realise the whole amount — Default made for more than three years — Subsequent payment of entire arrears of interest — Held that there was no waiver of the default clause and that the payment would only give the plaintiff a fresh period of limitation under this section from the date of payment but would not postpone the starting point of limitation till there was again default for three years in payment of interest.)]

towards such instalments will save limitation under this section. It will be noted that such cases do not come under Art. 75 but under Art. 74. (See Art. 75 Note 7). Similarly, where default has been made and has not been waived with the result that time begins to run under Art. 75 from the date of the default, limitation can be extended by payment under this section.^{2a} Where an instalment bond provides that on default the agreement for payment by instalments shall be cancelled or invalidated and the whole unpaid balance, shall become due, it has been held that on the happening of the default the agreement to pay by instalments no longer subsists and the obligee has no option to waive the default and to treat each subsequent default as providing a cause of action where in such a case the obligor pays the first defaulted instalment within three years from the date of default a fresh period of limitation begins to run from the date of payment for the unpaid balance.^{2b} The question when a default was made will, however, involve a determination of the question whether any earlier payments were made and accepted by the creditor. In order to prove such payments, it is not necessary that the payment should be in the handwriting of or in a writing signed by the person making the payment. As has been seen in Note 24, it is only *for the purposes of section 20* that a payment towards the debt should be in the handwriting of the person making it; the creditor is not debarred from proving by evidence that a payment of certain instalments was made for his debt and that he had waived the default in respect of such instalments.³

See also Note 23 to Article 75.

37. Distinction between Sections 19 and 20 and Article 183. — Article 183 contains a proviso under which an acknowledgment of liability or a part payment or payment of interest will give a fresh starting point of limitation under that article. But, there are various points of difference between Ss. 19 and 20 on the one hand and Art. 183 on the other, as regards the *requirements* of such acknowledgment or payment. Thus, under both Ss. 19 and 20, the acknowledgment or payment must be made before the expiry of the prescribed period of limitation, while Art. 183 does not prescribe any time limit within which the acknowledgment or payment must be made.¹ Similarly, an acknowledgment under S. 19 need not be addressed to the person entitled, while under Art. 183 the acknowledgment is required to be made to the person entitled. Again, in

2a. ('49) 36 AIR 1949 All 764 (766) : ILR (1950) All 701, *Chheda v. Baldeo*.

2b. ('49) 36 AIR 1949 Pat 447 (447) : 30 Pat L Tim 11 (DB), *Nalinaksha Ghosh v. Suleman*.

3. ('27) 14 AIR 1927 Cal 102 (106) : 98 Ind Cas 147 (DB), *Gobinda Chandra v. Pulin Behari*.

('25) 12 AIR 1935 Lah 394 (395) : 6 Lah 163 : 89 Ind Cas 294 (DB), *Nand Lal v. Akki*.

('31) 18 AIR 1931 Cal 157 (158) : 58 Cal 615 (DB), *Probhat Chandra v. Mohesh*.

[But see ('12) 16 Ind Cas 961 (961) : 1913 Pun Re No. 35 (DB), *Jawand Lal v. Sharf Din*.]

Section 20 — Note 37

1. ('87) 11 Bom 506 (513) (DB), *Purmananddas Jiwanddas v. Vallabdas Wallji*.

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regard to a payment under S. 20, an acknowledgment of the payment is required to be made in the handwriting or in a writing signed by the person making the payment, while there is no such provision in Art. 183. So also, it has been held that a payment under Art. 183 need not be made by the person liable or his agent,² while under S. 20 the payment must be made by the person liable or his agent. Thus, an acknowledgment or payment which satisfies the requirements of Ss. 19 and 20 may fail to satisfy the requirements of Art. 183 and conversely, an acknowledgment or payment which satisfies the requirements of Art. 183 may fail to satisfy the requirements of S. 19 or S. 20.

In the first case, it is clear, the acknowledgment or payment will not furnish a fresh starting point of limitation under Art. 183 taken by itself. But, under S. 3, the articles in the first schedule must be read subject to the provisions of Ss. 4 to 25 of the Act and hence, a fresh period of limitation will run from the date of the acknowledgment or payment under Ss. 19 and 20 notwithstanding the fact that the acknowledgment or payment is ineffective for the purposes of Art. 183.³

In the converse case, viz., that of an acknowledgment or payment which satisfies the requirements of Article 183 but fails to satisfy the requirements of sections 19 and 20, the date of the acknowledgment or payment will be the starting point of limitation under Article 183 notwithstanding that the acknowledgment or payment does not satisfy the requirements of sections 19 and 20.⁴

The reason is that S. 3 only provides that where a proceeding is instituted *after the expiry* of the period prescribed by the first schedule, such proceeding shall be dismissed, subject to the provisions of Ss. 4 to 25. In other words, the provisions of the section come into play only in cases where the proceeding is instituted *after* the period prescribed by the first schedule and not where under the particular article in question itself, the proceeding is not time-barred.

2. ('25) 12 AIR 1925 Mad 1131 (1132) : 90 Ind Cas 1022 (DB), *Prabappa Chetti v. Desikachari*. (Payment for judgment-debtor or on his account is sufficient.)

('31) 18 AIR 1931 Pat 218 (219) : 10 Pat 213 : 132 Ind Cas 109 (DB), *Tugan Mull v. Ladhu Lal*.

3. ('40) 27 AIR 1940 Cal 210 (210) : I L R (1939) 2 Cal 523 : 188 Ind Cas 280, *Sreenarain Kayan v. Bhagwandas Churiwalla*. (Acknowledgment not made to creditor though not falling under Proviso to Article 183, will extend limitation under S. 19.)

4. ('31) 18 AIR 1931 Pat 218 (219) : 10 Pat 213 : 132 Ind Cas 109, *Tugan Mull v. Ladhu Lal*. (Provisions of Article 183 regarding acknowledgments and payments are self-contained and must be read independently of the provisions of Ss. 19 and 20.)

('25) 12 AIR 1925 Mad 1131 (1132) : 90 Ind Cas 1022 (DB), *Prabappa Chetty v. Desikachari*.

[See ('24) 11 AIR 1924 Mad 638 (640) : 78 Ind Cas 832, *Sabapathy Chetty v. Shanmugappa Chetty*. (Properties belonging to the judgment-debtor were sold and the proceeds brought into Court—The Court ordered payment thereout to the decree-holder but the money was actually paid only some time later—Held that the payment by Court operated to give a fresh starting point of limitation for execution of the decree under Article 183 of the Limitation Act—Such payment was a payment of an agent of the judgment-debtor.)]

Section 21

21.* (1) The expression "agent duly authorised in this behalf," in sections 19 and 20, shall, in the case of a person under disability, include his lawful guardian, committee or manager, or an agent duly authorised by such guardian, committee or manager to sign the acknowledgment or make the payment.

(2) Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them.

(3) for the purposes of the said sections —

(a) an acknowledgment signed, or a payment made, in respect of any liability, by, or by the duly authorised agent of, any widow or other limited owner of property who is governed by the Hindu law, shall be a valid acknowledgment or payment, as the case may be, as against a reversioner succeeding to such liability; and

(b) where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorised agent of, the manager of the family for the time being shall be deemed to have been made on behalf of the whole family.

Synopsis

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| 1. Legislative changes. | 4. Acknowledgment or payment by a guardian of insane person. |
| 2. Scope of the section. | 5. Court of Wards, acknowledgment or payment by. |
| 3. Acknowledgment or payment by guardian of minor. | |

* Act of 1877 : S. 21.

21. Nothing in sections 19 and 20 renders one of several joint-contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed, or of a payment made by, or by the agent of any other or others of them.

Act of 1871 ; S. 20, Explanation 2.

Explanation 2. — Nothing in this section renders one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them.

Act of 1859 : S. 4, Proviso.

Provided that, if more than one person be liable, none of them shall become chargeable by reason only of a written acknowledgment signed by another of them.

One of several joint contractors, etc., not chargeable by reason of acknowledgment or payment made by another of them.

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Notes 1-2

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| <p>5a. Acknowledgment by agent of guardian.</p> <p>6. Sub-section (2)—General.</p> <p>7. Joint contractors—Acknowledgment or payment by one of them—Effect of.</p> <p>8. "Joint contractors," meaning of.</p> <p>9. Co-heirs of single debtor, whether joint contractors. See Note 8.</p> <p>10. Muhammadan co-heirs.</p> <p>11. Co-mortgagors — Acknowledgment or payment by one—Effect of.</p> <p>12. Principal and surety — Acknowledgment or payment by one, whether will save limitation against the other.</p> | <p>13. Partner — Authority of, to acknowledge or pay on behalf of firm.</p> <p>14. Hindu trading family.</p> <p>15. Executors.</p> <p>16. Joint mortgagees.</p> <p>17. Acknowledgment or payment by one of several judgment-debtors.</p> <p>18. "Chargeable," meaning of. See Note 6.</p> <p>19. Acknowledgment or payment by Hindu widow, whether binding on reversioners.</p> <p>20. Acknowledgment or payment by manager of Hindu joint family — Sub-section (3) clause (b).</p> <p>21. Acknowledgment or payment by manager of Malabar tarwad.</p> <p>22. Acknowledgment or payment by head of Muhammadan family.</p> |
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TOPIC INDICATOR

Acknowledgment or payment by a partner after dissolution —

Whether binds estate of a deceased partner. See Note 13.

Acknowledgment or payment by manager after partition —

Whether binds other members. See Note 20.

Lawful guardian of minor. See Note 3.

Natural guardian of minor. See Note 3.

Sections 19, 20 and 21. See Notes 2, 6.

1. Legislative changes.

- (1) In the Act of 1859, there was a general provision that if more than one person were liable, none of them should be chargeable by reason only of an acknowledgment signed by another of them.
- (2) In the Act of 1871, the general words which occurred in the Act of 1859 were repealed and it was provided that in the case of *partners* or *executors*, an acknowledgment by one of them alone could not, by itself, be binding on the others.
- (3) In the Act of 1877, the provision was expanded so as to include joint contractors and mortgagees. Further, whereas the previous sections had only referred to acknowledgments of liability, the provision in the Act of 1877 referred both to acknowledgments and payments.
- (4) Sub-section (1) of the section was added in the Act of 1908.
- (5) Sub-section (3) was added by the Limitation (Amendment) Act, I of 1927.

2. Scope of the section.—This section supplements the provisions of ss. 19 and 20 as to the *persons* by whom an acknowledgment or payment may be made.

The section only deals with the question as to who can *keep alive* a right which is not time-barred. It is not concerned with the question as to who can *revive* a time-barred debt. Thus, it does not deal with

the question whether a Hindu widow can revive a time-barred debt of her husband. Similarly, it does not deal with the power of the manager of a Hindu joint family to revive a time-barred debt of the family. The undermentioned cases¹ can, however, be consulted in regard to this matter.

3. Acknowledgment or payment by guardian of minor.—

Before the enactment of sub-s. (1) in the Act of 1908, there was a conflict of decisions on the question whether the guardian of a minor is an agent duly authorised within the meaning of ss. 19 and 20 for the purpose of making acknowledgments of liability and payments on behalf of the minor.¹ This conflict has now been set at rest by the

Section 21 — Note 2

1. ('37) 24 A.I.R. 1937 Nag 327 (329): 172 Ind Cas 493, *Chunilal Dhurajmal v. Chakkilal*. (Manager of Hindu family cannot revive time-barred debt — Hindu father alone has the power to pass a promissory note for a time-barred debt so as to be binding on his son.)
- ('82) 5 Mad 169 (170) (FB), *Chinnaya Nayadu v. Gurunatham*. (Manager of Hindu family cannot revive time-barred debt.)
- ('21) 8 AIR 1921 Pat 99 (100): 61 Ind Cas 20: 6 Pat L Jour 256 (DB), *Sadhusaran Prasad v. Brahmdo Prasad*. (Do.)
- ('90) 13 Mad 189 (190) (DB), *Kondappa v. Subba*. (Do.)
- ('96) 20 Bom 155 (157, 158) (DB), *Dinkar v. Appaji*. (Manager of a joint Hindu family has no power to revive a debt by an acknowledgment except as against himself.)
- ('24) 11 AIR 1924 Lah 611 (613): 5 Lah 317: 82 Ind Cas 96 (DB), *Thakur Das Putli*. (Do.)
- ('27) 14 AIR 1927 Lah 657 (658): 103 Ind Cas 706: 9 Lah 85 (DB), *Santu Ram v. Dodan Bai*. (Hindu widow can acknowledge and revive time barred debts of her husband — Whether the debt was time-barred during or after the lifetime of the husband is immaterial.)
- ('11) 11 Ind Cas 737 (737) (DB) (All), *Indar Singh v. Sarju Singh*. (Mortgage by father for time-barred antecedent debt not binding on sons.)
- ('13) 18 Ind Cas 726 (727): 35 All 207 (DB), *Dalip-Singh v. Kundan Lal*. (Father of Hindu joint family cannot revive time-barred debt except in the case of necessity.)
- ('27) 14 A.I.R. 1927 Oudh 52 (52): 99 Ind Cas 215 (DB), *Bramhadin v. Ram Lakhan*. (Hindu mother as guardian of minor son is not competent in law to revive time-barred debt due from his deceased father.)

Section 21 — Note 3

1. ('08) 30 All 422 (438): 5 All L Jour 375 (FB), *Ram Charan Das v. Gaya Prasad*. (Dissenting from ('04) 26 All 598 (DB), *Tilak Singh v. Chhutta Singh* — Acknowledgment or payment if for benefit of minor may be made by guardian.)
- ('02) 26 Bom 221 (233, 234): 3 Bom LR 817 (FB), *Annapagauda v. Sangadyapa*. (Overruling ('94) 20 Bom 61 (DB), *Ramalsingji v. Vadilal* — Guardian can acknowledge or pay if it is for minor's benefit.)
- ('02) 4 Bom L R 812 (813) (DB), *Bhulli v. Nanalal*. (Guardian can acknowledge or pay if it is for minor's benefit.)
- ('95) 18 Mad 456 (457), *Kailasa Padiachi v. Ponnukannu Achi*. (Guardian can acknowledge or make payments.)
- ('94) 17 Mad 221 (222), *Sobhanadri S. Appa Rao v. Sriramulu*. (Do.)
- ('03) 26 Mad 330 (331) (DB), *Subramania Ayyar v. Arumuga Chetti*. (Do.)
- ('86) 1886 Pun Re No. 25, p. 44, *Behari Lal v. Chattan Lal*. (Do.)
- ('90) 1890 Pun Re No. 7, p. 17, *Jodh Raj v. Chuttan Lal*. (One of the certificated co-guardians can acknowledge a debt.)

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enactment of sub-s. (1), under which it is clear that an acknowledgment or payment made by the guardian of a minor will be binding on him.²

There is a conflict of decisions, however, on the question whether an acknowledgment or payment by the guardian will be effective irrespective of the question of its being for the *minor's benefit*. One view is that the question of benefit to the minor is irrelevant under this section and that it is relevant only in considering the powers of the guardian to incur *fresh* debts on behalf of the minor.³ The other view is that an acknowledgment or payment under this section will not bind the minor unless it is for his benefit.⁴ It is submitted that the former view is correct.

The section requires that the acknowledgment or payment must be made by the "lawful guardian" of the minor. A person appointed guardian by the Court, will be a lawful guardian for the purposes of the section.⁵ But the expression will also include *natural* guardians

('04) 27 Mad 243 (255) : 14 Mad L Jour 84 (FB), *Perasami Mudaliar v. Seetharama Chetti*. (Obiter—Payment of interest or part payment of principal by a receiver or guardian may stand on a different footing from an acknowledgment of liability made by him.)

('02) 29 Cal 647 (650) : 6 Cal W N 729 (DB), *Narendra Nath Sirkar v. Rai Charan Haldar*. (Certificated guardian can make part payment or payment of interest on behalf of minor.)

('99) 26 Cal 51 (52) : 3 Cal W N 313 (DB), *Chhato Ram v. Bilto Ali*. (Guardian whether certificated or natural cannot give acknowledgment.)

('86) 13 Cal 292 (295) (DB), *Wajibun v. Kadir Buksh*. (Natural guardian cannot give acknowledgment.)

('83) 13 Cal L R 112 (114), *Azuddin v. Lloyd*. (Do.)

2. ('43) 30 A I R 1943 Pat 218 (226) : 22 Pat 144 : 206 Ind Cas 126 (DB), *Mani Devi v. Anpurna Dai*. (The Legislature however does not enact that for the purposes of Limitation Act, the guardian shall be treated as an agent of his ward.)

('39) 26 AIR 1929 Mad 414 (420) : 184 Ind Cas 735 (DB), *Margaret Lornie v. Abu Backer Sait*.

('33) 20 A I R 1933 Mad 713 (713, 714) : 57 Mad 43 : 145 Ind Cas 654 (DB), *Rosayya v. Pitchayya*.

('22) 9 AIR 1922 Nag 98 (100, 101) : 18 Nag L R 145 : 65 Ind Cas 53 (DB), *Jiwan Das v. Janaki*. (Guardian can also execute a bond for a previous debt which is binding on the minor.)

('23) 10 AIR 1923 All 499 (499) : 45 All 524 : 81 Ind Cas 275 (DB), *Alijan Khan v. Majiduddin*. (Acknowledgment made in 1907—Held S. 21 of the present Act was sufficient answer to question that it was not valid.)

3. ('39) 26 AIR 1939 Cal 399 (402) : ILR (1939) 2 Cal 33 : 187 Ind Cas 831 (DB), *Gumti Devi v. Jugal Kishore*.

('32) 1932 Mad W N 1193 (1196), *Subbakka v. Venkata Setti*. (If a guardian is a lawful guardian S. 21 applies irrespective of the question of minor's benefit.)

('34) 21 AIR 1934 Lah 685 (686) : 153 Ind Cas 23 (DB), *Ram Narain v. Harbans*. (The question of benefit is only relevant to the original debt.)

4. ('19) 6 A I R 1919 Mad 993 (996) : 43 Ind Cas 865 (DB), *Chidam Baram v. Veerappa*. (An executor cannot acknowledge unless he is empowered to do so.)

('33) 20 AIR 1933 Oudh 132 (133) : 145 Ind Cas 180 (DB), *Bzchu v. Baldeo*.

5. ('32) 19 AIR 1932 Pat 337 (339) : 12 Pat 147 : 142 Ind Cas 495 (DB), *Bageswari Charan Singh v. Bindeswari Charan Singh*.

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who under the law are the legal guardians of the minor.⁶ Thus, under the Hindu law, after the father's death, the mother is the natural and legal guardian of a minor and so, she will be a lawful guardian for the purposes of this section.⁷ But an acknowledgment or payment by the *de facto* guardian of a minor who is not his legal guardian will not be binding on the minor under this section.⁸ See also the under-

6. ('28) 15 A I R 1928 Mad 226 (231) : 108 Ind Cas 529 (DB), *Ramaswami v. Kasinatha*. (A *de facto* guardian cannot give an acknowledgment.)

('13) 19 Ind Cas 362 (362) (Mad), *Tirapayya v. Ramaswami*. (Person need not be appointed a guardian.)

7. ('40) 27 AIR 1940 Mad 33 (35) : ILR (1940) Mad 258 : 186 Ind Cas 749 (FB), *Chennappa v. Onkarappa*.

('39) 26 A I R 1939 Cal 399 (402) : I L R (1939) 2 Cal 33 : 187 Ind Cas 831 (DB), *Gumti Debi v. Jugal Kishore*.

('33) 20 AIR 1933 Oudh 132 (133) : 145 Ind Cas 180 (DB), *Bechu Singh v. Baldeo*. ('13) 19 Ind Cas 362 (362) (Mad), *Tirapayya v. Ramaswami*.

('18) 5 A I R 1918 Cal 977 (978) : 45 Cal 630 : 42 Ind Cas 472 (DB), *Bireswar v. Ambikacharan*. (Payments made by the eldest brother of the infants while their mother was alive cannot be said to be made by a 'lawful guardian' within the meaning of this section.)

('34) 21 AIR 1934 Lah 685 (686) : 153 Ind Cas 23 (DB), *Ram Narain v. Harbans*.

8. ('49) 36 AIR 1949 FC 218 (223) : 1949 F C R 65 (FC), *Sriramulu v. Pundarikakshayya*. (AIR 1946 Mad 1 : I L R (1946) Mad 242 (FB), *Pundarikakshayya v. Sreeramulu* and A I R 1946 Mad 198 : I L R (1946) Mad 648 (DB), *Bapayya Pundarikakshayya* affirmed.)

('48) 35 AIR 1948 Nag 293 (295) : I L R (1947) Nag 710 (DB), *Tukaram Ramji v. Madhorao Manaji*. (Subsequent acknowledgment by minor on attaining majority does not amount to ratification of acknowledgment given by *de facto* guardian during minority.)

('46) 33 A I R 1946 Mad 198 (201) : I L R (1946) Mad 648 (DB), *Bapayya v. Pundarikakshayya*. (Sale by *de facto* guardian held must be set aside as it was in respect of debt which, though binding on minor, was time-barred.)

('46) 33 A I R 1946 Mad 1 (4) : I L R (1946) Mad 242 : 222 Ind Cas 416 (FB), *Pundarikakshayya v. Sreeramulu*.

('43) 30 AIR 1943 Bom 381 (382, 383) : I L R (1943) Bom 486 : 210 Ind Cas 532 (DB), *Dashrath v. Gajanan*. ('Lawful guardian' is required and not merely a person who under certain circumstances may have power to alienate the property of the minor.)

('40) 27 AIR 1940 Mad 33 (35, 37) : I L R (1940) Mad 358 : 186 Ind Cas 749 (FB), *Chennappa v. Onkarappa*. (Lawful guardian is *de jure* guardian in contrast to *de facto* guardian.)

('38) 25 A I R 1938 Mad 853 (855) : I L R (1939) Mad 65 : 179 Ind Cas 201 (DB), *Namq Nagayya v. Kalla Narasayya*. (('13) 19 Ind Cas 362, *Tirapayya v. Ramaswami* overruled.)

('32) 1932 Mad W N 1193 (1196), *Subakka v. Venkata Setti*. ('Lawful guardian' means guardian *de jure* — Guardian *de facto* is not within section.)

('28) 15 A I R 1928 Mad 226 (231) : 108 Ind Cas 529, *Ramasami Pillai v. Kasinatha Iyer*. (Dissenting from 19 Ind Cas 362.)

[See ('44) 31 A I R 1944 Mad 152 (152, 153) : 215 Ind Cas 123, *Madava Pillai v. Subramaniya*. (*De facto* guardian executing promissory note for money due by minor's deceased father on previous obligation — *De facto* guardian making payment in respect of such promissory-note — Such payment would be by person liable to pay the debt and would save limitation for suit against minor on the pro-note — No question of the *de facto* guardian being the minor's duly authorised agent arises in such a case.)

('17) 4 A I R 1917 Pat 510 (511) : 40 Ind Cas 809 (DB), *Gita Prasad Singh v. Raghu Singh*. (He was undoubtedly the *de facto* guardian and there is nothing

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mentioned cases⁹ bearing on the question as to who would be lawful guardians within the meaning of this section.

The section contemplates a lawful guardian of *property*. A mere guardian of the *person* of the minor will not be a lawful guardian within the meaning of this section.¹⁰ A testamentary guardian of the person and property of a minor girl does not cease to be the guardian of property within the meaning of this section on the marriage of the minor.^{10a}

The implied agency of the guardian terminates on the ward's death and hence, the guardian cannot make an acknowledgment or payment after the ward's death so as to bind the ward's estate.¹¹

tangible on the record to show that he was not the lawful guardian — Payment was for *minor's* benefit and avoided a suit against him — *Held* that the payment extended limitation against the minor.)]

9. ('42) 29 AIR 1942 Mad 663 (663, 664): 203 Ind Cas 212, *Saradambal v. Kuppusami*. (There can be no guardian in respect of a minor's interest in his joint family property; the only person who can bind him by a valid acknowledgment being the manager. Where a pro-note is executed by the mother as guardian for her minor sons, any payment by her after the elder son has attained majority cannot bind even the remaining son, who is a minor.)

('40) 27 A I R 1940 Mad 33 (35, 36, 38) : I L R (1940) Mad 358 : 186 Ind Cas 749 (FB), *Chennappa v. Onkarappa*. (Under Hindu law, after the father and mother, no other relation including the paternal grandmother is the lawful guardian — A I R 1928 Mad 42 (DB), *Surayya v. Subamma* and A I R 1926 Mad 457 (DB), *Seetharamamma v. Appiah*, overruled — ('78) 2 Cal L R 583, *Kristo Kissor v. Kadermoye Dossee*, followed.)

('32) 1932 Mad W N 1193 (1196), *Subbakka v. Venka'a Setti*. (Interim guardian appointed by Court in proceedings under the Guardians and Wards Act is lawful guardian within S. 21 — But the powers of such guardian may be defined by the order of the Court — If the order appointing him restricts his power, an acknowledgment by him is of no effect.)

('95) 17 All 198 (206, 207) : 22 Ind App 31 : 6 Sar 551 (P C), *Beti Maharani v. Collector of Etawah*. (Person appointed by Collector as manager of land is not guardian or even *agent* to acknowledge *personal* liability.)

('07) 1907 Pun L R No. 43, p. 244 : 1907 Pun W R No. 23 (FB), *Ghulam Haidar Shah v. Ghulam Muhammad Khan*. (A Settlement Officer is not a guardian of a Mahomedan minor.)

('19) 6 AIR 1919 Mad 993 (995) : 43 Ind Cas 865 (D B), *Chidambaram Pillai v. Veerappa Chettiar*. (Mere direction to executor appointed under will to manage property till minor beneficiaries attain age will not constitute him guardian of the property.)

('37) 24 AIR 1937 Cal 191 (192, 193): 171 Ind Cas 712 (DB), *Abheswari v. Baburali Shaikh*. (Mother of Mahomedan infant sons in the absence of any evidence to the contrary is not *lawful* guardian.)

('17) 4 AIR 1917 Lah 8 (8) : 42 Ind Cas 17, *Charan Shah v. Wadhu Ram*. (Do.)

('18) 5 A I R 1918 Cal 977 (978) : 45 Cal 630 : 42 Ind Cas 472 (DB), *Bireswar Mookerjee v. Ambika Charan Bhattacharjee*. (Eldest brother is not lawful guardian of Hindu minor during the mother's lifetime.)

10. ('42) 29 AIR 1942 Mad 663 (664): 203 I. O. 212, *Saradambal v. Kuppusami*.

('18) 5 AIR 1918 Low Bur 136 (137): 9 Low Bur Rul 78: 40 Ind Cas 858, *Yagapp Chetti v. A. Y. Mahmood*. (Under the Mahomedan law the father's brother is only a guardian of the *person* of a minor girl.)

10a. ('48) 35 AIR 1948 Mad 155 (157): ILR (1948) Mad 351 (DB), *Rajarajeswari v. Sankaranarayana*.

11. ('06) 30 Bom 218 (219) : 7 Bom L R 739 (DB), *Yellappa v. Desayappa*.

A guardian continuing in management of the ward's property after the ward attains majority is not entitled as *guardian* to acknowledge or pay debts on behalf of the ward. But the authority to *manage* includes the power to pay interest on subsisting debts as an incident of the management and hence, a payment of interest by the ex-guardian will save limitation in such cases.¹²

Where the certificate of guardianship has been granted to two persons jointly, an acknowledgment by one of them alone will not be binding on both and through them on the minors, unless the guardian who signed the acknowledgment acted as the agent of the other guardian. But the authority to act as agent need not be express or special. Hence, where one of the guardians, whether by express agreement or by general understanding with the other guardian, was left to do almost the whole work of guardianship, especially the work of going over accounts and signing balances, it was held that an acknowledgment signed by him alone was binding on the minor.¹³

Where a guardian has been appointed by the Court, his position must be taken subject to the restrictions imposed by the order appointing him guardian. Hence, where an order appointing an interim guardian required that he must take the permission of the Court before making any payments, it was held that payments made by him without such permission cannot save limitation under S. 20.¹⁴

In the undermentioned case¹⁵ an acknowledgment made by a *vakil* on behalf of a minor was held binding on the minor.

4. Acknowledgment or payment by a guardian of insane person. — In the undermentioned case¹ it was held that before a person is *appointed* the guardian of an insane person he is not the lawful guardian of the insane person. In that case, the defendant's deceased husband had executed a promissory note in favour of the plaintiff. In a suit against the defendant on the promissory note, the plaintiff relied, for the purpose of meeting the plea of limitation, on an admission made by the defendant in a petition by her to get herself appointed the guardian of her insane husband. Pending the petition the husband died and she was never in fact appointed guardian. It was held that the admission was not made by a lawful guardian within the meaning of this section, and that the wife as such was not an *agent* of the husband for the purposes of making the acknowledgment.

12. ('95) 18 Mad 456 (457), *Kailasa Padayachi v. Ponnukannu Achi*. (No special authority to make payment is necessary.)

13. ('90) 1890 Pun Re No. 7, p. 17, *Jodh Raj v. Chuttan Lal*.

14. ('32) 1932 Mad W N 1193 (1196), *Subbakka v. Venkata Setti*.

15. ('96) 23 Cal 374 (387) (DB), *Norendra Nath Pahari v. Bhupendra Narain*. (('83) 9 Cal 730 (DB), *Toree Mahomed v. Mahomed Mabood*, relied upon.)

Section 21 — Note 4

1. ('83) 20 A I R 1933 Mad 686 (687, 688) : 56 Mad 964 : 146 Ind Cas 49 (DB), *Gomathi Ammal v. Avu Ammal*. (The defendant was held to be not even an agent of necessity.)

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Notes 5-6

5. Court of Wards, acknowledgment or payment by. —

A Court of Wards can make acknowledgments or payments so as to save limitation in respect of the debts due from the ward.¹ But the Court of Wards is not the *guardian* of the ward. Its authority is *statutory*. (See Note 58 under section 19.)

5a. Acknowledgment by agent of guardian. — The mere fact that a person has been appointed manager of the estate of a ward by the guardian of the minor or the Court of Wards does not invest such manager with power to make acknowledgments of liability or payments so as to save limitation. The Court must be satisfied apart from the fact of such appointment, that the manager was "duly authorised" expressly or impliedly by the guardian or the Court of Wards to make the acknowledgment or payment.¹

6. Sub-section (2)—General. — An *acknowledgment* under section 19 may be made by the person liable or by his agent, and such acknowledgment will bind not only the person by whom or by whose agent it is made, but also those who claim under such person. Where more persons than one are jointly liable, an acknowledgment by one of them will not bind the others,¹ though it will bind the particular person who makes the acknowledgment and those who claim under him.²

A *payment* under S. 20 is required to be made by the person liable to pay the debt or legacy or by his agent, and such payment will save

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1. ('16) 3 AIR 1916 Cal 107 (108) : 43 Cal 211 : 34 Ind Cas 205 (DB), *Rashbehary v. Anand*.
- ('88) 1888 All W N 187 (189) (DB), *Kamla Kuar v. Har Sahai*.
- ('94) 17 All 198 (208, 209) : 22 Ind App 31 : 6 Sar 551 (P C), *Beti Maharani v. Collector of Etawah*.
- ('10) 6 Ind Cas 407 (408) : 34 Mad 221 (DB), *Kondamodalulunga v. Sarvarayadu*. (Acknowledgment by the Collector as the agent of the Court of Wards, is equally binding—Collector cannot promise to pay a barred debt.)
- [See ('97) 1897 Pun Re No. 1, p. 4, *Sardar Bachattar Singh v. Jagannath*. (Payment of money made in pursuance of an order of the President of the Court of Wards to the creditor of the ward on account of the debt due to him would not amount to part payment within the meaning of S. 20 though the order directing the payment would amount to an acknowledgment so as to save limitation under S. 19.)]

Section 21 — Note 5a

1. ('39) 26 A I R 1939 Bom 237 (248, 249) : 183 Ind Cas 225 (DB), *Bhalchandra Dattatraya v. Chanbasappa Mallappa*.

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1. ('28) 15 AIR 1928 All 387 (388) : 110 I.C. 561 (DB), *Gaya Prasad v. Babu Ram*. ('41) 28 AIR 1941 Mad 110 (110), *C. K. Kunjandi v. Chinnavava Rowther*. ('05) 27 All 575 (579) : 2 All L Jour 287 (DB), *Ashan-ul-lah v. Dakkhini Din*. (Acknowledgment by one of the debtors if made as agent of the others will, however, bind the other debtors.)
- ('35) 22 AIR 1935 Mad 101 (103) : 58 Mad 418 : 154 Ind Cas 1053 (DB), *Lakshmi Naidu v. Gunnamma*. (*Obiter* — ('29) AIR 1929 Mad 881 (DB), *Thayammal v. Muthukumaraswami* and ('20) A I R 1920 Mad 418 (DB), *Muthu v. Md. Hussain*, relied on.)
2. ('28) 15 AIR 1928 All 387 (388) : 110 I.C. 561 (DB), *Gaya Prasad v. Babu Ram*. ('12) 13 Ind Cas 702 (704) (DB) (Cal), *Chandra Kumar v. Ram Din Poddar*.

limitation not only against the person by whom or by whose agent the payment is made, but also as against those who claim under such person.³ Where more than one person are jointly liable to pay a debt, a payment under S. 20 need not be made by *all* the persons liable but may be made by *any one* of such persons.⁴ In such cases, limitation will be saved not only as against the person making the payment and those who claim under him, but also as against other joint-debtors [except in cases coming under section 21 (2).]⁵ In *Chinnery v.*

3. ('05) 27 All 575 (579) : 2 All L Jour 287 (DB), *Ashan-ul-lah v. Dakkhini Din.* (But part payment by one of the judgment-debtors will not save limitation against the other judgment-debtors except where such other judgment-debtors are the legal representatives of the person making the payment.)

('28) 15 AIR 1928 All 387 (389) : 110 Ind Cas 561 (DB), *Gaya Prasad v. Babu Ram.*

('32) 19 A I R 1932 Cal 620 (620) : 59 Cal 1128 : 138 Ind Cas 740 (DB), *Jogesh Chandra v. Monindra Narain.*

('28) 15 A I R 1928 Mad 972 (975) : 112 Ind Cas 491, *Chegamull Saganmull v. Govindaswami Chetty.* (A Hindu widow can keep a debt of the husband alive by making payments under Section 20.)

4. ('26) 13 A I R 1926 Cal 150 (151) : 90 Ind Cas 774 (DB), *Achola Sundari v. Doman.* (The expression 'persons liable to pay' in S. 20 does not mean the entire body of persons liable to pay the debt.)

('41) 28 AIR 1941 Mad 110 (110), *C. K. Kunjandi v. Chinnavava Rowther.*

('37) 24 AIR 1937 Cal 191 (192) : 171 Ind Cas 712 (DB), *Abheswari v. Baburali.* (But if the debt is susceptible of division a different rule applies.)

('38) 25 AIR 1938 Cal 129 (131) : 176 Ind Cas 191 (DB), *Azizur Rahman v. Upendranath Samanta.* (Section 20 contemplates debts of all kinds whether secured or unsecured.)

('35) 22 AIR 1935 Mad 101 (103) : 58 Mad 418 : 154 Ind Cas 1053 (DB), *Lakshmi Naidu v. Gunnamma.*

[But see ('34) 21 A I R 1934 Pat 224 (225) : 151 Ind Cas 753, *Madho Lal v. Shamlal.*]

5. ('44) 31 AIR 1944 Mad 152 (152) : 215 Ind Cas 123, *Madava Pillai v. Subramaniya.*

('41) 28 AIR 1941 Cal 643 (653) : ILR (1941) 2 Cal 311 : 198 Ind Cas 471 (DB), *Sukumari Gupta v. Dharendra Nath.*

('41) 28 AIR 1941 Mad 110 (110), *C. K. Kunjandi v. Chinnavava Rowther.*

('40) 27 AIR 1940 Cal 401 (403) : I L R (1940) 2 Cal 362 : 191 Ind Cas 608, *Ranjit Kumar v. Kisor Mohan.* (Following ('06) 33 Cal 1278 (DB), *Domilal v. Roshan.*)

('39) 26 AIR 1939 Mad 69 (70) : ILR (1939) Mad 140 : 180 Ind Cas 49 (DB), *Somasundara Edangapurandar v. Narasimha Chariar.* (On death of Hindu father, sons becoming liable under pronote executed by father — One of the sons endorsing payment on pronote — Endorsement saves limitation also against son who has become a convert to Islam.)

('38) 25 AIR 1938 Mad 774 (777) : I L R (1938) Mad 968 : 178 Ind Cas 243 (DB), *Pangudaya Pillai v. Uthandiya Pillai.*

('05) 32 Cal 1077 (1081) : 9 Cal W N 868 (DB), *Krishna Chandra v. Bhairab.*

('15) 2 AIR 1915 Cal 5 (7) : 22 Ind Cas 510 (DB), *Hem Chandra v. Purna Chandra.* (Payment of interest by mortgagor after parting with equity of redemption in one of the mortgaged properties extends period of limitation against the purchaser.)

('27) 14 AIR 1927 Cal 193 (194, 195) : 98 Ind Cas 381 (DB), *Rajtilak Narayan v. Mufixuddin Topadar.* (*Lewin v. Wilson*, (1886) 11 A C 639, followed — Payment by mortgagor — Limitation was saved against the purchaser of equity of redemption.)

('33) 20 AIR 1933 Cal 325 (327) : 60 Cal 87 : 143 Ind Cas 315 (DB), *Umesh Chandra v. Hemanga Chandra.* (Where estates A, B and C are included in one mortgage and the owner of A pays interest, the mortgagee's remedy against B and C is preserved.)

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Evans,⁶ a payment was made by the agent of the mortgagor after a portion of the mortgaged property had been sold by the mortgagor, and the question arose whether such payment saved limitation as against the purchaser from the mortgagor. It was held that the payment saved limitation also as against the purchaser. In construing section 40 of 3 & 4 will IV, c. 27, the material words in which are similar to the words of section 20, the Lord Chancellor said as follows :

"It is quite clear that the payment of money to the mortgagee by the person liable to pay, in respect of the interest on the mortgage, continues the mortgage in all its original integrity and force, with respect to *all* the estates properly comprised in the mortgage, and which had not been aliened or conveyed away by the mortgagee, or with his assent."

In this respect section 20 differs from section 19 under which the acknowledgment operates only against the person making the acknowledgment and not against others who may be jointly liable with him.⁷ In *Lewin v. Wilson*,⁸ while discussing certain sections of a statute of New Brunswick which correspond approximately to sections 19 and 20, the Privy Council observed as follows :

" Payment and acknowledgment are two very different things. As regards the person making them, acknowledgment may . . . be made by a person who, though a party to a mortgage contract, has ceased to have any substantial interest in it and has nothing to lose by acknowledgment, whereas payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain and is not put upon any further assertion of his

(37) 24 AIR 1937 Cal 191 (192) : 171 Ind Cas 712 (DB). *Abheshwari v. Baburali*. (If the debt is one and indivisible, payment by one would interrupt limitation against all the debtors unless they can come within the exception laid down in Section 21 (2).)

[See also (37) 24 AIR 1937 Cal 226 (229) : 172 Ind Cas 121, *Sudhamoyee Bose v. Bhujendra Nath*. (Decree for rent of tenure against widow — Widow relinquishing tenure in favour of reversioners — Payment by one reversioner — Time is extended against all.)

(38) 25 AIR 1938 Cal 129 (134) : 176 Ind Cas 191 (DB), *Azizur Rahman v. Upendra Nath*. (Joint mortgagors were held in this case to be joint contractors within the meaning of Section 21 (2).)

(30) 17 AIR 1930 Mad 738 (739, 740) : 127 Ind Cas 641, *Lokanadha v. Lokhono*. (Payment by one co-heir of the debtor saves limitation against the other co-heirs.)

(12) 17 Ind Cas 619 (619) (DB) (Mad), *Velayudam v. Vaithilingam*. (Suit on promissory note against promisor and promisor's universal donee — Payment by promisor after the gift saved limitation against universal donee.)]

6. (1864) 145 R R 79 (84) : 11 L T (N S) 68 (72) : 11 H L C 115 : 10 Jur (N S) 855 : 13 W R 20 : 4 N R 520.

7. (35) 22 AIR 1935 Mad 101 (103) : 58 Mad 418 : 154 Ind Cas 1053 (DB), *Lakshmi v. Gunnamma*. (Point conceded.)

8. (1886) 11 A C 639 (645) : 55 L J P C 75. (Cited in (38) A I R 1938 Cal 129 (DB), *Azizur Rahman v. Upendra*.)

rights; but not so if he only receives acknowledgment. If, therefore, we find that the Legislature has used different language about the two cases, we must not readily conclude that it has done so by accident or without meaning it."

The above passage sums up what may be assumed to be the reasons of the Legislature in making a distinction between sections 19 and 20 on the question under discussion.

What is the effect of this sub-section on the above summarised provisions? As regards section 19, even if that section stood alone, an acknowledgment by one person can save limitation only as against him and not as against others who may be jointly liable with him, unless the latter have authorized the former to make the acknowledgment.⁹ Hence, the effect of this sub-section is simply to provide that members of the groups specified therein are not *ipso facto* agents of each other for the purpose of making acknowledgments. In other words, the sub-section does not constitute an *exception* to section 19, but simply serves as an *explanation* to that section dealing with the question of who can be considered as agents for the purpose of the section. Thus, it was observed in *Chandra Kumar Dhar v. Ramdin Poddar*,¹⁰ "Section 21 does not lay down an exception to S. 19, but enumerates those cases in which the act of one member of a class is liable to be taken as the act of all; and, in respect of these cases, it provides that an acknowledgment of one should not, by itself, be taken as the acknowledgment of the other, but that there must be some authority express or implied."

As regards S. 20, if the persons liable constitute any of the groups mentioned in this sub-section and the debt is *common* to all the members of the group as such, this sub-section operates as an *exception* to the provisions of S. 20. The reason is that as a general rule, under S. 20 a payment by one of the persons liable to pay a debt will operate against all the persons liable to pay the same debt (see *supra*), while in the cases mentioned in this sub-section such payment will not operate against the other persons liable to pay the same debt.¹¹ But, where the debt is *not common* to all the persons but a distinct debt is owed by each of them, a payment by one of them will, even under S. 20 itself, operate only against him and not against the others unless

9. ('05) 27 All 575 (579) : 2 All L Jour 287 (DB), *Ashanullah v. Dakkhini Din*. (Sub-section does not constitute an exception to S. 19.)

('28) 15 AIR 1928 All 387 (388) : 110 I. C. 561 (DB), *Gaya Prasad v. Babu Ram*.

('35) 22 AIR 1935 Mad 101 (103, 104) : 58 Mad 418 : 154 Ind Cas 1053 (DB), *Lakshmi v. Gunnamma*. (Payment by managing member — Authority to make payment is implied.)

10. ('12) 13 Ind Cas 702 (704) (DB) (Cal).

11. ('38) 25 AIR 1938 Cal 129 (131) : 176 Ind Cas 191 (DB), *Azizur Rahman v. Upendra Nath*. (Operation of S. 20 is subject to the provisions of S. 21 (2).)

('29) 16 AIR 1929 Mad 881 (882, 883) : 53 Mad 119 : 121 Ind Cas 858 (DB), *Thayammal v. Muthukumaraswami Chettiar*. (The fact that the defendant making the payment was permanently living and messing with the defendants did not constitute specific authorization within the meaning of S. 20.)

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he has been authorized by the latter to make the payment.¹² Hence, in such cases, the sub-section does not operate as an *exception* to S. 20. The effect of the sub-section in such cases is only to provide that the members of the groups referred to therein are not *ipso facto* agents of each other for making part payments or payments of interest. Thus, while in regard to section 19 this sub-section operates only as an *explanation* and not as an *exception*, in regard to S. 20 it operates in some cases as an *exception* and in others as an *explanation*.¹³ In the undermentioned case¹⁴ the Calcutta High Court observed as follows :

“The word ‘only’ in that sub-section [sub-s. (2)] is not a mere surplusage and if effect be given to the word, the sub-section would not in any way interfere with the operation of Ss. 19 and 20, but would restrict the application of those sections to cases which strictly satisfy their requirements.”

It is submitted that the proposition that this sub-section does not in any way interfere with the operation of Ss. 19 and 20, is, in view of the above discussion, too wide.

In some decisions¹⁵ it has been held that a payment under S. 20, like an acknowledgment under S. 19, only operates against the person who makes the payment and not against the others. The logical result of this view will be that even in the case of section 20 (as in that of S. 19) this sub-section only operates as an *explanation* and not as an *exception* to the section. But, the balance of authority is against this view and it must be taken to be not good law.

In the undermentioned case,¹⁶ it was held by the Patna High Court that the payment under S. 20 must be made by *all* the persons liable to pay the debt. On this reasoning it was held in that decision that a payment by one of two debtors could not save limitation as

12. ('38) 25 AIR 1938 Cal 129 (134) : 176 Ind Cas 191 (DB), *Azizur Rahman v. Upendra Nath*. (Obligation of the principal debtor and his surety are distinct.)
13. ('37) 24 AIR 1937 Cal 191 (193) : 171 Ind Cas 712 (DB), *Abheswari v. Baburali*. (A Mahomedan debtor died leaving behind him his widow and sons — The widow made payment — Held it saved limitation in respect of her share of debt only.)

13. ('38) 25 AIR 1938 Cal 129 (134, 135) : 176 Ind Cas 191 (DB), *Azizur Rahman v. Upendra Nath*.

14. ('27) 14 AIR 1927 Cal 193 (195) : 98 Ind Cas 381 (DB), *Rajtilak Narayan v. Mufizuddin Topadar*.

15. ('39) 26 AIR 1939 All 230 (231) : ILR (1939) All 258 : 181 Ind Cas 490 (DB), *Ram Kumar v. Hira Lal*. (Sub-section (2) does not lay down exceptions to any general principle embodied in S. 20 — Payment by one joint judgment-debtor does not save limitation against others.)

('05) 27 All 575 (579) : 2 All L Jour 287 (DB), *Ashan-ul-lah v. Dakkhini Din*.
See also the observations in the following cases :

('17) 4 AIR 1917 Mad 895 (895, 896) : 32 Ind Cas 608, *Kothandaraman Chetty v. Shanmugan Chetty*.

('18) 5 AIR 1918 Cal 707 (709, 710) : 44 Cal 978 : 39 Ind Cas 705 (DB), *Brojendra Kishore v. Hindustan Co-operative Insurance Co., Ltd.* (Payment of interest by principal even with consent of surety does not extend limitation against a surety.)

16. ('34) 21 AIR 1934 Pat 224 (225) : 151 Ind Cas 753, *Madho Lal v. Shamlal*.

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against the other. It was observed in this connexion that this is made clear by the provisions of this sub-section. In other words, the view according to the above Patna decision also seems to be that this sub-section is only an *explanation* to S. 20 dealing with what will constitute agency for the purposes of making a payment under the section and what will not constitute such agency. But the view that a payment under S. 20 must be made by *all* the persons liable is not correct. (See *supra*.)

The sub-section does not mean that a member of any of the classes mentioned therein *cannot in any circumstances* acknowledge or make payments on behalf of the other members of the class. The word "only" implies that where the person making the acknowledgment or payment is *authorised* to do so by the other members of the group to which he belongs, such acknowledgment or payment will operate against the other members also. In other words, the sub-section merely means that where there is nothing else than an acknowledgment or payment by a partner, joint contractor etc., the other partners, joint contractors etc., will not be affected by such acknowledgment or payment. Where, however, the person making the acknowledgment or payment has the authority of the other members of the group to which he belongs, to make the acknowledgment or payment, such acknowledgment or payment will bind the other members also.¹⁷

17. ('32) 19 AIR 1932 Bom 316 (318, 319) : 138 Ind Cas 805, *Gordhandas v. Bhulabhai*. (In a going mercantile concern a partner must be presumed to act as an agent in making an acknowledgment or a part payment.)

('29) 16 AIR 1929 Cal 714 (716) : 56 Cal 556 : 121 Ind Cas 741, *Bengal National Bank Ltd. v. Jatindra Nath Majumdar*. (Acknowledgment or part payment by one partner will bind the other partners where such an act was necessary for or usually done in carrying on the business—Contract Act, S. 251.)

('26) 13 AIR 1926 Mad 114 (115) : 92 Ind Cas 653 (DB), *Mahadeva Iyer v. Ramakrishna Reddiar*. (Mercantile firm — Partner's authority extends to making an acknowledgment by part payment so as to bind his partners.)

('28) 15 AIR 1928 All 491 (492) : 50 All 982 : 111 Ind Cas 143, *Devi Dayal v. Baldeo Prasad*. (Acknowledgment made during the course of partnership business binds the other partners.)

('28) 15 AIR 1928 Mad 972 (975) : 112 Ind Cas 491, *Chegamull Saganmull v. Govindaswami Chetty*. (Under S. 21 a partner *ipso facto* has no authority to acknowledge or to make a part payment, but if he has general authority to contract debts or make payments he has implied authority to keep the debt alive and it is unnecessary to make out a special authority.)

('86) 10 Bom 358 (362), *Premji Ludha v. Dossa Doongersey*. (The meaning of the word "only" in S. 21 is that it must also be shown that the partner signing the acknowledgment had the authority express or implied — In a going mercantile concern such agency is presumed as a general rule.)

('88) 10 All 418 (420) : 1888 All W N 93 (DB), *Gadu Bibi v. Parsotam*.

(1900) 24 Bom 493 (502) : 2 Bom L R 378 (DB), *Kariyappa v. Rachappa*.

('99) 1899 Pun Re No. 45, p. 216, *Bichha Lal v. Jai Parshad*.

('88) 1888 Bom P J 147, *Ravji v. Narayandas*.

('28) 15 AIR 1928 Mad 173 (174) : 107 Ind Cas 646, *Rangaswami Aiyangar v. Somasundaram Chettiar*. (When nothing more appears than that one of several co-obligors has made a payment or an acknowledgment of liability, such payment or acknowledgment will not save limitation against the other obligors of the debt.)

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In the undermentioned case¹⁸ of the Rangoon High Court it was observed that the existence of a mortgage or charge on immovable property would be a circumstance beyond the mere acknowledgment or payment referred to by the sub-section, and that therefore, a payment made by one of several persons jointly liable in respect of a mortgage would, under S. 20, operate against all of them, notwithstanding the provisions of this sub-section. It is submitted that the reasoning is not correct. It assumes that S. 20 makes the existence of a mortgage or charge a determining factor in regard to the applicability of the rule contained therein, viz., that a payment by one of several joint debtors operates against *all* of them. This view of S. 20 is not correct. That section makes no distinction between secured and unsecured debts, and equally in both cases the fact that the debt is common to all the debtors is the only factor on which the rule that payment by one operates against all is based.

The authorisation of a member of any of the groups mentioned in the sub-section to acknowledge or pay on behalf of others may be express or implied and may be general or special (see Notes under ss. 19 and 20.) It need not have been made with reference to the particular acknowledgment or payment in question.¹⁹

The sub-section does not interfere with the rule under ss. 19 and 20 that an acknowledgment or payment will operate against the person making such an acknowledgment or payment and those who claim under him irrespective of its consequences with regard to other persons who may be jointly liable with him.²⁰

The word "chargeable" in this sub-section refers not only to personal liability but also to liability in respect of *property*.²¹ Hence, in cases where this sub-section operates as an exception to S. 20, it will serve as such exception both with reference to personal liability as well as liability with reference to property. In other words, where one member of any of the groups mentioned in this sub-section makes a payment under S. 20, limitation will not be saved as against the other members of the group not only with regard to their *personal* liability but also with regard to their liability in respect of *property*.

18. ('36) 23 AIR 1936 Rang 504 (505) : 165 Ind Cas 828, *U Tha Mo v. Palaniappa*. (In case of a simple promissory note however payment by a debtor does not operate to save limitation against his co-debtors.)

See also Note 11.

19. ('33) 20 A I R 1933 Cal 826 (827) : 147 Ind Cas 459 (DB), *Jiban Krista v. Hari Nath*. (('22) AIR 1922 All 230 (DB), *Narain Rao v. Manni Kuar*, distinguished.)

20. ('12) 13 Ind Cas 702 (704) (DB) (Cal), *Chandra Kumar v. Ram Din Poddar*. (Section 21 does not lay down exceptions to S. 19.)

('28) 15 AIR 1928 All 387 (388) : 110 I. C. 561 (DB), *Gaya Prasad v. Babu Ram*.

('35) 22 AIR 1935 Mad 101 (103) : 58 Mad 418 : 154 Ind Cas 1053 (DB), *Lakshmi Naidu v. Gunnamma*.

21. ('29) 16 A I R 1929 Mad 881 (884) : 53 Mad 119 : 121 Ind Cas 858 (DB), *Thayammal v. Muthukumaraswami Chettiar*. (The term 'joint contractors' has been held by the Madras High Court to include joint mortgagors.)

The categories mentioned in this sub-section are exhaustive and not merely illustrative.²² Hence, in cases which do not come within any of them the operation of Ss. 19 and 20 will not be affected in any way by this sub-section. The view expressed in the undermentioned decision²³ that the categories mentioned in this sub-section are *not* exhaustive is, it is submitted, not correct.

The sub-section is not concerned with the question as to the validity of an acknowledgment or payment made to one of several creditors. Hence, a payment made to one of several joint mortgagees is sufficient for the purposes of section 20.²⁴

7. Joint contractors — Acknowledgment or payment by one of them — Effect of — An acknowledgment under S. 19 saves limitation only as against the person who makes the acknowledgment and those who claim under him. Hence, where an acknowledgment of liability is made by one of several joint contractors, limitation is saved only as against the particular joint contractor who makes the acknowledgment and those who claim under him and not as against others. Where, however, any of the other joint contractors has authorised the acknowledgment to be made, it will bind him and limitation will be saved as against him also. This sub-section provides that the mere fact that certain persons are related to each other as joint contractors cannot make them, by itself, agents of each other for making acknowledgments of liability.

As regards a *payment* under S. 20, where the debt is common to several joint debtors, a payment by any one of them will save limitation as against the others also. The effect of this provision is curtailed in the case of joint *contractors* by sub-s. (2) of this section. Hence, in the case of joint contractors, though the debt may be common to all of them, and notwithstanding the provisions of S. 20, a payment by one of them will not save limitation against the others.¹ Thus, where A and B borrow money on the security of a promissory note,² or a

22. ('30) 17 A I R 1930 Mad 738 (739, 740) : 127 Ind Cas 641, *Lokanadha Naiko v. Lokhono*. (Thus co-heirs and other persons who derive their liability not from direct contract with the promisee cannot be brought within the scope of S. 21 (2).)

23. ('17) 4 A I R 1917 Mad 895 (895, 896) : 32 Ind Cas 608, *Kothandaraman Chetty v. Shunmugam Chetty*. (The words 'joint contractors' in S. 21 apply to surety.)

24. ('28) 15 AIR 1928 All 387(389):110 I.C. 561(DB), *Gaya Prasad v. Babu Ram*.

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1. ('42) 29 AIR 1942 Cal 251 (255) : ILR (1941) 2 Cal 576 : 201 Ind Cas 138 (DB), *Jnan Chandra v. Manoranjan*. (Hundi.)

('33) 20 AIR 1933 Cal 90 (91) : 141 Ind Cas 716 (DB), *Wazed Ali v. Brojendro*.

2. ('41) 28 A I R 1941 Rang 37 (40) : 1940 Rang L R 603 : 194 Ind Cas 177 (DB), *Eusoof Karwa v. Mrs. Niemeyer*. (There must be some evidence from which it can be inferred that one joint contractor was acting as agent of other.)

('37) 24 AIR 1937 Rang 195 (196, 197) : 169 Ind Cas 477 (DB), *Palaniappa v. U Tha Mo*. (('36) AIR 1936 Rang 504, *U Tha Mo v. Palaniappa*, confirmed.)

('34) 21 AIR 1934 Mad 327 (330) : 150 I. C. 91 (DB), *Mahomed Aliyar v. Gnana*.

('28) 15 AIR 1928 Mad 173 (174) : 107 Ind Cas 646, *Rangasamy Aiyangar v. Somasundaram Chettiar*.

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bond,³ a payment by A will not save limitation against B. But, where one joint contractor has authorised another joint contractor to make a payment, such payment will save limitation against both.^{3a} Such authorisation need not be express and may be inferred from the conduct of the joint contractors.⁴

Although a payment by one of several joint contractors will not, in the absence of authority from the others, save limitation as against them, yet, the payment will save limitation as against the particular contract or who makes the payment⁵ and those who claim under him.⁶

It has been held that although the payment or acknowledgment by one joint debtor may not, in view of this section, save limitation as against any other debtor, the former can sue the other co-debtors for contribution where he has been compelled to pay more than his share of the joint debt.⁷

- (‘33) 20 AIR 1933 Cal 826 (826) : 147 Ind Cas 459, *Jiban Krista v. Hari Nath*.
 (‘26) 13 AIR 1926 Oudh 601 (603) : 96 Ind Cas 353 : 2 Luck 180 (DB), *Oudh Commercial Bank, Ltd. v. Bishambhar Nath*. (Promisors in this case were jointly and severally liable under the promissory note.)
 (‘11) 11 Ind Cas 858 (858, 859) (DB) (Low Bur), *Muthuveerappa Chetty v. Abdul Kadir*. (The decision in so far as it lays down that the authority should be express is, it is submitted, not correct.)
 (‘30) 124 Ind Cas 555 (555, 556) (DB) (All), *Bhagwat Prasad v. Muzaffar*.
 [See also (‘34) 21 A I R 1934 Pat 224 (225) : 151 Ind Cas 753, *Madholal v. Shamlal*. (Hand-note executed by two persons — Payment by one does not save limitation against other — The reasoning on which the decision is based is that under S. 20 where there are more than one debtor the payment must be by all the debtors — Submitted that this view is not correct.)]
 3. (‘32) 19 A I R 1932 Cal 620 (621) : 59 Cal 1128 : 138 Ind Cas 740 (DB), *Jogesh Chandra Saha v. Monindra Narain Chakravarty*. ((‘12) 14 Ind Cas 128, *Arjun v. Rohima Banu*, is correctly decided.)
 3a. (‘28) 15 AIR 1928 Mad 173 (174) : 107 Ind Cas 646, *Rangasami v. Somasundaram*. (Authority need not be express.)
 (‘18) 5 AIR 1918 Oudh 152 (153) : 45 Ind Cas 613, *Mubarak Ali v. Gopi*.
 (‘35) 22 AIR 1935 Mad 101 (104) : 154 Ind Cas 1053 : 58 Mad 418 (DB), *Lakshmi v. Gunnamma*. (A and B co-mortgagors — A making payment can be shown to have acted as manager of family authorised to pay on B’s behalf also.)
 4. (‘28) 15 A I R 1928 Mad 173 (175) : 107 Ind Cas 646, *Rangasamy v. Somasundaram*. (Previous endorsement by A — Subsequent endorsement by B — Held, B had adopted and ratified the prior endorsement.)
 (‘35) 22 AIR 1935 Mad 101 (104) : 154 Ind Cas 1053 : 58 Mad 418 (DB), *Lakshmi v. Gunnamma*. (Agency may be implied from the facts and circumstances.)
 (‘15) 2 AIR 1915 Mad 307 (307) : 25 Ind Cas 927, *Annamalai Pattar v. Natesa Aiyar*. (Held that the series of endorsements on the promissory note constituted sufficient evidence that the defendants had authorised each other to make acknowledgment so as to bind both.)
 5. (‘41) 28 AIR 1941 Mad 110 (110), *C. K. Kunjandi v. Chinnavava Rowther*.
 (‘23) 10 AIR 1923 Bom 369(369) : 74 Ind Cas 302 (DB), *Devi Chand v. Jamshedji*.
 6. (‘28) 15 AIR 1928 All 387(389) : 110 I.C. 561(DB), *Gaya Prasad v. Babu Ram*.
 (‘32) 19 A I R 1932 Cal 620 (620) : 138 Ind Cas 740 : 59 Cal 1128 (DB), *Jogesh-chandra v. Monindra Narain*.
 (‘15) 2 AIR 1915 Mad 962 (965) : 28 Ind Cas 69, *Kallianiamma v. Narayanan*.
 (‘23) 10 AIR 1923 Lah 135 (137, 138) : 71 I.C. 737(DB), *Ramkishan v. Hirde Ram*.
 7. (‘15) 2 AIR 1915 Mad 675 (678) : 39 Mad 288 : 27 Ind Cas 337 (DB), *Abraham v. Raphial*. (This is so because duty to contribute is clearly distinct from the duty to pay to the promisee.)

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8. "Joint contractors," meaning of. — Where two or more persons jointly make a contract with another person, the former will be joint contractors. The question has arisen if the expression "joint contractors" in S. 21 includes any *other* class or classes of persons and if so, what class or classes of persons? On this question, there is a conflict of decisions. The different views taken may be classified as follows :

- (1) The *first* view is that the test to be applied to see if any set of persons would constitute joint contractors is whether they are jointly liable on a contract which, *when it was made*, was made by two or more persons jointly. According to this view, where a contract is made by two or more persons jointly, all persons who are jointly liable on such a contract will be joint contractors within the meaning of this section although they or any of them may not have been, *originally*, parties to the contract. Thus, where A and B make a joint contract with C, and A dies leaving D as his heir, B and D would be joint contractors.¹ Similarly, where A and B make a joint contract with C, the successors of A and B would be joint contractors.² But, where the contract, when made, was not entered into by several persons jointly but was only made by a *sole* contractor, the fact that subsequently two or more persons become jointly liable under the contract cannot make such persons joint contractors.^{2a} Thus, the co-heirs of a single debtor will not be joint contractors.³ Similarly, where

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1. ('41) 28 AIR 1941 Mad 110 (111), *C.K. Kunjandi v. Chinnavava*. (One of joint contractors dying—Subsequent payment by other within limitation — Payment does not save limitation against heirs of deceased joint contractor.)
- ('38) 25 A I R 1938 Cal 129 (132, 136) : 176 Ind Cas 191 (DB), *Azizur Rahman Osmani v. Upendranath Samanta*. (Mortgage by A and B — A dying leaving B, C and D as heirs — Payment by B after the death of A, on his own behalf only will not operate as against C and D—The fact that the surviving co-mortgagor who makes the payment is himself one of the co-heirs does not affect the question.)
- ('18) 5 AIR 1918 Oudh 152 (153) : 45 Ind Cas 613, *Mubarak v. Gopinath*.
[See ('33) 20 A I R 1933 Cal 268 (269, 270) : 143 Ind Cas 472 (DB), *Dharnidhar v. Indranarayan*. (Mortgage by A and B — B dying leaving C, his son — Payment by A does not operate as against C.)]
2. ('38) 25 AIR 1938 Mad 111 (112) : 175 Ind Cas 426, *Nagayya Naidu v. Duraisami Naidu*. (Purchasers from co-mortgagors are joint contractors.)
- ('18) 5 AIR 1918 Pat 646 (646) : 43 Ind Cas 351 (DB), *Sarab Narain Das v. Top Ojha*. (Mortgage by two widows — Reversioners succeeding to estate are joint mortgagors — ('10) 37 Cal 461, *Sarodacharan v. Durgaram*, distinguished.)
- 2a. ('12) 17 Ind Cas 619 (620) (DB) (Mad), *Velayudam Pillai v. Vaithiyalingam Pillai*. (Executant of promissory note and universal donee from executant who is liable on the promissory note under S. 128, Transfer of Property Act, are not joint contractors.)
3. ('41) 28 AIR 1941 Mad 110 (111), *C. K. Kunjandi v. Chinavava Rowther*. (Payment by one heir saves limitation against other heirs.)
- ('10) 5 Ind Cas 484 (485) : 37 Cal 461 (DB), *Sarodacharan v. Durga Ram*. (Co-heirs of sole mortgagor are not joint contractors.)
- ('29) 16 AIR 1929 Mad 419 (420) : 118 Ind Cas 302, *Narasimha Rama Aiyar v. Ibrahim*. (Payment by one co-heir will extend period of limitation against other co-heirs even where such co-heirs take the property as tenants-in-common and

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A mortgages certain property to B and subsequently transfers a portion of the equity of redemption to C who therefore becomes jointly liable with A in respect of the mortgage to B, A and C are *not* joint contractors.⁴

(2) The *second* view is that the test to be applied to see if certain persons are joint contractors is whether, *at the time of the acknowledgment or payment* they are jointly liable on a contract.⁵ According to this view, therefore, although a contract may have been made, in the first instance, by a *sole* contractor, if subsequently several persons become jointly liable on the contract, they will be joint contractors within the meaning of this section. Thus, the co-heirs of a single debtor will be joint contractors under this view.⁶

(3) The *third* view is that the expression "joint contractors" is confined to persons who *themselves* jointly enter into a contract with another and cannot apply to their successors. According to this view, even where a contract is made by several persons jointly, the *successors* of the contractors will not be joint contractors. This view proceeds on the ground that the categories given in S. 21 are exhaustive and not merely illustrative and

that their interests are several — ('12) 14 Ind Cas 128; *Arjun v. Rohima Banu*, dissented from.)

('38) 25 AIR 1938 Mad 111 (112) : 175 Ind Cas 426, *Nagayya Naidu v. Duraiswami Naidu*. (Obiter.)

('38) 25 AIR 1938 Cal 129 (136) : 170 Ind Cas 191 (DB), *Azizur Rahman v. Upendranath Samanta*.

4. ('33) 20 A I R 1933 Pat 1 (4) : 12 Pat 93 (DB), *Badri Das v. Pasupathi*. (('20) AIR 1920 Mad 418 (DB), *Muthu v. Md. Hussain*, distinguished.)

('33) 20 AIR 1933 Cal 325 (327) : 60 Cal 87 : 143 Ind Cas 315 (DB), *Omeshchandra v. Hemangachandra*. ((1864) 10 Jur (N S) 855, *Chinnery v. Evans*, followed.)

('05) 32 Cal 1077 (1080, 1081) (DB), *Krishna Chandra v. Bhairab Chandra*.

('06) 33 Cal 1278 (1281) : 11 Cal W N 107 (DB), *Domilal Sahu v. Roshan Dobay*. (Payment by mortgagor who is personally liable operates against transferee of equity of redemption also.)

('27) 14 AIR 1927 Cal 193 (195) (DB), *Raj Tilak v. Mufizuddi*. (Do.)

('15) 2 A I R 1915 Cal 5 (7) : 22 Ind Cas 510 (D B), *Hemchandra Chowdhry v. Poornachandra Chowdhry*. (Do.)

[See also ('18) 5 AIR 1918 Lah 310 (312, 313) : 44 Ind Cas 213 : 1918 Pun Re No. 3 (DB), *Ram Chand v. Mewa Ram*. (Payment by mortgagors to sub-mortgagee keeps alive the right of suit by sub-mortgagee against the sub-mortgagor.)]

5. ('36) 23 AIR 1936 All 820 (825) : I L R (1937) All 272 : 166 Ind Cas 106 (FB), *Mahomed Taqi Khan v. Raja Ram*. (Overruling A I R 1927 All 209 (D B), *Ibrahim v. Jagdish* and A I R 1918 All 61 (DB), *Raushan v. Kanhaiya*.)

6. ('36) 23 A I R 1936 All 820 (825) : I L R (1937) All 272 : 166 Ind Cas 106 (FB), *Mahomed Taqi Khan v. Raja Ram*. (Co-heirs of sole mortgagor are joint contractors.)

('12) 14 Ind Cas 128 (128) (Cal), *Arjun Ram Pal v. Rohima Banu*. (Do.)

('35) 22 A I R 1935 Cal 648 (650) : 158 Ind Cas 512, *Annada Charan v. Jhatu Charan*. (Following A I R 1922 All 37 (DB), *Collector of Jaunpur v. Jamuna Prasad* — ('10) 37 Cal 461 (DB), *Sarodacharan v. Durgaram*, not followed.)

('18) 5 AIR 1918 Low Bur 136 (137) : 9 Low Bur Rul 78 : 40 Ind Cas 858, *Yagappa v. Mahomed*. (('12) 14 Ind Cas 128, *Arjun v. Rohima Banu*, relied on.)

that cases of co-heirs and other persons who derive their liability not from *direct contract with the promisee*, cannot be brought within its scope.⁷

It is submitted that the *first* view mentioned above is correct on principle. The expression "joint contractors" necessarily implies that the persons have *jointly* entered into a contract. Where one of them dies, his successor will be in the same legal position and will be a joint contractor with the other.⁸ But, where the contract is entered into by a sole contractor, his successors will be only successors of a *sole* contractor and cannot have the character of *joint* contractors.⁹ The balance of authority also is in favour of this view.

9. Co-heirs of single debtor, whether joint contractors. — See Note 8.

10. **Muhammadan co-heirs.**—An *acknowledgment* of liability under S. 19 is effective only against the person making the acknowledgment and cannot save limitation against other persons who may be jointly liable with the person making the acknowledgment. So, independently of the question whether or not the co-heirs of a deceased Muhammadan debtor are joint contractors within S. 21, sub-s. (2), an acknowledgment made by one of the co-heirs cannot save limitation as against any other co-heir except where the latter has authorized such acknowledgment.¹

As regards the question whether a *part payment or payment of interest* under S. 20 by one of the heirs of a deceased Muhammadan debtor will save limitation against the other heirs also, there is a conflict of decisions. According to one view such payment will not save limitation against the other heirs. This view is based on the ground that the co-heirs are joint contractors and so, under sub-s. (2) of this section, payment by one of them will be effective only against the particular co-heir who makes the payment and not against others.²

7. ('30) 17 A I R 1930 Mad 738 (739, 740) : 127 Ind Cas 641, *Lokanadha v. Lokhono Naiko*. (Descendants of co-mortgagors are not joint contractors.)

8. ('41) 28 AIR 1941 Mad 110 (111), *C. K. Kunjandi v. Chinnava Rowther*.

9. See ('10) 5 Ind Cas 484 (485) : 37 Cal 461 (DB), *Saradacharan v. Durgaram*.

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1. ('42) 29 AIR 1942 Pat 73 (75) : 20 Pat 770 : 199 Ind Cas 566 (DB), *Fida Ali v. Bhuneshwari Kuar*. (Mortgage by deceased Muhammadan—Acknowledgment by one heir cannot save limitation against others.)

('36) 23 A I R 1936 All 820 (825, 826) : ILR (1937) All 272 : 166 I C 106 (FB), *Md. Taqi Khan v. Raja Ram*. (Co-heirs of debtor are joint contractors — ('18) AIR 1918 All 61 (DB), *Raushan v. Kanhaiya* and AIR 1927 All 209 (DB), *Ibrahim v. Jagdish*, held overruled.)

('22) 9 AIR 1922 All 37 (41) : 44 All 360 : 66 Ind Cas 171 (DB), *Collector of Jaunpur v. Jamna Prasad*.

('30) 17 AIR 1930 Mad 218 (220) : 53 Mad 480 : 122 Ind Cas 501 (D B), *Raja Rama v. Fakruddin Sahib*.

2. ('36) 23 A I R 1936 All 820 (825, 826) : I L R (1937) All 272 : 166 Ind Cas 106 (FB), *Md. Taqi Khan v. Raja Ram*. (Overruling A I R 1927 All 209 (DB), *Ibrahim v. Jagdish*.)

('12) 14 Ind Cas 128 (128) (Cal), *Arjun Ram Pal v. Rohima Banu*.

('18) 5 A I R 1918 Low Bur 136 (137) : 9 Low Bur Rul 78 : 40 Ind Cas 858, *Yagappa Chetty v. Mahomed*.

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According to the *second* view also a payment by one of the co-heirs will not save limitation against the other co-heirs. But this view proceeds on the ground that under Muhammadan law, each co-heir is bound to pay only a proportionate share of the debt of the deceased and so, there being no common debt between the co-heirs, a payment by one of them operates only as against him and not against others.³ A *third* view is that a payment by one co-heir will operate as against the other co-heirs also, the reason being that the debt is a single debt under section 20 and the co-heirs are not joint contractors within the meaning of this section.⁴

11. Co-mortgagors—Acknowledgment or payment by one—Effect of.—An *acknowledgment* by one co-mortgagor will be effective only against him and cannot save limitation as against other co-mortgagors.¹ The reason is that apart from the provisions of this section, under section 19, an acknowledgment by one of several joint debtors will save limitation only as against the person making the acknowledgment and not against his co-debtors.

As regards the question whether a *payment* under section 20 by one co-mortgagor will save limitation as against other co-mortgagors also, there is a conflict of decisions. The different views taken may be classified as follows :

- (1) The *first* view is that a payment by one of the co-mortgagors will *not* save limitation against the other co-mortgagors. This view is based on the ground that co-mortgagors are joint contractors within section 21, sub-section (2).²

3. ('37) 24 A I R 1937 Cal 191 (192, 193) : 171 Ind Cas 712 (D B), *Abheswari v. Baburahi*. (It is only where the debt is one and indivisible that payment of interest by one of the debtors would interrupt limitation against all unless the case came within Section 21 (2).)

[See also ('85) 11 Cal 421 (427) (DB), *Bussenteram v. Kamaluddin*.]

4. ('29) 16 A I R 1929 Mad 419 (420) : 118 Ind Cas 302, *Narasimha v. Ibrahim*.

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1. ('43) 30 A I R 1943 Bom 381 (383) : I L R (1943) Bom 486 : 210 Ind Cas 532 (DB), *Dashrath v. Gajanan*. (The words "joint contractors" in S. 21 (2), Lim. Act must be taken to include co-mortgagors.)

('42) 29 A I R 1942 Pat 73 (75) : 20 Pat 770 : 199 Ind Cas 566 (D B), *Fida Ali v. Bhuneshwari Kuar*. (Mortgage by deceased Muhammadam — Acknowledgment by one heir cannot save limitation against others.)

('39) 26 A I R 1939 Pat 451 (455) : 18 Pat 434 : 184 Ind Cas 597 (D B), *Rameshwar Dayal v. Ram Das Sahu*.

('02) 25 Mad 220 (233) (F B), *Narayana Ayyar v. Venkataramana Ayyar*. (Co-mortgagors are joint contractors and acknowledgment by one cannot save limitation against others.)

('28) 15 AIR 1928 All 387 (388) : 110 I C 561 (DB), *Gaya Prasad v. Babu Ram*.

('36) 23 AIR 1936 All 820 (825, 826) : ILR (1937) All 272 : 166 Ind Cas 106 (FB), *Mahomed Taqi Khan v. Raja Ram*. (Acknowledgment by one of the heirs of a mortgagor does *not* save limitation against others.)

2. ('43) 30 A I R 1943 Bom 381 (383) : I L R (1943) Bom 486 : 210 Ind Cas 532 (DB), *Dashrath Motiram v. Gajanan Keshav*.

('41) 28 A I R 1941 Rang 37 (41, 46) : 1940 Rang L R 603 : 194 Ind Cas 177, (DB), *Esoof Karwa v. Mrs. Niemeyer*. (Mahomedan brother and sister execut-

The balance of authority is in favour of this view. It is submitted that this view is also correct on principle. The obligation of co-mortgagors to pay the mortgage debt is based on *contract and prima facie*, therefore, co-mortgagors are joint contractors. The fact that the sub-section specifically refers to *mortgagees* but does not specifically refer to *mortgagors* does not appear to be a sufficient reason for not giving the words "joint contractors" their natural meaning.

- (2) The *second* view is also to the effect that a payment by one of the co-mortgagors will not save limitation against other co-mortgagors. But the reason given is that under S. 20 (as in the case of section 19) a payment by one joint-debtor cannot save limitation as against other joint-debtors.³ The difference between the first view and this view is this. Under the *first* view, a payment by one co-mortgagor would, if S. 20 stood alone, operate against the other co-mortgagors also, but this result is *averted* by the operation of S. 21, sub-section (2). But, under this second view even under section 20 itself, such payment would not save limitation against the other co-mortgagors. It is submitted that the latter view is not correct. It is now settled law that a payment under section 20 will save limitation as against *all* the persons who are liable to pay the debt.

ing mortgage — Payment by one cannot save limitation against other—Brother cannot be deemed to be sister's agent.)

('39) 26 A I R 1939 Rang 287 (288, 289) : 184 Ind Cas 622 (D B), *U So Maung v. J. Thom.*

('29) 16 AIR 1929 Mad 881 (884) : 121 Ind Cas 858 : 53 Mad 119 (DB), *Thayam-mal v. Muthukumaraswami.*

('20) 7 AIR 1920 Mad 418 (419) : 55 Ind Cas 763 (DB), *Mulhu v. Muhammad.*

('15) 2 AIR 1915 Cal 652 (653) : 26 Ind Cas 511 (DB), *Baikuntagni v. Lal Chand.*

('36) 23 A I R 1936 All 820 (825) : I L R (1937) All 272 : 166 Ind Cas 106 (F B), *Mahomed Taqi v. Raja Ram.*

('18) 5 AIR 1918 Pat 646.(646) : 43 Ind Cas 351 (DB), *Sarab Narain Das v. Top Ojha.* (Successors of original mortgagors are joint contractors.)

('38) 25 A I R 1938 Mad 111 (112) : 175 Ind Cas 426, *Nagayya Naidu v. Duraisami Naidu.* (Purchasers from co-mortgagors are joint contractors.)

('33) 20 AIR 1933 Cal 268 (269, 270) : 143 Ind Cas 472 (DB), *Dharanidhar Ghose v. Indranarayan Sinha.* (Mortgage by A and B — B dying leaving C, his son — Payment by A does not operate against C.)

('38) 25 A I R 1938 Cal 129 (132) : 176 Ind Cas 191 (DB), *Azizur Rahman v. Upendranath.* (Do.)

('18) 5 AIR 1918 Oudh 152 (153) : 45 Ind Cas 613, *Mubarak Ali v. Gopinath.* (Do.)
[See also ('32) 19 AIR 1932 Cal 620 (621) : 59 Cal 1128 : 138 Ind Cas 740 (D B), *Jogesh Chandra v. Monindra Narain.*]

3. ('05) 27 All 575 (579) : 2 All L Jour 287 (DB), *Ashanullah v. Dakkhini Din.*

See also the observations in the following cases, which indicate that payment and acknowledgment stand on the same footing in this respect :

('18) 5 AIR 1918 Cal 707 (709, 710) : 44 Cal 978 : 39 Ind Cas 705 (DB), *Brojendra v. Hindusthan Co-operative Insr. Society Ltd.* (Payment by principal debtor does not keep alive the debt against the surety.)

('17) 4 AIR 1917 Mad 895 (895, 896) : 32 Ind Cas 608, *Kothandaraman Chetty v. Shunmugam Chetty.* (The words 'joint contractors' in S. 21 would apply to a surety.)

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(3) The *third* view is that a payment by one co-mortgagor will save limitation against the other co-mortgagors also. This view proceeds on the ground that S. 21, sub-s. (2) is relevant only when the question is whether a certain person is or is not the duly authorized agent of another person for the purpose of making an acknowledgment or payment on his behalf. According to this view, where, *independently of any question of agency*, one person is competent by his act, to start a fresh period of limitation against another person, S. 21, sub-s. (2) has no application at all. Hence, as under S. 20, a payment by one co-mortgagor will save limitation against other co-mortgagors also, *apart from any question of agency*, S. 21, sub s. (2) does not apply at all to the question.⁴ But, in regard to the *personal* covenants of the mortgagors, the liabilities are distinct and so, under S. 20, payment by one of the co-mortgagors will not save limitation as against the others unless the person making the payment is the duly authorized agent of the person sought to be bound.⁵ In such cases, S. 21, sub-section (2) would be relevant as showing that one joint contractor is not, *ipso facto*, the agent of another joint contractor for the purpose of making an acknowledgment or payment on his behalf. It is submitted that this view also is not correct. The language of sub-s. (2) is general and does not warrant the view that the sub-section does not apply to cases where the act of one person binds another independently of any question of agency. Further, there is no reason for making any distinction between the liability of the co-mortgagors as regards the *property* and their liability on their *personal* covenants. In either case, the debt would be only one and the same for all the debtors.

(4) The *fourth* view also is that a payment by one co-mortgagor will save limitation as against other co-mortgagors also. But, the reason given is that "the existence of the charge on the property is clearly something beyond the payment or acknowledgment which follow the words "by reason only of" in S. 21, sub-s. (2).⁶

4. ('33) 20 A I R 1933 Pat 1 (5) : 12 Pat 93 : 140 Ind Cas 145 (DB), *Badri Das v. Pasuputi Banerji*. (Per Agarwala, J.)

('36) 23 A I R 1936 Pat 361 (362) : 163 Ind Cas 808, *Sripati Samanta v. Lalji Sahu*. (Distinction between joint contractors and the body of persons interested in equity of redemption is that with the joint contractors there are number of separate single debts : for the persons interested in equity of redemption there is one single indivisible debt and a single indivisible security.)

5 ('36) 23 AIR 1936 Pat 361 (362) : 163 Ind Cas 808, *Sripati Samanta v. Lalji*. [See also ('38) 25 A I R 1938 Pat 383 (385) : 174 Ind Cas 156 (D B), *Baijnath Prasad v. Sati Lal Sahu*. (According to Wort, J. payment by one co-mortgagor will keep alive the *mortgage* against all but will not keep alive the personal liability of the other mortgagors - But according to Manohar Lall, J. payment by one mortgagor cannot save limitation against the other mortgagors.)]

6. ('36) 23 AIR 1936 Rang 504 (505) : 165 Ind Cas 828, *U Tha Mo v. Palaniappa Chettiar*. (But in case of a simple promissory note, payment by a debtor does not extend limitation against his co-debtor.)

See also Note 6.

It is submitted that the reasoning is not correct. It assumes that the existence of the charge is a determining factor under S. 20 in making a payment by one of the co-mortgagors effective against the others. This is not so. Under that section, the basis on which limitation is saved against all the co-debtors is that the *debt is common* to all of them. No special significance attaches to its being a *secured* debt.

- (5) In the undermentioned case,⁷ a payment by one co-mortgagor was held sufficient to save limitation under S. 20 as against other co-mortgagors also. But, no reference is made to the provisions of S. 21, sub-s. (2) at all. In view of the discussion above, the decision cannot be accepted as correct.
- (6) A mortgaged his property to B. B sub-mortgaged the property to C. It was held that a payment by A to C saved limitation for a suit by C, not only against A but also against B.⁸ The reason given was that though the debt due by A and B was one and the same, they were not *joint* contractors. But, at the same time, it was pointed out that A and B were not co-mortgagors. Hence, the case did not touch the question whether co-mortgagors are joint contractors.
- (7) In the undermentioned case,⁹ where there were two mortgagors, A and B, it was contended that a payment made by A alone would not be effective under section 20 to start a fresh period of limitation. This contention was overruled and it was held that the section did not require that the payment under it should be made by the entire body of persons liable to pay the debt. It is submitted that this case does not touch the question as to whether a payment by one co-mortgagor will save limitation as against the other co-mortgagor also.¹⁰

It has already been seen that the correct view under this section is that co-mortgagors are joint contractors and that a payment by one of them will not save limitation against the others. The further question arises whether this proposition applies only to cases of persons who have *themselves* jointly executed a mortgage in favour of another or whether it applies also to *other* cases where two or more persons may be jointly liable to pay a mortgage debt. This depends

7. ('35) 22 A I R 1935 Rang 473 (477) : 160 Ind Cas 314, *U Sin v. U Tun Si*. (Note that this case relies on ('18) AIR 1918 All 61 (DB), *Roshan Lal v. Kanhaiya Lal* and ('27) A I R 1927 All 209 (D B), *Ibrahim v. Jagdish* which have been overruled in ('36) AIR 1936 All 820 (FB), *Md. Taqi v. Raja Ram*.)

8. ('18) 5 AIR 1918 Lah 310 (312, 313) : 1918 Pun Re No. 3 : 44 Ind Cas 212 (DB), *Ram Chand v. Mewa Ram*. (Sub-mortgagor's position is that of an acknowledged surety.)

9. ('26) 13 AIR 1926 Cal 150 (151) : 90 Ind Cas 774 (DB), *Achola Sundari v. Doman*.

10. ('32) 19 AIR 1932 Cal 620 (621) : 59 Cal 1128 : 138 Ind Cas 740 (DB), *Jogesh Chandra v. Monindra Narain*.

[See also ('38) 25 AIR 1938 Pat 383 (385) : 174 Ind Cas 156 (DB), *Baijnath Prasad v. Satilal Sahu*. (Observations of Manohar Lall J. support the above view of the decision in AIR 1926 Cal 150, *Achola Sundari v. Doman*.)]

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on the question whether the expression "joint contractors" in this section is confined to persons who have *themselves* jointly entered into a contract with another or whether the expression will include also *other* persons who may be jointly liable in respect of a contract. This question has been fully discussed in Note 8.

A payment by one co-mortgagor does not save limitation as against others not only as regards their *personal* liability but also as regards their liability in respect of their share in the mortgaged *property*. The reason is that the word "chargeable" in sub-s. (2) refers not only to *personal* liability but also liability in respect of *property*.¹¹ (See Note 6.)

Although a payment by one co-mortgagor does not save limitation as against the other co-mortgagors, such payment will save limitation as against the particular co-mortgagor who makes the payment.¹² In such cases limitation will be saved not only in regard to the *personal* liability of the co-mortgagor making the payment but also in regard to his liability in respect of his share in the mortgaged *property*.¹³ Further, such co-mortgagor's share will be liable for the *whole* mortgage debt and not merely for a proportionate part of it. The reason is that the mortgagee is entitled under the law to proceed against *any* part of the mortgaged property for the recovery of his debt.¹⁴

Sub-section (2) of this section, however, has no application to the case of a joint Hindu family in which the father as manager makes a payment on behalf of the family. Such a case will come within the provisions of sub-s. (3) (b) of the section. Thus, where a decree on a mortgage is passed against the father and his sons who are members of a joint Hindu family and the father as manager of the family makes a payment towards interest, such payment will operate to save limitation not only against the father but against his sons as well.¹⁵

Where a mortgage deed executed by two persons contains a default clause to the effect that on default in the payment of the annual interest the mortgagee should be entitled to the possession of the mortgaged property and where after default is committed, one of the co-mortgagors pays off the arrears of interest completely, and the

11. ('39) 26 AIR 1939 Rang 287 (289) : 184 Ind Cas 622 (DB), *U So Maung v. J. Thom.* (Relationship of principal and surety does not exist between joint contractors.)

(29) 16 AIR 1929 Mad 881 (884) : 121 Ind Cas 858 : 53 Mad 119 (DB), *Thayammal v. Muthukumaraswami.*

[See however ('38) 25 AIR 1938 Pat 383 (385) : 174 Ind Cas 156 (DB), *Bajinath Prasad v. Satilal Saku.* (According to Wort J., payment by one mortgagor will keep alive the mortgage against all but not the liability on the personal covenant.)]

12. ('29) 16 AIR 1929 All 380 (381) : 119 Ind Cas 437 (DB), *Ghasi Khan v. Kishori.*

13 ('29) 16 AIR 1929 All 380 (381) : 119 Ind Cas 437 (DB), *Ghasi Khan v. Kishori.*

14. ('29) 16 AIR 1929 All 380 (381) : 119 Ind Cas 437 (DB), *Ghasi Khan v. Kishori.*

15. ('38) 25 AIR 1938 All 638 (639) : 179 Ind Cas 90, *Ragghi v. Nathu Lal.*

mortgagee accepts such payment, the cause of action based on the default is wiped out and limitation for a suit for possession by the mortgagee will only run from the next default. In such a case, there is no question of the extension of the period of limitation by payment by one of the co-mortgagors and hence sub-s. (2) of this section does not apply at all. Although payment by one of the co-mortgagors may not be sufficient to extend the period of limitation as against the other co-mortgagor such payment may be sufficient to discharge both the co-mortgagors from the liability they may have incurred under the terms of the mortgage deed.¹⁶

12. Principal and surety — Acknowledgment or payment by one, whether will save limitation against the other.— An *acknowledgment* of liability by the principal debtor will save limitation only as against him and not as against the surety.¹ Similarly, an acknowledgment by the surety will save limitation only as against him and not as against the principal debtor.

There is a conflict of decisions as to whether a *payment* made by a principal debtor will save limitation as against the surety and conversely, whether a payment by the surety will save limitation as against the principal debtor. One view is that for the purpose of S. 20, the debts of the principal debtor and the surety are *distinct* and that, therefore, a payment by one of them cannot save limitation as against the other.² Another view is that the debt is *common* both to the

16. ('39) 26 AIR 1939 Lah 212 (215), *Abdullah v. Ishaq Mohammad*.

Section 21 — Note 12

1. ('39) 26 AIR 1939 Nag 31 (32) : 179 Ind Cas 771, *Suwalal v. Faele Hussain* (This principle will apply to continuing guarantee also.)

('31) 18 AIR 1931 Lah 691 (694) : 13 Lah 240 (DB), *Diyalu Mal v. Nandhu*.

2 ('04) 28 Bom 248 (251, 252) : 5 Bom L R 1020 (DB), *Gopal Daji v. Gopal Sonu*. (There is no presumption that principal debtor is agent of surety.)

('18) 5 AIR 1918 Cal 707 (709, 710) : 44 Cal 978 : 39 Ind Cas 705 (DB), *Brojendra Kishore Roy v. Hindusthan Co-operative Insurance Society Ltd.* (This holds good even where the payment by the principal debtor is made with the knowledge and consent of the surety and even at his request.)

('38) 25 AIR 1938 Cal 129 (134) : 176 Ind Cas 191 (DB), *Azizur Rahman v. Upendranath Samanta*. (Obiter.)

('11) 9 Ind Cas 8 (9) (Mad), *Sami Aiyangar v. Laxmi*.

('17) 4 AIR 1917 Mad 895 (896) : 32 Ind Cas 608, *Kothandaraman Chetty v. Shunmugam Chetty*. (The words 'joint contractors' in Section 21 (2) would apply to a surety.)

('30) 17 AIR 1930 Mad 112 (112) : 120 Ind Cas 576, *Secretary of State v. C. R. Subramania Iyer*. (28 Bom 248 and 9 Ind Cas 8 followed; A I R 1919 Lah 374, *Harbanslal v. Nathu*, not followed.)

('34) 21 AIR 1934 Mad 639 (640) : 152 Ind Cas 464 (DB), *Vaiyapuri Pandaram v. Seetharama Chettiar*. (AIR 1918 Cal 707, followed.)

('25) 12 AIR 1925 Mad 132 (132) : 80 Ind Cas 932, *Jaganadha Reddiar v. Lakshmana Reddiar*. (Liability of the endorser of a promissory note arises out of the endorsement and not on the note — A payment of money by the maker of the note and signed by him saves limitation only against the person liable on the note and has nothing to do with persons liable on the endorsement.)

('24) 11 AIR 1924 Nag 411 (412) : 20 Nag L R 140, *Abde Ali v. Askaran*. (It was conceded that payment by the principal debtor in this case was not on behalf of surety.)

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surety and the principal debtor, and that, therefore, a payment by one of them *will* save limitation against the other also. This view involves the assumption that the principal debtor and the surety are not joint contractors within this sub-section.³ In some decisions^{3a} belonging to the first group, an opinion has been expressed that even viewing the debt as the joint debt of the principal debtor and the surety, they will be *joint contractors* within S. 21, sub-s. (2) and therefore a payment by one of them will not save limitation as against the other. In the undermentioned case⁴ it was held that a payment by the principal debtor will not save limitation against the surety. But, beyond saying that an *acknowledgment* by a principal debtor will save limitation only against him and not as against the surety, the judgment does not give any reason for its decision.

The weight of authority is in favour of the first view. It is submitted, however, that the view does not seem to be correct on principle. The *debt* is common to both the surety and the principal debtor although the *contracts* under which they are liable are distinct.⁵ Further, the *third* view referred to above that even if the debt of the surety and principal debtor is deemed to be common to both, they are *joint contractors* within the meaning of sub-section (2) of this section, does not also appear to be correct. The *contracts* under which the two are liable are distinct, though the *debt* is common.

13. Partner, authority of, to acknowledge or pay on behalf of firm—As seen in Note 6, sub-section (2) does not preclude an acknowledgment or payment, by a member of any of the groups specified therein from being effective against the other members of the group where such members have *authorised* such acknowledgment or

(31) 18 AIR 1931 Oudh 310 (310) : 132 Ind Cas 798 (DB), *Jainarain Singh v. Parmeshar Murao*. (Point not disputed.)

(32) 19 AIR 1932 Rang 88 (89) : 10 Rang 398 : 139 Ind Cas 138, *U Ba Pe v. Ma Lay*. (Payment by surety did not extend limitation against the principal.)

(25) 12 AIR 1925 Bom 244 (245) : 49 Bom 202 : 86 Ind Cas 883 (DB), *Raghavendra Gururao v. Mahipat Krishna*. (The principal debtor and the surety can each keep his liability alive, though the remedy of the creditor may be barred as against the other on account of limitation.)

3. (40) 27 AIR 1940 Cal 401 (402 to 405) : I L R (1940) 2 Cal 362 : 191 Ind Cas 608, *Ranjit Kumar v. Kisori Mohan*.

(19) 6 AIR 1919 Lah 374 (375) : 1919 Pun Re No. 105 : 53 Ind Cas 586, *Harbanslal v. Nathu*. (Dissenting from (03) 28 Bom 248 (DB), *Gopal Daji v. Gopal Sonu*.)

[See (18) 5 AIR 1918 Lah 310 (312, 313) : 1918 Pun Re No 3 : 44 Ind Cas 213, *Ram Chand v. Mewa Ram*.]

[See also (39) 26 AIR 1939 Rang 287 (289) : 184 Ind Cas 622 (DB), *U So Maung v. J. Thom*. (The observations of Mackney J., in this case suggest that payment by principal debtor will save limitation against the surety also.)

3a. (17) 4 AIR 1917 Mad 895 (896) : 32 Ind Cas 608, *Kothandaraman Chetty v. Shuumugam Chetty*.

(18) 5 AIR 1918 Cal 707 (712) : 44 Cal 978 : 39 Ind Cas 705 (DB), *Brojendra Kissore v. Hindusthan Co operative Insurance Society Ltd.* (Per Mookerji J.)

4. (31) 18 AIR 1931 Lah 691 (694) : 13 Lah 240 (DB), *Diyalu Mal v. Nandhu*.

5. (40) 27 AIR 1940 Cal 401 (402) : I L R (1940) 2 Cal 362 : 191 Ind Cas 608, *Ranjit Kumar v. Kisori Mohan*.

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payment. Hence, an acknowledgment or payment by a partner will save limitation against the other partners also where the latter have *authorised* such acknowledgment or payment. Such authorisation need not be express and may be implied from the facts and circumstances of each case.¹ Further, under the law, each partner has implied authority on behalf of all the partners to do all such acts as are necessary or usually done in the course of carrying on the business of the kind carried on by the firm of which he is partner. (See s. 19 of the Partnership Act of 1932.) Hence, if the nature of the business of the firm is such that acknowledgments of liability or making part payments or payments of interest are things done in the usual course of the business, a partner may be presumed to have been authorized by the other partners to make such acknowledgments or payments.²

Section 21 — Note 13

1. ('45) 32 AIR 1945 Mad 263 (264) : (1945) 1 Mad L Jour. 279, *Periambala Chettiar v. Muhammad Ghouse Saheb*. (Managing partner making payment towards partnership debt—Endorsement by him, held saved limitation against partners.)
- ('19) 6 AIR 1919 Mad 1140 (1142, 1143) : 41 Mad 427 : 45 Ind Cas 18 (FB), *Veeranna v. Veerabhadraswami*. (Overruling ('08) 32 Mad 421 (DB), *Vala-subramania v. Ramanathan* and ('11) 35 Mad 142 (DB), *Mohideen Sahib v. Official Assignee of Madras*.)
- ('25) 12 AIR 1925 Rang 30 (32) : 84 Ind Cas 391 : 2 Rang 367 (DB), *Rala Singh v. Bhagwan Singh & Sons*. (Trading partnership — One partner has implied authority to bind the other partners by signing a pro-note.)
- ('35) 22 AIR 1935 Lah 559 (560) : 158 Ind Cas 260, *Dayal & Co. v. Radha Kishan*. (Endorsement made by a partner in the ordinary course of business and with the implied consent of the other partner binds the latter.)
- ('26) 13 AIR 1926 Mad 114 (115) : 92 I:C 653 (DB), *Mahadeva v. Ramakrishna*.
- ('28) 15 AIR 1928 Mad 972 (975) : 112 Ind Cas 491, *Chegamull Saganmull v. Govindaswami*. (Partner *ipso facto* has no authority to acknowledge or to make a part payment. But if he has general authority to contract debts or make payments he has implied authority to keep the debt alive and it is unnecessary to make out special authority.)
2. ('88) 10 All 418 (419, 420) : 1888 All W N 93 (DB), *Gadu Bibi v. Parsotam*.
- ('28) 15 AIR 1925 All 491 (491, 492) : 50 All 983 : 111 Ind Cas 143, *Debi Dayal v. Baldeo*. (When a joint Hindu family carries on business, its members are in a position of partners in regard to persons dealing with that business.)
- ('26) 13 AIR 1926 Mad 114 (115) : 92 Ind Cas 653, *Mahadeva v. Ramakrishna*.
- ('32) 19 AIR 1932 Lah 456 (456) : 137 Ind Cas 771, *Kuljas Ram v. Wishan Singh*. (AIR 1926 Lah 616 (DB), *Ganda Singh v. Bhag Singh* followed.)
- ('09) 4 Ind Cas 708 (709) : 32 All 51, *Lalta Parshad v. Babu Parshad*. (Case of managing partner.)
- ('16) 3 AIR 1916 Bom 119 (121) : 38 Ind Cas 873 (DB), *Abdullah v. Ranchodlal*. (Partner appointed *vahivatdar* by Court to manage business of partnership can acknowledge or pay on behalf of the firm.)
- ('99) 1899 Pun Re No. 45 p. 216, *Bichhalal v. Jai Parshad*.
[See observations in ('14) 1 AIR 1914 Mad 609 (612) : 37 Mad 146 : 21 Ind Cas 634, *K. R. V. Firm v. Sitharamaswami*. (An opinion was expressed in this case that the cases to the contrary reported in ('08) 32 Mad 421 (DB), *Vala-subramania v. Ramanathan* and ('11) 35 Mad 142 (DB), *Mohideen Sahib v. Official Assignee of Madras*, should be reconsidered.)]
- [But see ('16) 3 AIR 1916 Mad 508 (509) : 28 Ind Cas 845 (DB), *Veerappa Chetty v. Chidambaram Chetty*. (Even if a partner was put in charge of a

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Thus, in a going *mercantile* concern, as an ordinary rule, each partner may be presumed to have authority to acknowledge and make payments on behalf of the firm.³ But, in the case of partnerships which are not of such a character, as for instance, a mining company, a farming company, a firm of attorneys, etc., there is no such implied authority.⁴

Moreover, even in the case of partnerships to which the presumption of agency above referred to applies, the presumption will hold good only in the case of acknowledgments or payments made in the *course of the partnership business*.⁵ Thus, where an acknowledgment is made by a partner in the course of proceedings relating to his insolvency, he cannot be considered as acting in the course of the partnership business and the acknowledgment cannot be used as against the other partners.⁶ Further, where a partner purports to acknowledge only his own liability and not that of the partnership as a whole, his acknowledgment cannot save limitation as against the other partners.⁷

The presumption of agency above referred to does not apply in the case of a partnership which has ceased to be a *going concern*.⁸ Hence, after a partnership has been dissolved, an acknowledgment or payment made by one of the ex-partners in respect of a debt which was a partnership debt cannot bind the other ex-partners.⁹ But, even

branch of partnership business and was himself a partner that alone will not justify the presumption that he was authorised to bind the firm by payment or acknowledgment.)]

3. ('39) 26 A I R 1939 Lah 397 (398) : 184 Ind Cas 734, *Gulsaran Das v. Brij Mohan*.

('86) 10 Bom 358 (362), *Premji Ludha v. Dossa Doongersy*.

('32) 19 AIR 1932 Bom 316 (318, 319) : 138 I. C. 805, *Gordhandas v. Bhulabhai*.

[See ('73) 10 Bom H C R 319 (322) (DB), *Premabhai Hemabhai v. T. H. Brown*. (One partner can bind firm by giving promissory note or drawing bill of exchange.)]

('88) 1888 Bom P J 147, *Ravji v. Narayandas*.]

[But see ('09) 2 Ind Cas 309 (310): 32 Mad 421 (DB), *Valasubramania Pillai v. Ramanathan Chettiar*. (Authority cannot be presumed even in a going mercantile concern.)]

4. See ('73) 10 Bom H C R 319 (322) (DB), *Premabhai Hemabhai v. T. H. Brown*, (No authority to draw bill of exchange or give promissory note.)

5. ('17) 4 AIR 1917 Mad 518 (518) : 36 Ind Cas 389 (DB), *Kissendoss v. Khatau Makanjee Spinning & Weaving Co., Ltd.*

6. ('17) 4 AIR 1917 Mad 518 (518) : 36 Ind Cas 389 (DB), *Kissendoss v. Khatau Makanjee Spinning & Weaving Co., Ltd.*

7. ('01) 3 Bom L R 144 (150) (DB), *Baldeo Das v. Manekchand*.

8. ('89) 1889 Pun Re No. 140, p. 477, *Naubat Rai v. Seva Ram*. (Where the firm merely exists for the purpose of winding up its affairs, one partner cannot sign acknowledgments on behalf of the firm.)

('16) 3 A I R 1916 Low Bur 75 (76) : 36 Ind Cas 225 : 8 Low Bur Rul 363 (DB), *Malayandi Chetty v. Narayanan Chetty*. (When a money lending firm is being wound up, one partner cannot give an acknowledgment for a subsisting debt so as to bind the firm.)

('25) 12 AIR 1925 Nag 268 (270) : 85 Ind Cas 775, *Sheonarain v. Babu Lal*.

9. ('86) 10 Bom 358 (362, 363), *Premji Ludha v. Dossa Doongersey*.

('26) 13 AIR 1926 Mad 114 (115) : 92 I. C. 653 (DB), *Mahadeva v. Ramakrishna-*

in such cases, a partner who has been authorized to wind up the business¹⁰ or to collect and pay the debts of the partnership, or who has been appointed a receiver with the consent of the other partner to realise assets, to *pay debts* and do other acts,^{10a} will be considered as having authority to acknowledge or make payments in respect of such debts so as to save limitation.¹¹

Under S. 45 of the Partnership Act of 1932, notwithstanding the dissolution of a firm, the partners will continue to be liable *as such* to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution. There was a similar provision contained in S. 264 of the Contract Act before the Partnership Act of 1932 was passed. Hence, notwithstanding the dissolution of a firm, if the creditor has no notice of such dissolution and an acknowledgment or payment is made by a partner in respect of a partnership debt, the acknowledgment or payment will save limitation against the other partners also. The reason is that in such cases, by virtue of the provisions above referred to, the presumption of agency applicable to going concerns will apply also to *dissolved* partnerships, so far as third parties, like creditors of the firm, who are ignorant of the dissolution of the firm, are concerned.¹²

(198) 8 Mad L Jour 261 (262) (DB), *Rajagopala Pillai v. Krishnasami Chetti*. (Where a partnership is dissolved by the death of one of the partners, the surviving partners cannot bind the representatives of the deceased partner by their acknowledgment of a debt of the firm unless they are specially authorised to do so.)

(125) 12 AIR 1925 Nag 268 (269, 270) : 85 I. C. 775, *Sheo Narain v. Babu*. (Do.)

(116) 3 AIR 1916 Mad 235 (236) : 30 Ind Cas 675 (DB), *Muthuswami Nadan v. Sankaralingam Chetty*.

10. (129) 16 A I R 1929 Lah 266 (267) : 118 Ind Cas 529, *Pahumal v. Chunilal*. (But the question whether a particular partner was authorized to wind up the business is mixed question of law and fact.)

10a. (137) 24 AIR 1937 Mad 764 (766) : 174 Ind Cas 22, *Krishnayya v. Seetharamayya*.

See also Note 52 under S. 19 and Note 22 under S. 20.

11. (116) 3 A I R 1916 Mad 235 (236, 237) : 30 Ind Cas 675 (DB), *Muthuswami Nadan v. Sankaralingam Chetty*. (Partner authorized to pay debts – From this the lesser power of acknowledging debts can be inferred.)

12. (132) 19 AIR 1932 Bom 316 (319) : 138 Ind Cas 805, *Gordhan Das v. Bhula Bhai*. (In absence of proof and knowledge of dissolution by creditors, signature of partner to acknowledgments must be deemed to be on behalf of other partners.)

(102) 26 Bom 42 (49) : 3 Bom L R 484 (DB), *Dalsukh Ram v. Kalidas*. (Burden of proving that the creditor had notice of dissolution is on the partner who asserts that the creditor had such notice.)

(130) 17 A I R 1930 Bom 236 (237, 238) : 125 Ind Cas 442, *Krishnabai v. Varji vandas Jagjivandas*. ((86) 10 Bom 358, *Premji v. Dossa Doongersey*, distinguished on the ground that it must be assumed in that case that the creditor had knowledge of the dissolution of the firm.)

(129) 16 AIR 1929 Cal 714 (716) : 56 Cal 556 : 121 Ind Cas 741, *Bengal National Bank Ltd. v. Jatindra Nath*.

(126) 13 A I R 1926 Lah 616 (616, 617) : 7 Lah 403 : 99 Ind Cas 563 (DB), *Ganda Singh v. Bhag Singh*. (But where on the date of the acknowledgment the partners have ceased to do business and the fact was *within the knowledge of the*

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Suppose, after the dissolution of a firm, of which the creditor has no notice, one of the partners makes an acknowledgment or payment in respect of a partnership debt. Will such acknowledgment or payment bind the estate of a deceased partner? It was held by the Bombay High Court in the undermentioned case¹³ that the acknowledgment or payment will bind the estate of the deceased partner. The reason given was that in such cases, the presumption under S. 264 of the Contract Act, of the *continuance* of the firm must be made even against the estate of the deceased partner. Further, it was held that S. 261 of the said Act only provided that the estate of a deceased partner would not be liable in respect of any *obligation incurred* by the firm after his death. As in the case of an acknowledgment under S. 19 or payment under S. 20, *no fresh obligation is incurred*, the above provision did not form any objection to holding that the estate of the deceased partner was bound by the acknowledgment or payment made by one of the partners after his death.

It is submitted that the above ruling would not be good law under the Partnership Act of 1932, the proviso to S. 45 of which provides that the estate of a partner who dies is not liable under S. 45 (corresponding to S. 264 of the Contract Act) for *acts done* after his death. The reason is that the expression "acts done" is wide enough to include acknowledgments of liability and part payments or payments of interest.

Under S. 4 of the Limitation Act of 1859, an acknowledgment by *an agent* was not recognised. Hence, under that Act one partner could not acknowledge on behalf of another even if he was authorised by the latter to do so.¹⁴

14. Hindu trading family. — Where a joint Hindu family carries on business, the members of the family are in the position of partners in regard to persons dealing with the business. Hence, as in the case of other partnerships, an acknowledgment or payment by *any* member of the family made in the course of the business may be presumed to be authorised by the other members of the family.¹

person in whose favour the acknowledgment was made, one partner has no power to make an acknowledgment so as to save limitation against the other.)

('29) 16 AIR 1929 Lah 266 (267) : 118 Ind Cas 529, *Pahu Mal v. Chuni Lal*.

('26) 13 A I R 1926 Mad 114 (115) : 92 Ind Cas 653 (DB), *Mahadeva v. Rama Krishna*.

13. ('35) 22 A I R 1935 Bom 357 (358, 359) : 60 Bom 5 : 158 Ind Cas 159 (DB), *Babu v. Dayambai*.

14. ('67) 2 Agra 370 (374) (DB), *Banarasee Dass v. Khooshal Chund*.

Section 21 — Note 14

1. ('44) 31 AIR 1944 Mad 33 (37) : ILR (1944) Mad 763 : 214 Ind Cas 113, *Venkatachalam v. Venkateswara Rao*.

('37) 1937 Mad W N 1312 (1313), *Narayana Iyer v. Narayana Iyer*. (But this presumption will not apply to an acknowledgment made by one of the members after partition — In such a case the onus of proving that he was authorized by the other members to give the acknowledgment will be on the plaintiff.)

('28) 15 AIR 1928 All 491 (491, 492) : 50 All 982, *Debi Dayal v. Baldeo*.

Similarly, the presumption applicable to partnerships, viz., that even after dissolution a partnership must be deemed to be continuing as regards creditors and others dealing with the firm who have no notice of the dissolution, will also apply to a Hindu trading family. Hence, even after partition in the family, if the creditor has no notice of such partition, an acknowledgment or payment made by any member of the family in the ordinary course of business will be binding on the other members of the family also.²

15. Executors. — An executor can make acknowledgments of liability under S. 19 and payments under S. 20 on behalf of the estate.¹ Where there are more than one executor, an acknowledgment or payment by one of them alone will not be effective against the others.²

16. Joint mortgagees. — In the case of joint mortgagees, there is no question of any *payment* by them under S. 20. But, they can make an acknowledgment of liability under S. 19 so as to save limitation for a suit for redemption by the mortgagor.

As seen in Note 6, an acknowledgment under S. 19 operates only as against the person making it and not against others who may be jointly liable with him. Hence, even under S. 19 itself, an acknowledgment by a co-mortgagee will not operate against the other co-mortgagees for purposes of limitation, except where the latter have authorised him to make the acknowledgment.¹ The object of sub-section (2) of this section in such cases is to provide that the mere fact that persons stand to each other in the relation of co-mortgagees will not make them agents for each other for the purpose of making acknowledgments under section 19.^{1a}

Although an acknowledgment under S. 19 will be effective against the particular person who makes the acknowledgment irrespective of its effect with regard to others who may be jointly liable with him, an acknowledgment of liability by a co-mortgagee will be ineffective even to sustain a suit for redemption of such co-mortgagee's *share* in the mortgage. The reason is that the entire mortgage must be treated as one indivisible unit and redemption of a portion of the mortgage

2. ('30) 17 AIR 1930 Bom 236 (237) : 125 Ind Cas 412, *Krishnabai v. Varjivandas*.

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1. (1864) 2 Mad H C R 84 (85), *Raja Iswara Das v. Richardson*.
2. ('67) 8 Suth W R 63 (63), *Chunder Kant Mitter v. Ramnarain Dey Sircar*.
(The admission of one executor would not bind another, at any rate, if the admission was not made in the character of executor.)
See also Note 56 to section 19.

Section 21 — Note 16

1. ('07) 1907 Pun L R No. 43, p. 236 : 1907 Pun W R No. 23 (FB), *Ghulam Haider Shah v. Ghulam Muhammad Khan*.
- ('10) 5 Ind Cas 992 (994) : 1910 Pun Re No. 39, *Ganga Ram v. Pokhar Das*.
- ('09) 4 Ind Cas 579 (581) (All), *Jaigopal Misir v. Sheo Sagar Singh*.
- 1a. See ('41) 28 A I R 1941 Pat 147 (150) : 19 Pat:938 : 189 Ind Cas 855 (DB), *Mukh Narain v. Ramlochan Tiwari*. (Under S. 21 (2) acknowledgment by one of several mortgagees is insufficient to provide a fresh period of limitation.)

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alone cannot be allowed under the law except in certain special circumstances.² Where, however, the mortgagees have partitioned the mortgagee right and each of them is in separate possession of a portion of the mortgaged property, an acknowledgment by one of them can be used in a suit for redemption of the particular share which is in his enjoyment.³

Where A and B are two co-mortgagees and A dies with the result that the entire mortgagee right becomes vested in B, there is no longer any question of co-mortgagees and hence, an acknowledgment by B after A's death in such circumstances will be sufficient to keep alive the right of redemption.⁴

Under the Acts of 1859 and 1871, an acknowledgment of the right of redemption was required to be made by the mortgagee or some person claiming under him. Where there were more than one mortgagee or more than one person claiming under the mortgagee, the expression "mortgagee" or "some person claiming under the mortgagee" was held to mean *all* the mortgagees or *all* the persons claiming under the mortgagee.⁵ Further, under the above Acts an

2. ('96) 18 All 458 (460) : 1896 All W N 147, *Dharma v. Balmakund*. (('93) 17 Bom 173, *Bhogilal v. Amritlal*, followed — Case of mortgage in which interest of each mortgagee could not be apportioned so as to allow of the mortgage being redeemed piecemeal — Whole suit is liable to be dismissed.)

('12) 14 Ind Cas 132 (133) : 34 All 371 (DB), *Jwala Prasad v. Achay*. (18 All 458, followed.)

('04) 1 All L Jour 355 (357), *Hanuman Prasad v. Raghunandan Singh*. (Acknowledgment was made by the mortgagee for himself and as agent of his co-mortgagee, but owing to the fact that it was so made when Limitation Act of 1859 was in force which did not provide for acknowledgment by agents, the redemption suit was dismissed.)

('34) 21 AIR 1934 Lah 293 (293) : 151 Ind Cas 385, *Ahmad Shah v. Kartar*.

('11) 10 Ind Cas 238 (240) (All), *Chunni v. Hukum Singh*.

('20) 7 AIR 1920 Lah 516 (516, 517) : 67 Ind Cas 463 (464), *Nadar Shah v. Ishar Das*. (The fact that each branch of the family was recorded as having one-sixth share would not have entitled the plaintiff to sue for redemption piecemeal.)

3. ('30) 17 AIR 1930 Bom 466 (475) : 54 Bom 625 : 128 Ind Cas 417 (FB), *Motilal Jadar v. Samal Bechar*. (('92) 17 Bom 173 (DB), *Bhogilal v. Amritlal*, distinguished.)

('09) 2 Ind Cas 469 (470) (DB) (Bom), *Hiralal Icchalal v. Narsilal*.

[See also ('10) 6 Ind Cas 190 (191) (DB) (All), *Sheonandan Singh v. Achhabar Singh*. (Equity of redemption vesting in one co-mortgagee — In a suit for redemption by him, acknowledgment by defendant or some person through whom he derives his title may be relied on.)]

4. ('15) 2 AIR 1915 Mad 962 (965) : 28 Ind Cas 69, *Kalliani Amma v. Narayanan Nambiar*. (The defendants in this case claimed to derive title through B alone.)

5. ('15) 2 AIR 1915 Mad 951 (951) : 26 I.C. 127 (DB), *Muhammade v. Mayi Kunhi Haji*. (Mortgage in favour of Karnavan of Malabar tarwad — Acknowledgment by anandravan — Anandravan not 'person claiming under mortgagee' — Treating him as co-mortgagee acknowledgment by one co-mortgagee is not sufficient to save limitation.)

('93) 17 Bom 173 (177, 178) (DB), *Bhogilal v. Amritlal*.

('09) 1 Ind Cas 203 (204) (DB) (Mad), *Vaikunta Bhakta v. Kunni Pakki Beari* (In this case the mortgagee making the acknowledgment had subsequently acquired the whole of mortgage property — Held, the acknowledgment being not valid at the time it was made did not save limitation.)

acknowledgment by an agent was not valid.⁶ Hence, there could be no question of one of several mortgagees acting as the agent of the others for purposes of an acknowledgment.

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Notes 16-17

17. Acknowledgment or payment by one of several judgment-debtors. — An *acknowledgment* by one of several co-judgment-debtors will save limitation only against him and not against the other judgment-debtors.¹ A *payment* under S. 20 by one of several joint judgment-debtors will *prima facie* save limitation as against *all* the judgment-debtors. But, where the decree has been passed against them in their capacity as joint contractors, partners, executors or mortgagees, the payment will, under sub-s. (2) of this section, save limitation only against the particular judgment-debtor who makes the payment and not as against the others.²

(1909) 1 Ind Cas 204 (204, 205) (DB) (Mad), *Ganpathy Naicken v. Makki Keyi*. (17 Bom 173, followed.)

(1877) 1877 Pun Re No. 61, *Mt. Mah Bibi v. Motan Mal*. (Single mortgage in favour of number of persons — Acknowledgment by one mortgagee cannot give new period of limitation in respect to share or portion of property mortgaged, but is absolutely without effect.)

(1888) 1888 Pun Re No. 157, p. 420, *Hakikat Rai v. Gangadas*. (Do.)

(1911) 10 Ind Cas 238 (240) (All), *Chunni v. Hukum Singh*. (Entry in a khewat is sufficient acknowledgment if made by all the mortgagees.)

(1900) 1900 Pun Re No. 62, p. 240, *Bhawani Das v. Md. Yusuf*. (Sole heir of original mortgagee is "person claiming under mortgagee" though he has sons who have taken an interest by birth in the mortgagee right.)

6. (1888) 1888 Pun Re No. 157, p. 420, *Hakikat Rai v. Gangadas*.

(1880) 1880 Pun Re No. 85, p. 204, *Hakim Devi Dyal v. Prab Dyal*.

[But see (1878) 1878 Pun Re No. 78, *Khair Md. v. Ahmudin*.]

Section 21 — Note 17

1. (1912) 13 Ind Cas 702 (704) (DB) (Cal), *Chand-a Kumar v. Ram Din*. ((1905) 27 All 575 (DB), *Ashanullah v. Dakkhini*, followed.)

(1912) 14 Ind Cas 1 (2) (DB) (Cal), *Nanda Lal Marwari v. Rampal Singh*.

(1914) 1 AIR 1914 Cal 764 (765) : 22 Ind Cas 709 (DB), *Ban Behary Kapur v. Jnanendranath Ghosh*.

(1917) 4 AIR 1917 Cal 422 (424) : 37 Ind Cas 738 (DB), *Jogendra Pd. v. Asutosh*.

[See (1908) 1908 Pun Re No. 54, p. 270, *Bhagwan Singh v. Mohanlal*.]

See also Note 54 to Section 19.

2. See (1949) 36 AIR 1949 Pat 214 (215) : 14 Cut L Tim 51, *Banchanidhi v. Udekar Sahu*. (Decree against four brothers on basis of debt incurred by their deceased father — Endorsement of payment by one saves limitation against all : AIR 1933 Pat 1 : 12 Pat 93, *Badri Das v. Pasupati Banerji* and AIR 1936 Pat 361, *Sripati Samanta v. Lalji Sahu*, Rel. on; AIR 1936 All 21 : 58 All 313 (FB), *Genda Lal v. Hazari Lal*, Not followed.)

(1927) 14 AIR 1927 Cal 193 (195) : 93 Ind Cas 381 (DB), *Rajtilak Narayan v. Mufuzuddi*. (Mortgage decree against several persons who are not joint contractors — Payment by one saves limitation against all.)

(1933) 20 AIR 1933 Pat 1 (4) : 12 Pat 93 (DB), *Badri Das v. Pasupathi*. (Do.)

[See also (1938) 25 AIR 1938 Pat 395 (396) : 176 Ind Cas 876, *Ram Ranbijaya Prasad v. Nagesar Tiwari*. (One judgment-debtor becoming insolvent — Receiver making payment on his behalf — Such payment would not save limitation against other judgment-debtor.)]

[See however (1938) 25 AIR 1938 All 638 (639) : 179 Ind Cas 90, *Ragghi v. Nathu Lal*. (The latter part of the above rule does not apply where the judgment-debtors constitute a Hindu joint family and a payment is made by the manager — Special provision is made for such a case in sub-s. 3 (b) of S. 21.)]

Section 21
Notes 18-20

18. "Chargeable," meaning of.—See Note 6.

19. Acknowledgment or payment by Hindu widow, whether binding on reversioners. — Before the enactment of sub-s. (3) cl. (a) of this section in 1927, it was held that an acknowledgment of liability or payment under S. 20 by a Hindu widow would not bind the reversioners succeeding to the estate after her.¹ These decisions are no longer law now since the enactment of the above clause under which it is expressly provided that such payment or acknowledgment will be binding on the reversioners.²

20. Acknowledgment or payment by manager of Hindu joint family — Sub-section (3) clause (b). — This clause which was introduced into the section by the Limitation (Amendment) Act, I of 1927, gives legislative effect to the decisions¹ which prior to its

[But see ('48) 35 A I R 1948 Oudh 193 (197) : 23 Luck 114 (FB), *Naziruddin Ahmad v. Parmanand*. (Section 21 is explanatory of S. 19 as well as S. 20 and does not constitute an exception in the case of either of these sections. Where a joint decree for under-proprietary rent is obtained by the superior proprietor against a number of persons a payment towards the decree made by one of them does not save limitation against the other judgment-debtors also.)

('05) 27 All 575 (579) (DB), *Ashanullah v. Dakkhini*. (Under S. 20 payment by one co-debtor saves limitation only against him and not against others — Submitted view is not correct.)

('39) 26 AIR 1939 All 230 (231) : ILR (1939) All 258 : 181 Ind Cas 490 (DB), *Ram Kumar v. Hira Lal*. (Do.)]

Section 21 — Note 19

1. ('36) 23 AIR 1936 All 858 (859) : 166 Ind Cas 182 (DB), *Tej Bahadur v. Kothi Radha Kishan Gopi Kishan*. (Right of suit barred before the amendment — Acknowledgment by widow not being binding on reversioners — Right held was not revived by amendment.)

('13) 19 Ind Cas 291 (295) : 40 Ind App 74 : 35 All 227 (PC), *Soni Ram v. Kanhaiya Lal*. (Confirming in appeal ('09) 3 Ind Cas 725 (DB), *Shankar Lal v. Soni Ram*.)

('25) 12 AIR 1925 Cal 862 (864, 866) : 86 Ind Cas 353 (DB), *Mohini Mohan v. Sarat Sundari*.

('25) 12 AIR 1925 Nag 207 (210) : 82 Ind Cas 1052, *Laxmi v. Venkata Rao*. (If an acknowledgment by a limited female heir would not extend limitation as against the reversionary owner, much less a renewal mortgage by a trespasser would extend it.)

[But see ('28) 15 AIR 1928 Mad 972 (975) : 112 Ind Cas 491, *Chegannull v. Govindaswami*. (Hindu widow can keep alive debt by making payment under S. 20, Limitation Act—('13) 35 All 227 (PC), *Soni Ram v. Kanhaiya*, distinguished.)]

2. ('46) 33 AIR 1946 Pat 120 (121) : 226 Ind Cas 186 (DB), *Sunderbati Kuer v. Sukhdeo Singh*.

('37) 24 AIR 1937 Pat 40 (42) : 16 Pat 45 : 166 Ind Cas 555 (DB), *Darogi Rai v. Basdeo Mahto*. (Case of borrowing and acknowledgment by daughter succeeding to father's estate.)

[But see ('50) 37 AIR 1950 All 60 (Pr 2) : 1949 All L Jour 423, *Safiq-ud-din v. Lakhan Singh*. (('13) 35 All 227:40 Ind App 74 (PC), *Soni Ram v. Kanhaiya Lal*, Foll. Note : There is no reference to the amendment of S. 21 by Limitation (Amendment) Act I of 1927 by the addition of sub-s. (3).]

Section 21 — Note 20

1. ('14) 1 AIR 1914 All 98 (99) : 36 All 264 : 23 Ind Cas 429 (DB), *Indar Pal v. Mewah*.

enactment had held that the manager of a Hindu joint family could make acknowledgment and payments so as to save limitation in regard to liabilities which were binding on the family. The clause provides that such payment or acknowledgment must be deemed to be made *on behalf of the family*.² But the manager has no authority to keep alive by acknowledgment or payment a debt which is already statute barred.^{2a}

('28) 15 AIR 1928 Pat 156 (158) : 6 Pat 811 : 109 Ind Cas 655 (DB), *Bajrang Prasad Singh v. Kesho Singh*.

('25) 12 AIR 1925 All 174 (175) : 85 Ind Cas 330 (DB), *Sanwal Das v. Saiyid Ali*.

('93) 17 Bom 512 (513, 514) (DB), *Bhasker Tatya Shet v. Vijalal Nathu*. (In the absence of proof to the contrary manager must be taken to be an agent authorized for making acknowledgments under S. 19.)

('25) 12 AIR 1925 Cal 1153 (1157) : 88 Ind Cas 1025, *Hari Mohan v. Sourendra*.

('19) 6 AIR 1919 Cal 7 (7, 8) : 52 Ind Cas 436 (DB), *Chandra Kanta v. Behari Lal*. (Payment by manager saves limitation.)

('16) 3 AIR 1916 Cal 747 (749) : 31 Ind Cas 30 (DB), *Har Prasad v. Bindeswari*.

('10) 5 Ind Cas 484 (485) : 37 Cal 461 (DB), *Saroda Charan v. Durga Ram De*.

('24) 11 AIR 1924 Lah 611 (613) : 82 Ind Cas 96 : 5 Lah 317 (DB), *Thakur Das v. Putli*.

('84) 1884 Pun Re No. 99, p. 280, *Narsingh Das v. Bachatar Singh*.

('19) 6 AIR 1919 Mad 370 (373) : 53 Ind Cas 878, *Thankammal v. Kunhamma*.

('17) 4 AIR 1917 Mad 518 (518) : 36 Ind Cas 389 (DB), *Kissendoss v. Khatau Co*. (Acknowledgment contained in insolvency petition of the managing member is however not binding on the other members of the family.)

('15) 2 AIR 1915 Mad 506 (508) : 26 Ind Cas 911 (DB), *Chidambaram Chetty v. Ramaswami Chettiar*.

('82) 5 Mad 169 (170) (FB), *Chinnaya Nayudu v. Gurunatham Chetti*. (Overruling ('78) 1 Mad 385, *Kumarasaminadan v. Pala Nagappa*.)

('25) 12 AIR 1925 Oudh 394 (395) : 86 Ind Cas 693, *Sitla Baksh v. Jagatpal Singh*.

('22) 9 AIR 1922 Oudh 135 (137) : 25 Oudh Cas 89 : 68 Ind Cas 196, *Ram Autar v. Beni Singh*.

2. ('50) 37 AIR 1950 P C 15 (Para 8) : 77 Ind App 22 : 29 Pat 272 (PC), *Nagarmal v. Bajranglal*. (Acknowledgment must satisfy requirements of S. 19 — Adjustments of accounts not signed by manager held not sufficient for S. 19, though manager was party and assented to adjustment.)

('39) 26 AIR 1939 Nag 156 (157) : 11LR (1939) Nag 235 : 182 Ind Cas 573 (DB), *Narain Chouthmal v. Rama Jago*. (Fact that other member had joined manager in borrowing the loan cannot impair representative capacity of manager — Per Niyogi, J., in Order of Reference.)

('39) 26 AIR 1939 Pat 490 (492) : 180 Ind Cas 365 (DB), *Thakur Prasad v. Ajoya Prasad*.

('38) 25 AIR 1938 All 638 (639) : 179 Ind Cas 90, *Ragghi v. Nathu Lal*. (Decree on mortgage passed against father and sons forming joint Hindu family — Father making payment towards interest on behalf of family to stay execution of decree — Payment operates to save limitation under S. 21 (3) (b) both as against himself and his sons.)

('36) 23 AIR 1936 Mad 871 (875) : 170 Ind Cas 749 (DB), *Ambalavana Pillai v. Gowri Ammal*.

[See ('35) 22 AIR 1935 Cal 648 (649) : 158 Ind Cas 512, *Annada Charan v. Jhatu*.

('30) 17 AIR 1930 Pat 301 (303) : 9 Pat 747 (DB), *Hasan Imam v. Brahmdeo*.]

2a. ('50) 37 AIR 1950 P C 15 (Para 4) : 77 Ind App 22 : 29 Pat 272 (PC), *Nagarmal v. Bajranglal*.

Section 21
Note 20

An acknowledgment or payment by the manager need not be *expressed* as made in his capacity as manager.³ But, an acknowledgment or payment by the manager in his individual capacity will not be binding on the other members of the family.⁴ Thus, it has been held that where the manager of a joint family mentions a debt in the schedule of debts filed by him in the course of proceedings for his being adjudicated an insolvent, the admission is made by him in his individual capacity and does not bind the family.⁵

The clause applies only where the liability in question is a *joint family* liability. Where the liability has been incurred by the members of the family in their individual capacity, the manager cannot, as such, acknowledge or make payments on behalf of the other members of the family.⁶ A liability which has been incurred by the act of *all* the members of the family will be as much a liability of the *family* as a liability incurred by the *manager* on behalf of the family.⁷ The fact that the liability has been incurred on behalf of a joint family need not appear on the face of the document under which a loan is borrowed. Such fact may be proved by oral evidence.^{7a}

[See also ('45) 32 AIR 1945 Mad 137 (138) : ILR (1945) Mad 634 (DB), *Subba-reddi v. Venkatramayya*. (But there is a difference between a debt which is unenforceable in law and one which is enforceable by reason of S. 4. An acknowledgment during the period allowed under S. 4 cannot be regarded as revival of a time-barred debt.)]

3. ('16) 3 AIR 1916 Cal 747 (749) : 31 Ind Cas 30 (DB), *Har Prosad v. Bindeswari*. ('25) 12 AIR 1925 Cal 1153 (1157) : 88 Ind Cas 1025, *Hari Mohan v. Sourendra*. ('19) 6 AIR 1919 Mad 370 (372) : 53 Ind Cas 878 (DB), *Thankammal v. Kunhamma*. ('36) 23 AIR 1936 Mad 871 (875, 876) : 170 Ind Cas 749 (DB), *Ambalavana Pillai v. Gowri Ammal*. (Where the manager is *also* liable in his private capacity to same creditor, it must be shown that his payment or acknowledgment was in his capacity as manager.)

4. ('17) 4 AIR 1917 Mad 518 (519) : 36 Ind Cas 389 (DB), *Kissendoss v. Khatau Co.* [See ('93) 20 Cal 18 (21), *Aghore Nath v. Grish Chunder*.]

5. ('41) 28 AIR 1941 Mad 772 (780) : ILR (1942) Mad 95 : 197 Ind Cas 199 (FB), *Mohana Reddi v. Gangaraju*. (A I R 1917 Mad 518, *Kissendoss v. K. M. Spinning & Weaving Co.*, Rel. on.)

('17) 4 AIR 1917 Mad 518 (519) : 36 Ind Cas 389 (DB), *Kissendoss v. Khatau Co.*

6. ('41) 28 AIR 1941 Pat 208 (209), *Juro Rauto v. Adhikanda Pradhano*. (25 Mad 220 (FB) followed.)

('02) 25 Mad 220 (234) (FB), *Narayan Ayyar v. Venkataramana Ayyar*.

('15) 2 AIR 1915 Cal 652 (653) : 26 Ind Cas 511 (DB), *Baikuntagni v. Lal Chand*.

[See ('20) 7 AIR 1920 Mad 352 (353) : 54 Ind Cas 318, *Duraiswami Aiyar v. Krishnier*. (Pro-note by father and son—Payment by father—Held in circumstances of case that father was *authorised* to pay on behalf of son also although the transaction was not a *family* transaction.)]

7. ('36) 23 AIR 1936 Mad 871 (875) : 170 Ind Cas 749 (DB), *Ambalavana v. Gowri*. (The words of S. 21 (3) (b) are not limited only to cases in which the original contract has been entered into by the manager alone.)

7a. ('40) 27 AIR 1940 Cal 137 (140) : 186 Ind Cas 891 (DB), *Kistur Chand v. Rajani Kanta*. (By such oral evidence the terms of the document are not varied—The words “as such” in the section do not also import that the document itself must show on the face of it that the debt has been incurred on behalf of the joint family.)

The authority of the manager under this clause will apply only so long as the family continues to be joint. Hence, although the family *was* joint when the liability was incurred, if at the time of the acknowledgment or payment by the alleged manager the family is divided, the acknowledgment or payment will not bind the other members of the family.⁸ But, even in such cases, it was held that if the creditor had no notice of the partition in the family at the time of the acknowledgment or payment, the acknowledgment or payment would bind the other members of the family. This view was based on the ground that the termination of the authority of an agent does not take effect as regards third parties, before it becomes known to them.⁹ (See Contract Act, section 208.) It is doubtful how far this view will be correct after the enactment of sub-s. (3) under which it is only an

8. ('45) 32 AIR 1945 Bom 511 (513) : ILR (1945) Bom 976, *Kashiram Bhagshet v. Bhaga Bhaushet*.

('39) 26 AIR 1939 Pat 451 (455) : 18 Pat 434 : 184 Ind Cas 597 (DB), *Rameshwar Dayal v. Ram Das Sahu*.

('38) 25 A I R 1938 Mad 774 (776, 778) : I L R (1938) Mad 968 : 178 Ind Cas 243 (DB), *Pangudaya Pillai v. Uthandiya Pillai*. (In this case the contention was raised that apart from the provisions of this section, under S. 20 itself, a payment by one member of the joint family whether before or after partition would save limitation against all, as under that section a payment by one joint debtor saves limitation against all (see Note 6)—So, it was argued even after partition, payment by the quondam manager would save limitation against all the members.—In rejecting the contention it was held that the liability of the members of a Hindu joint family for a joint family debt was not a debt within the meaning of S. 20 and so the principle that payment by one joint debtor would save limitation against all the joint debtors did not apply to such cases. It is submitted that the reason given is obviously incorrect as it leads to the result that there can be no extension of limitation by payment under S. 20 in respect of a debt due by a joint Hindu family.—The true reason for holding that the manager alone can make payments in regard to such debts so as to save limitation would appear to be that S. 21 (3) (b) is a *special* provision which prevails over the general provisions of Section 20.)

('37) 24 AIR 1937 Mad 586 (588) : 173 Ind Cas 319, *Rama Vadhyar v. Manian Vadhyar*. (('20) A I R 1920 Mad 352 (DB), *Duraiswami v. Krishnier*, distinguished on the ground that the acknowledgment in that case was made while the family was still joint.)

('17) 4 AIR 1917 Mad 534 (535) : 32 Ind Cas 997, *Kodindarama Aiyar v. Arunachala Aiyar*.

('17) 4 AIR 1917 Mad 167 (167) : 33 Ind Cas 986 (DB), *Bapanna v. Bhimalingam*. [See also ('41) 28 A I R 1941 Mad 925 (927, 928) : I L R (1942) Mad 251 : 198 Ind Cas 177 (FB), *Rangaswami v. Sivaprakasam*. (After partition, a part payment of principal or interest by one member cannot affect the others so as to extend the period of limitation against them : A I R 1938 Mad 774 : I L R (1938) Mad 968, *Pangudaya v. Uthandiya*; AIR 1937 Mad 586, *Rama Vadhyar v. Manian Vadhyar*. Approved; A I R 1939 Mad 69 : I L R (1939) Mad 140, *Somasundara v. Narasimhachariar*, Overruled.)

9. ('45) 32 AIR 1945 Bom 511 (525) : ILR (1945) Bom 976, *Kashiram Bhagshet v. Bhaga Bhaushet*.

('94) 1894 Bom P J 58, *Bhaskar Tatyashet v. Tulsidas Vijalal*. (Formal notice to creditors about partition and determination of managership is not necessary) [See also ('11) 10 Ind Cas 888 (889) : 35 Bom 302 (DB), *Ebrahim Haji Yakub v. Chuni Lal Chand*. (Not a case of manager of Hindu family but one of gumastha of family.)]

Section 21
Note 20

acknowledgment or payment by the manager for *the time being* that will save limitation.

An acknowledgment made by a manager of a joint Hindu family in respect of a family debt after he was adjudged an insolvent can save limitation as against the other co-parceners.^{9a}

An acknowledgment or payment by a *junior member* of a Hindu joint family who is not the manager cannot bind the other members of the family.¹⁰

The opinion was expressed in the undermentioned case¹¹ that where a debt is incurred by the father in a Hindu joint family for his own personal needs, an acknowledgment of liability signed by him will not be binding on his sons and grandsons against whom the debt is sought to be enforced under the doctrine of pious obligation. It is submitted that the view is not correct. No doubt, in such cases, s. 21 (3) (b) will have no application as the debt is not a joint family debt. But the acknowledgment will be binding on the sons and grandsons under S. 19 as made by a person from whom they derive their liability. Similarly, a payment by the father under S. 20 will be binding on the sons and grandsons on the principle that a payment under that section by any one of the persons liable will save limitation as against all the persons liable. Even where the debt was contracted by the father while the family was joint and the payment was made by him after partition, such payment would be binding on the sons and grandsons.¹²

Where an unauthorised person makes an acknowledgment or payment in regard to a debt due by a Hindu father a ratification of such acknowledgment or payment by the father after the expiry of the

9a. ('42) 29 A I R 1942 Mad 721 (722) : I L R (1943) Mad 53 : 204 Ind Cas 245, *Vyagreswarudu v. Bhadramma*.

10. ('01) 3 Bom L R 144 (151), *Baldeo Das Mohakamchand v. Manikchand*.

('22) 9 AIR 1922 Mad 23 (23) : 66 Ind Cas 155 : 45 Mad 345 (DB), *Rama Pattar v. Viswanath Pattar*. (Manager absent from his home but in correspondence with the junior members and controlling the management.)

('18) 5 AIR 1918 Oudh 323 (325) : 47 Ind Cas 655, *Lachhmi Narain v. Daya Shankar*. (If the father is alive, the son cannot in the absence of any other evidence be considered to be an *agent* of the father so as to bind the family by an acknowledgment of his.)

('23) 10 AIR 1923 Lah 135 (137) : 71 Ind Cas 737 (DB), *Ram Kishan v. Hirde*. [See also ('49) 36 A I R 1949 Mad 279 (Para 8) : (1948) 2 Mad L Jour 314, *Ramaiya v. Suryanarayana*. (Acknowledgment by some members of joint Hindu family in their individual capacity—Other members not bound.)]

11. ('40) 27 A I R 1940 Cal 137 (140) : 186 Ind Cas 891 (DB), *Kistur Chand v. Rajani Kanta*.

12. ('41) 28 AIR 1941 Mad 772 (781) : ILR (1942) Mad 95 : 197 Ind Cas 199 (FB), *Mohana Reddi v. Gangaraju*. (Per *Leach C. J. and Mockett J.* ; *Krishnaswami Ayyangar J.*, contra : AIR 1933 Mad 708 : 56 Mad 833, *Munusami v. Kutti Moopan*, approved.)

('33) 20 AIR 1933 Mad 708 (709) : 56 Mad 833 : 145 Ind Cas 404 (DB), *Munusami Goundan v. Kutti Moopan*. (('28) A I R 1928 Mad 657 (FB), *Subramania v. Sabapathi*, followed; AIR 1919 Mad 1175 (DB), *Venkanna v. Srinivasa*, distinguished.)

period of limitation will not keep alive the debt against the sons though it will be kept alive against the father.¹³

Under S. 4 of the Act of 1859, an acknowledgment by an agent was not recognised and so an acknowledgment by the manager of a Hindu joint family was operative under that Act only against himself and not against the other members of the family.¹⁴

21. Acknowledgment or payment by manager of Malabar tarwad. — The manager of a Malabar *tarwad* can acknowledge or make payments in respect of the liabilities binding on the *tarwad* so as to bind the whole *tarwad*.¹

22. Acknowledgment or payment by head of Muhammadan family. — The head of a Muhammadan family has no authority, as such head, to make acknowledgments or payments on behalf of the whole family.¹

Section 21
Notes 20-22

22.* (1) Where, after the institution of a suit, a new

Effect of substituting plaintiff or defendant is substituted or or adding new plaintiff added, the suit shall, as regards him, or defendant. be deemed to have been instituted when he was so made a party.

Section 22

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.

* Act of 1877 : S. 22.

Effect of substituting or adding new plaintiff or defendant.

22. When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party :

Proviso where original plaintiff dies.

Provided that, when a plaintiff dies, and the suit is continued by his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted by the deceased plaintiff :

Proviso where original defendant dies.

Provided also, that when a defendant dies, and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant.

Act of 1871 : S. 22.

Almost the same as that of Act of 1877.

Act of 1859.

No corresponding provision.

13. ('41) 28 A I R 1941 Mad 6 (16) (DB), *Thinnappa Chettiar v. Krishna Rao*.
(Father cannot acknowledge barred debt so as to keep it alive against son.)

14. ('75) 14 Beng L R 21 (49) (DB), *Gopal Narain v. Muddo Muttu*.

Section 21 — Note 21

1. ('19) 6 A I R 1919 Mad 370 (372, 373) : 53 Ind Cas 878 (DB), *Thankammal v. Kunhamma*.

Section 21 — Note 22

1. ('18) 5 A I R 1918 Low Bur 136 (137) : 40 Ind Cas 858, *Yagappa v. Mahomed*.

Section 22
Notes 1-2

Synopsis

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope. 3. Applicability of section to "applications." 4. Applicability of section to "appeals." 4a. Applicability to applications under Section 68 of the Provincial Insolvency Act. 5. Addition of parties under Order 1, Rule 10, Civil Procedure Code. 6. "New plaintiff or defendant." 7. "Substituted or added." 8. New party — Minor. 9. New relief claimed by a party. 10. Misdescription. 11. Parties in representative character. 12. Suit or appeal by or against a dead person. 13. Question of limitation to be considered, whether before or after addition or substitution. 14. "Deemed to have been instituted." 15. "As regards him." 16. Necessary parties. | <ol style="list-style-type: none"> 17. Joinder of parties in mortgage suits. 18. Necessary parties in suits relating to firms. 19. Necessary parties in suits relating to firms — Disclosure of partners' names. 20. Necessary parties in pre-emption suits. 21. Necessary parties in suits by or against clubs and corporations. 22. Necessary parties in suits between landlord and tenant. 23. Joint promisors and promisees and owners of joint right of action. 24. Torts. 24a. Necessary parties in suit for specific performance of contract to sell. 25. Objection to non-joinder of parties. 26. "When he was so made a party." 27. Sub-section (2). 28. "Assignment or devolution." 29. Transposition of parties. |
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TOPIC INDICATOR

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| <p>Addition of new ground of right or liability. See Note 6.</p> <p>Addition of party after limitation — Effect as against others on record. See Notes 5 and 15.</p> <p>Addition of party whose name already struck off. See Note 6.</p> <p>Addition of persons already represented in suit. See Note 6.</p> <p>Benamidar impleaded — Addition of real owner. See Note 6.</p> <p>Hindu joint family represented by manager — Addition of other members. See Notes 6 and 11.</p> | <p>Necessary and proper parties — Distinction. See Note 16.</p> <p>Original party having no right to sue — Addition of person having such right. See Note 6.</p> <p>Person correctly described — Mistake as to person liable discovered — No case of misdescription. See Note 10.</p> <p>Person not party to suit added in appeal — Section applies. See Note 4.</p> <p>Person not party to suit — Appellate Court's power to add such person. See Note 4.</p> |
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1. Legislative changes. — Under the prior Acts, only cases of devolution by *death* were excluded from the operation of sub-s. (1).

Sub-section (2) now excludes from the operation of sub-s. (1) not only cases of devolution by death, but cases of *assignment* of interest and *all* cases of devolution of interest.

2. Scope. — Where a suit has been instituted, it may subsequently appear that some persons have not been made parties to the suit either as plaintiffs or as defendants though such persons may have been necessary or proper parties. In such cases, these persons may be subsequently impleaded in the suit by the leave of Court as provided by the provisions of the law of procedure in that behalf. But when

such subsequent impleading of parties takes place, it cannot be said that the suit was instituted with these persons as parties to the action even *on the date of original institution itself*. On the other hand, so far as these persons are concerned, the suit must be deemed to have been filed on the date when they were made parties subsequently. This is indeed a general principle of law and the section is, in fact, based upon it. It does not introduce any new principle.¹ The justice of this rule is that, if it were not so, a party who may have acquired a right against another by lapse of time in the matter of making persons parties, would be compelled to lose it for no fault of his. This section is intended to safeguard such a right.²

It follows, also, that the section covers and contemplates only cases in which the action is defective *when it started*, by reason, for example, of the person or one of the persons in whom the right of action is vested not being before the Court. If A is the right person to sue, it would be clearly wrong to allow him, for the sake of avoiding the rule of limitation, to take advantage of a suit improperly instituted by B.³ Necessarily, therefore, the section can have no application to cases in which the action was originally properly constituted as to parties, but has become defective because there has been a change or devolution of interest subsequently.⁴ This latter principle is embodied in sub-section (2) of the section.

Section 22 — Note 2

1. See ('75) 1 Bom 295 (301) : 1 Ind Jur 128 (DB), *Abdul Karim v. Manji Hansraj*.
2. ('27) 14 AIR 1927 P C 252 (255) : 6 Rang 29 : 107 Ind Cas 237 : 55 Ind App 7 (PC), *Chockalingam Chetty v. Seethai Ache*.
[See ('67) 8 Suth W R 241 (243) (DB), *Mt. Brojo Kissore Dossee v. Sreenath Bose*.]
3. See ('40) 27 AIR 1940 Nag 274 (275) : 190 Ind Cas 430, *Mt. Gowarjabai v. Ganpalsa*. (Suit on pro-note by wrong person — Right person substituted after period of limitation—Suit so far as right person is concerned shall be deemed to be instituted on date of substitution.)
4. ('50) 37 AIR 1950 Kutch 83 (Pr 3), *Dhanji Karsan v. Manji Meghji*. (If an application to bring on record the legal representatives of a deceased person be made within the prescribed period by one of the heirs it does not matter if other heirs are brought on record later on.)
('16) 3 AIR 1916 P C 202 (205, 206) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty v. Subramanian Chetty*. (Case under Straits Settlement Limitation Ordinance.)
('24) 11 AIR 1924 Sind 47 (48) : 17 Sind L R 263 : 76 Ind Cas 119 (DB), *Manghoomal Jethanand v. Aratmal Satramdas*. (AIR 1922 Sind 13, *Manghoomal v. Aratmal* affirmed.)
('34) 21 AIR 1934 Bom 385 (386) : 58 Bom 536 : 153 Ind Cas 800 (DB), *Krishnaji Shivaji v. Hanmaraddi Mallaraddi*. (Pro-note in favour of father — Son suing as plaintiff — Father, the right plaintiff, cannot be substituted or added after limitation.)
('09) 5 Ind Cas 931 (931, 932) : 33 Mad 115, *Subbaraya Iyer v. Vaithinatha Iyer*. (Pro-note in favour of mother—Her minor sons suing on the pro-note with mother as guardian—Mother cannot be impleaded as proper plaintiff after limitation.)
[See ('10) 6 Ind Cas 680 (680) (Mad), *Guruvappa Chetty v. Srinivasa Row*.]
('24) 11 AIR 1924 Cal 90 (91) : 75 Ind Cas 255 (DB), *Rajani Kanta Roy v. Jyoti Prasad Singh*.]

Section 22
Notes 2-3

All that the section lays down is that a suit in which a party is subsequently joined shall be deemed to be instituted as regards him on the date of his joinder. Whether the suit becomes barred as regards him alone or as regards other parties also is a matter which will have to be ascertained with reference to the substantive law relating to the subject of necessary parties to an action and the law relating to limitation of actions contained in the statutes of the country.⁵

3. Applicability of section to "applications."—The section expressly deals with 'suits.' A 'suit' as defined in S. 2, cl. (10) of the Act does not include an 'application.' Applications are, therefore, not within the scope of this section.¹ Thus, the section does not apply to the following :

- (1) Execution applications.²
- (2) Applications under O. 21, R. 100 of the Code of Civil Procedure.³
- (3) Applications under O. 22 of the Civil Procedure Code for substitution of legal representatives.⁴
- (4) Applications under O. 9, R. 13 of the Civil Procedure Code.⁵
- (5) Application for filing an award under Schedule II Para. 20 of the Civil Procedure Code⁶ (now repealed by the Arbitration Act, 1940), though such an application is to be registered as a suit and the parties are to be treated as plaintiffs and defendants under the Civil Procedure Code.

But though the section does not in terms apply to applications the principle of the section applies to them⁷ and in so far as any of the

[See also (1864) 1864 Suth W R Gap 152 (152, 153) (DB), *Kishen Lall Chowdhry v. Chunder Coomar Roy*.]

5. ('22) 9 AIR 1922 Nag 213 (215) : 66 Ind Cas 217, *Kuksa v. Dajiba Bhau*.
(16) 3 AIR 1916 Sind 53 (54) : 10 Sind L R 38 : 35 Ind Cas 551 (DB), *Gehimal Dyalmal v. Karmoomal Siroomal*. ('03) 28 Bom 11 (DB), *Guruvayya v. Dutta-traya* followed.)

Section 22 — Note 3

1. ('44) 1944 Pat W N 499 (502), *Sheobadan v. Bihari Sao*. (Bihar Restoration of Bikasht Lands and Reduction of Arrears of Rent Act — Application for restoration.)
- ('23) 10 A I R 1923 Pat 88 (88) : 62 Ind Cas 536 : 6 Pat L Jour 463 (DB), *Chandrika Ray v. Ram Kuer Thakur*.
(09) 3 Ind Cas 314 (317) (DB) (Cal), *Jagat Tarini Dasi v. Rakhal Chandra*. (Execution proceedings.)
2. ('21) 8 AIR 1921 Pat 180 (181) : 62 Ind Cas 30 : 6 Pat L Jour 358 (DB), *Golab Koer v. Syed Mohamed Zaffer Hussain*.
[See ('30) 17 AIR 1930 All 597 (599) : 133 Ind Cas 23 (DB), *Zahurul Hasan v. Badri Narain*.]
3. ('31) 18 AIR 1931 Cal 385 (387) : 58 Cal 55 : 132 Ind Cas 631, *Indubhushan Das v. Hari Charan Mandal*.
4. ('19) 6 AIR 1919 Nag 150 (152) : 15 Nag L R 21 : 49 Ind Cas 34, *Amolaksao v. Govindrao*.
5. ('23) 10 AIR 1923 Pat 88 (88) : 6 Pat L Jour 463 : 62 Ind Cas 536 (DB), *Chandrika Roy v. Ram Kuer Thakur*.
6. ('31) 18 AIR 1931 All 725 (726) : 133 I. C. 410 (DB), *Mangal Sen v. Prag Das*.
7. ('31) 18 AIR 1931 All 725 (726) : 133 Ind Cas 410 (DB), *Mangal Sen v. Prag Das*. (Principle of S. 22 applies to application under C. P. C., Sch. II Para 20 and

above decisions may hold to the contrary, it is submitted that they are not correct.

Section 22
Notes 3-4

4. Applicability of section to "appeals." — This section applies only to suits. As under the definition in S. 2 (10), a suit does not include an appeal, this section does not apply to the joinder of parties to appeals. But as seen in Note 2, the section is based on a *general* principle; and this principle applies to appeals also.¹ Hence, where a person is newly added or substituted as a party to an appeal, the appeal must be held to have been instituted as regards such person on the date when he is so added or substituted. But, this principle does not apply to the special power of an appellate Court under Order 41, Rule 20 to add as respondent to an appeal a person who appears to the appellate Court at the hearing of the appeal to be interested in the result of the appeal.² Apart from O. 41, R. 20 the appellate Court has ample power under S. 151, C. P. C., to add a party to the appeal even after the expiry of the period of limitation for appeals.³ It has been held that though this section does not apply to an appeal as suit does not include an appeal, where the case is remanded for retrial with the direction to implead other persons, it would be applicable.⁴ As to the nature and extent of this power of the appellate Court, see the commentary under O. 41, R. 20 in the Authors' Civil Procedure Code, 5th (1950) Edition.

there is no bar to the transposition of a respondent as an applicant after the expiry of the period of limitation.)

('19) 6 AIR 1919 Cal 510 (510) : 50 Ind Cas 5 (DB), *Ajiuddin Ahamed v. Khoda Bux*. (Auction-purchaser not joined as party to application to set aside execution sale within the period of limitation for the application — Application is barred.)

('11) 10 Ind Cas 417 (420) (DB) (Cal), *Khoda Baksh v. Sader Pramanik*. (Application under S. 47, C. P. C.)

('91) 1891 All W N 121 (121) (DB), *Karamat Khan v. Mir Ali Ahmed*. (Auction purchaser is necessary party to application to set aside execution sale—His being made a party after the period prescribed by Art. 166 does not cure the defect due to his original non-joinder.)

Section 22 — Note 4

1. ('22) 9 AIR 1922 Nag 213 (215) : 66 Ind Cas 217, *Kuksa v. Dajiba Bhau*. (Section 22 applies to appeals as much as to suits in principle — But there is a difference in the result arising from the application of S. 5 of the Act.)

('78-80) 2 All 487 (492) (DB), *Ranjit Singh v. Sheo Prasad Ram*.

2. ('43) 30 AIR 1943 Oudh 78 (81) : 205 Ind Cas 628 (DB), *Nageshwar Prasad v. Chandraj Bahadur*.

('37) 24 AIR 1937 Mad 741 (744) : I L R (1938) Mad 52 : 172 Ind Cas 776 (DB); *Swaminatha v. Gopalaswami*. (Venkatasubba Rao, J., observed: "It is difficult to conceive a case where the right of appeal does not become barred as against a party not impleaded by the time the appeal comes on for hearing for under the rule, be it noted, the action to be taken is at the hearing of the appeal.")

See also cases cited in A.I.R. Commentaries on the Civil Procedure Code, 5th (1950) Edn., O. 41 R. 20 Note 11.

3. ('41) 28 AIR 1941 Lah 402 (403) : ILR (1942) Lah 603 : 198 Ind Cas 726 (DB), *Shanti Lal v. Firm Hira Lal*. (Failure to implead due to omission of name in copy of judgment—Delay condoned under S. 5, Limitation Act.)

4. ('42) 29 AIR 1942 Oudh 339 (340) : 199 Ind Cas 801 (DB), *Lakshmi Narain v. Satgurnath*.

Section 22
Notes 4-5

The Section does not apply to the transposition of a respondent as an appellant.⁵

4a. Applicability to applications under Section 68 of the Provincial Insolvency Act. — It has been held that proceedings under S. 68 of the Provincial Insolvency Act, 1920, are more akin to appeals than to a suit and that section 22 of this Act does not apply to them.¹ But it is submitted that S. 22 embodies a general principle which may apply to a proceeding although it may not be covered by the words of the section. At the same time the above decision may be supported on the other ground mentioned therein, viz., that section 68, Provincial Insolvency Act, does not contemplate that in a proceeding under it, any persons should be named as applicants and respondents to the proceeding and that there is no question of making any person a party to such proceeding.

5. Addition of parties under Order 1 Rule 10, Civil Procedure Code. — This section provides that where a *new* plaintiff or defendant is added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.¹ Thus, if on the addition of a new defendant the suit is barred against him, it will

5. ('49) 36 AIR 1949 Pat 309 (Prs 1, 2) : 27 Pat 956, *Bhubaneswar Prasad v. Sidheswar*. (The only cases where the appellate Court will not exercise its power and will not allow a respondent to be transposed to the category of appellant is where the result of such transposition is likely to be that new grounds not common to the appellant already on record, may have to be determined in disposing of the appeal — *Note* : In this case it was held that as S. 22 did not apply to appeals, there was no bar to transposition of respondent as appellant — But apart from this, sub-section (2) itself makes it clear that such transposition is not covered by the section.)

Section 22 — Note 4a

1. ('37) 24 AIR 1937 Lah 611 (611) : 168 Ind Cas 389, *Mai Chand v. Official Receiver, Ferozepore*.

Section 22 — Note 5

1. ('27) 14 AIR 1927 P C 252 (255) : 6 Rang 26 : 107 Ind Cas 237 : 55 Ind App 7 (PC), *Chockalingam Chetty v. Seethai Ache*.

('34) 21 AIR 1934 Bom 385 (386) : 58 Bom 536 : 153 Ind Cas 800 (DB), *Krishnaji Shivaji v. Hanmaraddi Mallaraddi*. (('87) 14 Cal 400 (DB), *Subodini v. Cumar Ganoda* dissented from.)

('85) 9 Bom 1 (9), *Fisher v. Pearse*.

('30) 17 AIR 1930 Cal 113 (127) : 57 Cal 170 : 123 Ind Cas 250 (DB), *Currimbhoy & Co. v. L. A. Creet*.

('30) 17 AIR 1930 Lah 747 (748) : 11 Lah 688 : 126 Ind Cas 78 (DB), *Sher Singh v. Sundar Singh*.

('25) 12 AIR 1925 Mad 917 (918) : 85 Ind Cas 961, *Venkatasubamma v. Pulipulla Reddy*.

('10) 6 Ind Cas 680 (680) (DB) (Mad), *Guruvappa Chetty v. Srinivasa Row*. (Subsequently added party may raise question of limitation.)

('10) 5 Ind Cas 931 (931, 932) : 33 Mad 115 (117) (DB), *Subbdraya Iyer v. Vaithinatha Iyer*.

('34) 21 AIR 1934 All 198 (200) : 147 Ind Cas 1067 (DB), *Atma Ram v. Beni Prasad*.

[See ('66) 6 Suth W R 298 (299) (DB), *Rajkishore Dossee v. Buddun Chunder*.

('27) 14 AIR 1927 Lah 819 (820) : 104 Ind Cas 700 : 9 Lah 217 (DB), *Muhamad Ismail Khan v. Said ud-din Khan*.]

have to be dismissed as against him.^{1a} But does the addition of a party after the period of limitation affect the suit against other defendants who are already on the record? The answer to this depends upon the question whether the added party is a *necessary* party or is only a *proper party* or whether he was already *constructively a party* to the suit though not actually so. If he was a *necessary* party, i. e., if the suit will not be a properly constituted one unless he is made a party, his addition after the period of limitation will entail the dismissal of the whole suit, inasmuch as the suit becomes a properly constituted one only when he is made a party, and inasmuch as at that time the suit is barred against all.² When the party added is only a *proper*

1a. ('51) 84 Cal L Jour 33 (45), *Mohammed Siddiq v. Mohamed Akbar*.

('32) 1932 Mad W N 330 (331), *Venkatasamy v. Punneya*.

('32) 19 AIR 1932 Lah 314 (315) : 137 Ind Cas 89 (DB), *Northern Bank of India v. Ramesh Chandar*. (Suit against wrong legal representative—Right legal representative impleaded after time—No question of *bona fides* arises.)

('09) 4 Ind Cas 1160 (1163) : 3 Sind L R 191, *Chelaram v. Baden Insurance Company*.

('36) 23 AIR 1936 All 94 (95) : 58 All 594 : 160 Ind Cas 1030, *Manni Gir v. Amar Jatichela*.

2. ('38) 25 AIR 1938 Cal 324 (325) : 177 Ind Cas 798 (DB), *Dinesh Chandra v. Rajendra Chandra*.

('04) 28 Bom 11 (17) : 5 Bom L R 618 (DB), *Guruvayya v. Dattatraya*.

('33) 20 AIR 1933 Sind 121 (122) : 143 Ind Cas 900 (DB), *Pahloomal v. Paramanand*. (Suit for accounts against one partner only — Other partners added as parties after period of limitation—Suit must be dismissed.)

('33) 20 A I R 1933 Cal 621 (622) : 60 Cal 777 : 146 Ind Cas 259 (DB), *Govind-chandra Ghose v. Jamaludin Mondal*. (All mortgagees or heirs of mortgagee must be parties to suit—Necessary party joined after limitation — Whole suit fails.)

('12) 13 Ind Cas 197 (199, 200) (DB) (All), *Gendan Lal v. Baburam*. (Necessary party not impleaded in mortgage suit till after limitation—Defect fatal to suit.)

('99) 21 All 346 (347, 348) : 1899 All W N 123 (DB), *Ganesha Singh v. Mundi Forest Company*. (Suit against unregistered company represented by its partner —Other partners sought to be added after limitation—Suit dismissed.)

('92) 14 All 524 (528) : 1892 All W N 104 (DB), *Imam-ud-din v. Liladhar*. (Partnership debt — Suit for — All partners must join — Addition of a partner after limitation — Suit to be dismissed.)

('29) 16 AIR 1929 Cal 591 (592) : 125 Ind Cas 109 (DB), *Giris Chandra v. Ram Saran Majumdar*. (Plaintiff suing as assignee of one of mortgagees — Representatives of deceased mortgagee not brought on record till expiry of limitation — Suit must be dismissed.)

('14) 1 A I R 1914 Cal 455 (456) : 41 Cal 727 : 22 Ind Cas 570 (DB), *Sidheshuri Pershad v. Dharamjit Narain*. (Suit by manager of joint Hindu family upon mortgage without joining nephew within limitation — *Held*, following ('01) 28 Cal 517 (SB), *Suraj Prosad v. Golab Chand*, that suit must be dismissed.)

('28) 15 AIR 1928 Lah 33 (34) : 100 Ind Cas 859, *Devi Dayal v. Narain Singh*. (Suit brought in name of Panchayat—Plaintiffs' names substituted after limitation—Suit must be dismissed.)

('02) 1902 Pun Re No. 69, page 250, *Ramchand v. Subban Baksh*.

('82) 1882 Pun Re No. 104, page 297, *Khan Muhammad Shah v. Muhammad Jan*. (Pre-emption suit — All representatives of deceased vendee not joined — Addition after limitation — Whole suit is barred.)

('25) 12 AIR 1925 Mad 761 (761, 762) : 87 Ind Cas 198, *Pappi Amma v. Kunhu*. (Karnavan necessary party in a suit on *teer* deed.)

Section 22
Note 5

party but not a necessary one, the suit as against the other defendants will not be barred.³ Where the party added is only a proper party no

- (14) 1 AIR 1914 Mad 395 (395): 23 Ind Cas 813, *Ramaswamy Iyengar v. Pavadai Chetty*. (Suit instituted by insolvent after adjudication—Receiver seeking to be made a plaintiff after the period of limitation.)
- (16) 3 AIR 1916 Pat 411 (414): 36 Ind Cas 77 (DB), *Chand Gorain v. Khub Lal Mohan*. (All heirs of mortgagee must be impleaded in a suit on mortgage debt.)
- (15) 30 Ind Cas 795 (796) (DB) (U P B R), *Fakhirunnissa Bibi v. Imdad Ali*. (Ejectment suit against sub-tenants' sub-tenant—Sub-tenant joined after limitation—Suit must be dismissed.)
- [But see (37) 24 AIR 1937 All 502 (503): 170 Ind Cas 743, *Mt. Jamna Kunwar v. Kunj Behari Lal*. (Necessary party can be impleaded as *pro forma* defendant and relief granted so far as other defendants are concerned—Submitted not correct—A necessary party is *ipso facto* not a *pro forma* party.)]
- See also Notes 12 and 15.
3. (39) 26 A I R 1939 Pat 138 (139): 17 Pat 588: 180 Ind Cas 983 (DB), *Bas Kuar v. Gaya Municipality*. (No relief claimed against party brought on record out of time—Question of limitation does not arise—6 Cal L Jour 558, relied on.)
- (21) 8 AIR 1921 Bom 152 (154): 45 Bom 1009: 61 Ind Cas 590 (DB), *Shivu Bai v. Shiddeshwar*. (Redemption suit filed in time—Other persons interested in equity of redemption may be impleaded after limitation.)
- (04) 26 All 528 (535): 1904 All W N 119 (DB), *Pateshri Pra'ap v. Rudra Narain*. (Affirmed on appeal to Privy Council: (10) 32 All 241 (PC), *Imdad Ahmad v. Pateshri Partap*.)
- (97) 1897 All W N 36 (37), *Behari Lal v. Girdhari Lal*. (Suit for possession of immovable property against some only of several persons in joint possession—Other defendants can be joined after expiry of limitation.)
- (25) 12 AIR 1925 Bom 547 (560): 94 Ind Cas 575, *Coorla Spinning & Weaving Mills Co. v. Vallabhdas Kallianji*. (*Del credere* agent suing—Principal not a necessary but only a proper party—Addition after limitation—Section 22 does not apply.)
- (19) 6 AIR 1919 Bom 135 (137): 43 Bom 575: 51 Ind Cas 223 (DB), *Sabduralli v. Sadashiv Supde*. (If Court can adjudicate as between parties impleaded section does not apply.)
- (15) 2 A I R 1915 Bom 272 (272): 39 Bom 729: 31 Ind Cas 180 (DB), *Virchand Vajekaran v. Kondu Kasom Atar*.
- (10) 8 Ind Cas 890 (890) (Cal), *Bhola Rny v. Jung Bahadoor*. (Plaintiff added to meet possible future objections.)
- (04) 28 Bom 11 (18): 5 Bom L R 618 (DB), *Guruvayya v. Dattatraya*.
- (98) 22 Bom 672 (679) (DB), *Ravji v. Mahadev*. (Benamidar suing—Real owner added.)
- (09) 1 Ind Cas 626 (629, 630): 36 Jal 675 (DB), *Mathewson v. Ram Kanai Singh Deb*.
- (07) 6 Cal L Jour 558 (565, 570): 12 Cal W N 84 (DB), *Mahomed Ishaq v. Sheikh Akramul Huq*. (Addition of *pro forma* defendants.)
- (06) 33 Cal 613 (620, 621): 3 Cal L Jour 576: 10 Cal W N 551 (DB), *Imam Ali v. Baij Nath Ram Sahu*. (Purchaser of a small portion of mortgaged property added after limitation—Suit not barred wholly.)
- (06) 33 Cal 1079 (1093) (DB), *Thakurmani Singh v. Dai Rani Koeri*. (Do.)
- (81) 7 Cal 284 (287) (DB), *Obhoy Churn v. Kritartha Moyi*. (Suit for possession—Some persons in possession impleaded after limitation—Suit dismissed against them.)
- (12) 16 Ind Cas 420 (421) (DB) (Mad), *Rangacharlu v. Muthukaruppan Kothan*. (Do.)
- (16) 3 A I R 1916 Mad 1029 (1034): 29 Ind Cas 634: 40 Mad 722 (DB), *Arunachalla Ambalan v. R.G. Orr*. (Where a suit is properly instituted and an assignment is made pending suit by the plaintiffs, and the assignee is allowed to continue the suit, Section 22 does not apply.)

question of limitation arises and the suit cannot be dismissed even as against him.^{3a} Where the added party is already constructively a party to the suit, as in the case of representative suits, it is really not a case of adding or substituting *new* parties, and this section does not apply to such a case.⁴ See also Note 6.

Illustrations.

1. A, one of the two heirs of a deceased Khoja Mahomedan institutes a suit to recover a debt due to the estate of the deceased. Here the suit is not a properly constituted one without adding the other heir as a party, and if the other heir is added after the period of limitation, the whole suit will be barred.⁵

2. A, B and D are partners carrying on business in partnership. A sues B for partnership accounts without impleading D as party. In this case also the suit is not a properly constituted one without impleading D as party, and if he is added after the period of limitation, the whole suit will become barred.⁶ The same principle will apply to one of several joint promisees suing without impleading the other joint promisees as parties.⁷

(14) 1 AIR 1914 Mad 272 (275) : 38 Mad 837 : 22 Ind Cas 826 (DB), *Annamalai Velan v. Marugappa Velan*. (Suit to set aside rent sale under Madras Rent Recovery Act — Person at whose instance sale was brought about is not necessary party.)

(16) 3 A I R 1916 Sind 53 (54) : 10 Sind L R 38 : 35 Ind Cas 551 (DB), *Gehimal Dyalmal v. Karmoomal Siroomal*. (Suit to recover property alienated by Hindu widow during plaintiff's minority — Intermediate purchasers are not necessary parties.)

[See ('08) 30 All 538 (540) : 5 All L Jour 554 : 1908 All W N 246 : 4 Mad L Tim 447 (DB), *Hazarimal v. Bhawani Ram*. (Objection as to non-joinder of parties must be raised at earliest opportunity.)

(91) 13 All 78 (85) : 1891 All W N 1, *Sohna v. Khalak Singh*.

(86) 12 Cal 642 (650) (DB), *Oriental Bank v. Charriol*.]

[See also ('28) 15 AIR 1928 Bom 526 (526) : 112 Ind Cas 786 (DB), *Bhauddin v. Ibrahim*.

(36) 23 AIR 1936 Cal 388 (390) : 166 Ind Cas 493, *Gajendra Nath Mandal v. Kunja Behari Mistri*.]

See also Notes 12 and 15.

3a. ('43) 30 A I R 1943 Oudh 164 (166) : 18 Luck 601 : 204 Ind Cas 444 (DB), *Sheo Prasad v. Parkash Rani*. (Puisne mortgagee added on his own application held not necessary party and suit held not barred as against him.)

4. See illustration (4) in the Note.

5. ('97) 28 Bom 580 (583) : Chitty's S C C R 527 (DB), *Fatmabai v. Pirbhai Virji*. [But see ('32) 19 AIR 1932 Lah 652 (653) : 141 Ind Cas 190, *Khairatti Shah v. Diwan Singh*. (Suit by one legal representative of a creditor — Other joined as plaintiff after limitation — Decree for share of former is not bad.)]

6. ('87) 14 Cal 791 (794) (DB), *Ramdayal v. Junmenjoy Coondoo*.

(13) 19 Ind Cas 963 (964) (DB) (Cal), *Ambika Charan v. Tarini Charan*. (All representatives of deceased partner not brought on record within time.)

See also Note 18.

7. ('83) 7 Bom 217 (220) : 7 Ind Jur 428 (DB), *Kalidas Kevaldas v. Nathu Bhagwan*. (One member of a joint family suing for joint debt.)

(06) 1906 Pun Re No. 79 : 1906 Pun W R No. 124, *Motan Mal v. Kripa Mal*. (One of two brothers suing for joint debt.)

(09) 4 Ind Cas 38 (41, 42) : 32 Mad 284 (DB), *Seshan Pattar v. Veeraraghava*. (One member of a joint family suing for joint debt.)

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Note 5

3. A, the landlord, sues C, a sub-tenant of B, who is himself a sub-tenant of A, for ejectment without impleading B as a party; B is made a party after the period of limitation. The whole suit must be dismissed as barred.⁸

4. A, the manager of a joint Hindu family, sues B for rent due in respect of family property. After the period of limitation, C, a member of the family, is added as a co plaintiff for the purpose of protecting A's interest and of removing any possible objections by the defendant. Here C is only a *proper* but not a necessary party and his addition after the period of limitation will not affect the suit by A, who in his own right as manager of the family was entitled to institute the suit.⁹ The same result may also be arrived at on the principle that the manager *represents* the other members, that the latter are *constructively parties* to the suit and that therefore their subsequent addition is not an addition of any *new parties* within the meaning of this section.¹⁰

5. A, as executrix of B's will, files a suit for recovery of possession of the lands belonging to the deceased B. C and D, the beneficiaries under the will are substituted for A after the period of limitation. The suit is not barred by this section. The reason is that an executor, trustee or administrator represents the persons beneficially interested and the addition of C and D is not the addition of any *new party*.¹¹

(86) 1886 Pun Re No. 8, *Dalluram v. Nibahumal*. (Joint contractors.)

(81) 6 Cal 815 (826) : 8 Cal L R 457 (DB), *Ramsebuk v. Ramlall Koondoo*.

[See (96) 6 Mad L Jour 27 (29) (DB), *Gopalasami v. Periasami Thevar*. (One coparcener suing to recover joint property.)]
See also Note 23.

8. (15) 30 Ind Cas 795 (796)(DB) (U P B R), *Fakirunnissa Bibi v. Imdad Ali*.
See also Note 22.

9. (11) 9 Ind Cas 739 (741) : 33 All 272 : 38 Ind App 45 (PC), *Kishan Parshad v. Har Narain Singh*.

(34) 21 AIR 1934 Bom 178 (183) : 58 Bom 348 : 151 Ind Cas 370, *Madhgouda v. Halappa*.

(14) 1 AIR 1914 Cal 681 (681) : 22 Ind Cas 798 (DB), *Bhola Roy v. Jung Bahadur Singh*. (Observations in (87) 14 Cal 400 (DB), *Subodini v. Cumar Ganoda Kant Roy*, as to applicability of Section 22, Limitation Act, to substitutions under Section 27 of the C. P. C. of 1882, doubted.)

(06) 33 Cal 1079 (1093) (DB), *Thakurmani Singh v. Dai Rani Koeri*. (28 Bom 11 followed.)

10. (24) 11 AIR 1924 All 908 (908) : 46 All 709 : 79 Ind Cas 1001 (DB), *Chetan Singh v. Sartaj Singh*. (12) 34 All 549 (FB), *Hori Lal v. Munman Kunwar*, followed.)

(12) 14 Ind Cas 35 (38) (DB) (All), *Nathilal v. Lala*.

[See also (15) 2 AIR 1915 Mad 424 (424) : 25 Ind Cas 945, *Rajam Iyengar v. Muthukrishna*. (Suit by plaintiff in private capacity—Amendment as manager of a company does not amount to addition of party—S. 22 does not apply.)]

11. (03) 7 Cal W N 817 (820, 821) (DB), *Janhabi v. Brojomohini*.

(08) 12 Cal W N 8 (11) (DB), *Mohunt Padmalall v. Lukmi Rani*. (Executors substituted for the legal representatives of the deceased.)

[See also (16) 3 AIR 1916 Cal 337 (338, 339) : 29 Ind Cas 680 (DB), *Nistarini Dassya v. Sarat Chandra*. (Widow suing as *administratrix* for benefit of her sons.)]

See also Note 11.

See the cases cited below¹² for further illustrations.

The mere fact that the Court, of *its own motion*, orders the name of any person to be added as a party does not render the provisions of this section inapplicable. So also the section applies to persons who are made defendants on their own application.¹³

This section does not apply to a case of *transposition* of parties, as sub-section (2) itself shows.¹⁴

Under sub-rule (5) of O. 1 R. 10, Civil Procedure Code, a person will be deemed to have been made a party, and proceedings will be deemed to have begun against him, only on the *service of summons on him*. Applying this sub-rule, some cases¹⁵ have held that the suit as against such a person will be barred unless the service is within the period of limitation. But, as the sub-rule is expressly made subject to section 22 of the Limitation Act, the suit as against a newly added defendant must be deemed to have been instituted when he is made a party, *for purposes of limitation*,¹⁶ though for *other* purposes, it must be deemed to be instituted when the summons is served on the defendant. When a person is added as a party on an application made for the purpose, such addition must be deemed to have effect from the

12. ('40) 27 AIR 1940 Lah 262 (264) : 192 Ind Cas 105, *Sita Ram v. Munshi Ram*. (Suit to enforce mortgage bond after mortgagor's death — Wrong person made defendant — Right persons made parties after limitation — Suit to be dismissed.)

('40) 27 AIR 1940 Nag 274 (275) : 190 Ind Cas 430, *Mt. Gowarjabai v. Ganpatsa*. (Suit on promissory note to be instituted in name of person in whose name the note stands, as plaintiff — Suit instituted in name of wrong person — Right person substituted after limitation — Suit to be dismissed: ('09) 33 Mad 115 (DB), *Subbaraya v. Vaithinatha* and ('34) A I R 1934 Bom 385 (DB), *Krishnaji v. Hanmaraddi*, followed.)

13. ('92) 14 All 524 (528) : 1892 All W N 104 (DB), *Imamuddin v. Liladhar*. ('06) 8 Bom L R 942 (946) (DB), *Damodar v. Nainsukh*.

('08) 35 Cal 519 (523) : 11 Cal W N 350 : 5 Cal L Jour 242 : 2 Mad L Tim 137 (FB), *Ramkinkar Biswas v. Akhilchandra*. (Overruling ('97) 24 Cal 640 (DB), *Girish Chunder v. Dwarka Nath* and ('99) 27 Cal 540 (DB), *Fakera v. Azimunnissa*.) ('30) 17 AIR 1930 Lah 747 (748) : 11 Lah 688 : 126 Ind Cas 78 (DB), *Sher Singh v. Sunder Singh*.

('25) 12 AIR 1925 Sind 181 (183) : 17 Sind L R 324 : 79 Ind Cas 914 (DB), *Ralli Ram Shewa Ram v. Budhram*.

('24) 11 AIR 1924 Cal 74 (76) : 50 Cal 549 : 75 Ind Cas 81, *Sheodayal Khemka v. Joharmull Manmull*.

('10) 5 Ind Cas 931 (931, 932) : 33 Mad 115 (DB), *Subbaraya Iyer v. Vaithinatha Iyer*.

('03) 1903 Pun L R No. 74, p. 291 : 1903 Pun Re No. 25 (DB), *Nabi Baksh v. Fakir Muhammad*.

14. ('40) 27 AIR 1940 Lah 262 (264) : 192 Ind Cas 105, *Sita Ram v. Munshi Ram*. (('28) AIR 1928 Bom 526 (DB), *Bhauddin v. Ibrahim*, dissented from.)

15. ('15) 30 Ind Cas 795 (795, 796) (DB) (U P B R), *Fakirunnissa Bibi v. Imdad Ali*.

('87) 14 Cal 400 (401) (DB), *Subodini Debi v. Ganoda Kant*. (Obiter.)

('25) 12 AIR 1925 Pat 37 (37, 38) : 3 Pat 230 : 78 Ind Cas 312 (DB), *E. I. Ry. Co. Ltd. v. Ram Lakhon Ram*.

16. ('11) 12 Ind Cas 586 (587) (DB) (Bom), *Mahomedbhai v. Ismail Haji Halinabhai*.

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date of the *application* and not merely from the date of the *order* on the application.¹⁷ The same principle applies even where the addition is made by the appellate Court in appeal from an order by the lower Court refusing to make the addition.¹⁸ (See also Note 26.)

A party once discharged and subsequently re-instated is a party only from the date of re-instatement.¹⁹

6. "New plaintiff or defendant." — It is only when a *new* plaintiff or defendant is added that the suit will be deemed to have been instituted when he was so made a party.

1. *Addition of persons already represented in the suit :*

Where a person is effectively represented in the suit, by those whose actions bind him in law, such as his father or the manager of the joint Hindu family, of which he is a member, the specific addition of his name among the parties after limitation is not the addition of a *new* party.¹

17. ('27) 14 AIR 1927 Mad 468 (469): 100 Ind Cas 680: 50 Mad 372 (DB), *South Indian Industrials Ltd. v. Narasimha*. (Dissenting from ('25) AIR 1925 Mad 487, *Ammayya v. Narayana*.)

('30) 17 AIR 1930 Sind 259 (260): 128 Ind Cas 675: 32 Cri L Jour 174: 25 Sind L R 107 (DB), *Hassanand v. Nandiram*. (Do.)

18. ('93) 17 Bom 29 (32) (DB), *Ramkrishna Moreshwar v. Ramabai*.

('04) 1 All L Jour 188 (190) (DB), *Rahim Baksh v. Brijbhukhan Saran*.

[See also ('10) 5 Ind Cas 931 (931): 33 Mad 115 (DB), *Subbaraya Iyer v. Vaithinatha Iyer*.]

19. ('26) 13 AIR 1926 P C 88 (91): 96 Ind Cas 887 (PC), *Haveli Shah v. Sheikh Painda Khan*.

See also Note 6.

Section 22 — Note 6

1. ('47) 34 AIR 1947 Pat 257 (258): 227 Ind Cas 570 (DB), *Ramkali v. Kali Prasad*. (Representative suit under O. 21, R. 63, C. P. C. on behalf of creditors — Co-plaintiffs can be added after limitation.)

('31) 18 AIR 1931 All 585 (586): 135 Ind Cas 248 (DB), *Banwari Singh v. Sakhranj Singh*. (Redemption suit — Father of joint family impleaded as defendant in time — Sons may be joined after limitation: ('14) AIR 1914 P C 136, *Sheo Shankar v. Jadoo Kunwar*, followed.)

('03) 7 Cal W N 817 (820, 821) (DB), *Janhabi Chowdhurani v. Brojo Mohini*. (An executor sufficiently represents the beneficiaries — Addition of latter as plaintiffs in a suit begun by the former is not addition of 'new parties'.)

('20) 7 AIR 1920 Nag 184 (185): 56 Ind Cas 386, *Narhar v. Narain*. (Benamidar represents real owner — Joining of latter after limitation is not addition of new party.)

('10) 5 Ind Cas 404 (405): 37 Cal 229: 37 Ind App 27 (PC), *Peary Mohan v. Norendra Nath*. (Suit against trust — All possible persons to represent trust impleaded — Subsequent amendment making it definite as to which of the defendants was proper trustee.)

('25) 12 AIR 1925 Oudh 440 (440, 441): 87 Ind Cas 180: 28 Oudh Cas 393, *Mt. Rajvanta v. Rameshar*. (Sons in joint family impleaded as defendants after limitation.)

[See ('50) 37 AIR 1950 Cal 236 (Prs 19, 26, 29), *Rameswarlal Bagla v. Bezonji Barjorji*. (Partners of firm on record either as plaintiff or defendant — Addition of firm name as co-plaintiff after limitation is not addition of new plaintiff as suit originally framed is properly constituted.)

('88) 12 Bom 158 (160, 161) (DB), *Hari Gopal v. Gokaldas Kushabshet*. (Joint family as plaintiff.)

Where by a *bona fide* mistake it was erroneously supposed that the plaintiff should be represented in a particular way and subsequently he is permitted to rectify the mistake and appear personally, it is not the addition of a new party. Thus, in a suit for the recovery of money due on a mortgage, the widow of the mortgagee sued as the administratrix of the estate of the mortgagee *for the benefit of the mortgagee's sons*. It was discovered, subsequent to the institution of the suit, that the period of her appointment as administratrix terminated before the suit and she then prayed that the sons should be added as plaintiffs. The addition was held not to be affected by this section.² Similarly, in the case of the addition of *defendants* to a suit, it has been held that where by a *bona fide* mistake, a wrong person is made defendant as the legal representative of a deceased person, and subsequently, the right person is made defendant, this section has no application.^{2a} The reason given is that in such a case the estate of the deceased person should be held to be sufficiently represented by the defendant originally impleaded.

Where, however, a daughter claiming under the will of her father sued to recover properties and subsequently the executor appointed under the will who ought to have been the plaintiff was sought to be substituted as plaintiff, it was held that the latter was a "new party" and could not be impleaded after limitation.³

See also Note 11.

(25) 12 AIR 1925 Mad 441 (442) : 86 Ind Cas 747, *Mayankutti v. Kathiri*. (Suit for maintenance in Malabar tavazhi must be on behalf of all the members.)

(12) 13 Ind Cas 38 (39) (DB) (All), *Bala Prosad v. Pratab Singh*. (Sons of mortgagor defendant not impleaded within limitation.)

(14) 1 AIR 1914 Cal 681 (681) : 22 Ind Cas 798 (DB), *Bhola Roy v. Jung Bahadur Singh*. (Suit filed by head of joint family—Infant nephew impleaded after limitation.)

(1900) 23 Mad 82 (84) (DB), *Puramethan Somayajipad v. Sankara Menon*. (Three sabhas managing a temple—Representatives of two sabhas alone suing as plaintiffs—*Held* suit bad—Subsequent addition of representatives of third sabha cannot cure defect.)]

2. (16) 3 AIR 1916 Cal 337 (338, 339) : 29 Ind Cas 680 (DB), *Nistarini Dasya v. Sarat Chandra*.

2a. (41) 28 AIR 1941 Mad 609 (610, 611) : (1941) 1 M L J 580 (583), *Subbiah Ambalam Serrai v. Unnamalai Achi*. (Suit against widow as representing estate of deceased person—Subsequent discovery that deceased had left will under which he had appointed two executors—Executors made defendants subsequently—S. 22 does not apply—Estate represented by defendant impleaded *bona fide*—AIR 1929 Mad 482 (DB), *Govappa v. Govappa* and AIR 1930 Mad 930 (DB), *Kushaldoss v. Rajamanicka*, followed; (73) 10 Bom H C R 224 (DB), *Kavasji v. Barjorji* and A I R 1932 Lah 314 (DB), *Northern Bank v. Ramesh Chandar*, dissented from—A I R 1921 Mad 528 (DB), *Seerangathuni v. Vaithilinga* and AIR 1925 Mad 917, *Venkatasubbamma v. Pulipulla*, distinguished.)

3. (25) 12 AIR 1925 Mad 917 (918, 919) : 85 Ind Cas 961, *Venkatasubbamma v. Pulipulla Reddy*.

[See also (40) 27 AIR 1940 Lah 262 (264) : 192 Ind Cas 105, *Sita Ram v. Munshi Ram*. (Suit to enforce mortgage bond after death of mortgagor—A, the right person to be made defendant not joined but B, A's father, joined as defendant—Subsequent addition of A—Section 22 applies.)

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Note 62. *Estate or person not properly represented in suit—Addition of proper representative :*

Where a debutter estate is made a party but it is not properly represented, an amendment adding a proper representative is not an addition of a new party.⁴

See also Note 8.

3. *Benamidar impleaded—Addition of real owner :*

A *benamidar* sufficiently represents the real owner. Where a *benamidar* is impleaded as a defendant in time, the fact that the real owner is impleaded after limitation is not fatal, where the *benamidar* was acting as the real owner and the *benami* relationship was known only subsequently.⁵ So also a suit by the *benamidar* is not infructuous by reason of the addition of the real owner as a party after limitation.⁶

4. ('05) 32 Cal 582 (598) : 9 Cal W N 421 (DB), *Raja Peary Mohun Mukerjee v. Narendra Nath Mukerjee*.

('13) 21 Ind Cas 421 (423) (DB) (Mad), *Subramani Aiyar v. Subba Naidu*. (Idol substantially on record from beginning—But representation improper—Rectification by making proper representation of idol—S. 22 does not apply.)

('05) 7 Oudh Cas 176 (178), *Ahmad Raza Khan v. Mirza Ali Hussain*. (Disqualified proprietor sued in his own name—Collector as his statutory representative added only after limitation—Held it was not a case of a new plaintiff.)

('19) 6 AIR 1919 Mad 809 (809) : 50 Ind Cas 353 (DB), *Ponnappa Naicken v. Venkateshaiyar*. (Suit by some trustees of temple against tenants—Addition of other trustees after limitation on objection by defendants—Suit not barred.)

5. ('38) 25 AIR 1938 Mad 687 (688) : 177 Ind Cas 381 (DB), *Subramania Chettiar v. Srinivasaraghava Ayyangar*. (A *benamidar* is competent to represent the real owner, because as a *benamidar* he will be in the position of a trustee and the real owner will be bound by any adjudication in a suit to which the *benamidar* is a party—A I R 1918 P C 140 : 46 Cal 566 : 46 Ind App 1 (PC), *Gur Narayan v. Sheolal Singh*, relied on—'The real owner added by way of caution will not be a new party—('01) 7 Cal W N 817 (DB), *Janhabai v. Brojo Mohini* and ('03) 28 Bom 11 (DB), *Guruvayya v. Duttatraya*, followed.) ('15) 2 AIR 1915 Cal 496 (497) : 26 Ind Cas 860, *Rajendra Kumar Ghosh v. Adinadi*.

[See also (1864) 1864 Suth W R Gap 316 (316), *Nundo Gopal Roy v. Jankeeram Chuckerbutty*. (Benamidar impleaded subsequently.)]

[See however ('13) 18 Ind Cas 392 (392) (DB) (Cal), *Jagabandhu Biswas v. Srinath Chatterjee*. (Principal cannot be added in shoes of *benamidar* out of time.)]

6. ('98) 22 Bom 672 (679) (DB), *Ravji v. Mahadev*.

('10) 8 Ind Cas 264 (267) (DB) (Mad), *Venkatachala Asari v. Subramaniya Chetty*.

('20) 7 AIR 1920 Nag 184 (185) : 56 Ind Cas 386, *Narhar v. Narain*.

('15) 2 AIR 1915 Nag 109 (111) : 11 Nag L R 116 : 31 Ind Cas 290, *Kashi Rao v. Ukarda*.

[See ('07) 30 Mad 245 (246) : 17 Mad L Jour 174 (DB), *Kuthaperumal Rajali v. Secretary of State*. (In what cases a *benamidar* can sue, discussed.)]

[See also ('40) 27 A I R 1940 Nag 274 (275) : 190 Ind Cas 430, *Mt. Gowarjabai Ganpatsa*. (In this case a promissory note was executed in favour of A but the suit on the note was filed by B—A was substituted after limitation—It was held that S. 22 applied and the suit was barred—The contention that B was *benamidar* for A was held not proved.)

('98) 22 Bom 820 (823) (DB), *Dagdu v. Balvant Ramachandra Nattu*.]

4. *Correction of misdescription :*

Where names of parties are substituted only to correct *misdescription*, there is no addition or substitution of a new party.⁷ See Note 10.

5. *Addition of new ground of the right or liability :*

If the amendment sought to be made does not lead to a change in the "*persona*" of the parties or does not introduce a new prayer or relief but only seeks to alter or add to the *ground or basis of the right or liability* of parties already on record, it is not a case of parties being newly added.

Illustrations.

- (a) Defendants originally impleaded as members of joint family sought to be made liable in the alternative as *partners*.⁸
- (b) Party impleaded as trustee sought to be made liable *personally*.⁹
- (c) A son originally impleaded as the *heir* of his father subsequently sought to be placed on record as *executor* under a will of the father.¹⁰
- (d) A person making a claim as being entitled through his father, subsequently seeking to amend his plaint by making the claim as being entitled through his uncle.¹¹
- (e) Person already on record in his own right sought to be added also as legal representative.¹²
- (f) Plaintiff suing in his personal capacity amending his description and claiming also as an administrator of an estate,¹³ or as the managing director of a company,¹⁴ or as an agent under a power of attorney.¹⁵

[But see ('68) 10 Suth W R 220 (221, 223) (DB), *Meheroonissa Bibee v. Hur Churn Bose*. (Benamidar held not entitled to maintain suit.)

('68) 10 Suth W R 469 (473) : 11 Beng L R 60 (Note) (DB), *Fuzeelun Beebee v. Omdah Beebee*. (Do.)]

7. ('25) 12 AIR 1925 Bom 527 (527) : 90 Ind Cas 685 (DB), *Ramprasad Shivrulal v. Shrinivas Balmukund*. (Substitution of names of coparceners in place of firm.)

8. ('31) 18 AIR 1931 Bom 590 (592) : 135 Ind Cas 423, *Bishamberdas v. Brijlal Arora*.

9. ('92) 15 Mad 417 (418) : 2 Mad L Jour 119 (DB), *Saminatha v. Muthaiya*.

10. ('03) 7 Cal W N 575 (577, 578) (DB), *Prosunno Kumar Sen v. Mahabharat Saha*.

[But see ('72) 1872 Bom P J (Reprint) 121 (122) (DB), *Maneklal v. Bhaskurao*. (Defendant originally impleaded as heir of executant of bond — Amendment as coparcener — Held suit barred.)]

11. ('16) 3 A I R 1916 Oudh 115 (117) : 19 Oudh Cas 221 : 36 Ind Cas 941 (DB), *Bisheshar Dayal v. Hira Lal*.

12. ('20) 7 AIR 1920 Sind 82 (83) : 78 Ind Cas 569 (DB), *Manager, Encumbered Estates in Sind v. Tharumal*.

13. ('25) 12 A I R 1925 Cal 419 (420) : 51 Cal 845 : 79 Ind Cas 403 (DB), *Naba Kumar Chowdhury v. Higheazany*.

14. ('17) 4 A I R 1917 Mad 471 (471) : 33 Ind Cas 357, *Muthukrishna Pillai v. Rajam Aiyangar*. (On Letters Patent Appeal from ('15) A I R 1915 Mad 424, *Rajam v. Muthukrishna*.)

15. ('78) 3 Bom 312 (321) (DB), *Ganpat Pandurang v. Adarji Dadabhai*. (Per Sargent J.)

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- (g) A sued on a promissory note signed by defendant on his own behalf and as guardian of a minor. The relief originally sought was against the property of the minor in the hands of the defendant. He subsequently prayed for an amendment asking for personal relief against the defendant. It was held that the amendment was only an alteration of the ground of liability of a person already a party.¹⁶

It has been held in some cases¹⁷ that where a manager of a joint Hindu family files a suit without stating in the plaint the capacity in which he is suing, the omission to state it within the period of limitation bars the suit. A contrary view has been held in the undermentioned cases.^{17a}

In the undermentioned case^{17b} a member of an unincorporated association was sued in his personal capacity. The plaint was amended allowing the plaintiff to sue him as representing the association. It was held that this was a case of addition of party. This view has, however, been overruled by a later Division Bench and it has been held there that an amendment of the plaint by which a suit is converted into a representative action does not involve addition of new parties.^{17c}

6. *Addition of party whose name has been struck off :*

When a party originally impleaded is struck out and is again joined a second time, he is a new party within the meaning of this

16. ('35) 22 AIR 1935 Mad 160 (161) : 154 Ind Cas 582, *Seshagiri Rao v. Seshagiri Rao*.
17. ('16) 3 AIR 1916 Bom 278 (279) : 40 Bom 248 : 33 Ind Cas 771 (DB), *Ramchandra Narayan v. Shripatrao*. (The plaint must show that the plaintiff is suing in a representative capacity.)
- ('16) 3 AIR 1916 Pat 310 (311) : 1 Pat L Jour 468 : 36 Ind Cas 542 (DB), *Girwar Narayan Mahton v. Mt. Makbulunnissa*. (Plaint must show that plaintiff is suing as manager.)
- ('09) 4 Ind Cas 38 (41, 42) : 32 Mad 284 (DB), *Seshan Pattar v. Veera Raghava*.
- 17a. ('22) 9 AIR 1922 Bom 281 (284) : 46 Bom 358 : 64 Ind Cas 966, *Ramnath Dwarkanath v. Ramrao Balkrishna*. (It need not necessarily appear in plaint.)
- ('34) 21 AIR 1934 Bom 178 (182) : 58 Bom 348 : 151 Ind Cas 370, *Madhgouda Babaji v. Halappa Balappa*. (Eldest brother alone suing for a debt due to deceased father—Joint family managership presumed in law — Younger brothers may be added as co-plaintiffs after limitation.)
- [See ('16) 3 AIR 1916 Cal 164 (166) : 28 Ind Cas 818 (DB), *Kuarmani Singha v. Wasif Ali Mirza*. (Plaintiff suing as shebait — Fact of representative character need not be stated in the cause title though it is a convenient place to state it.)
- ('24) 11 A I R 1924 All 908 (908) : 79 Ind Cas 1001 : 46 All 709 (DB), *Chetan Singh v. Sartaj Singh*. (Father party defendant in time — Sons impleaded beyond time — Presumption is that former represents latter.)]
- 17b. ('40) 27 A I R 1940 Mad 639 (641), *Sankara Menon v. Kuttani*. (By the amendment a very large number of fresh parties was added though by a special procedure one of the members who happened already to be on the record in his personal capacity was treated as the representative of the whole association.)
- 17c. ('43) 30 AIR 1943 Mad 531 (536) : I L R (1944) Mad 133 : 212 Ind Cas 533 (DB), *Nandaramdas v. Zulika Bibi*. (A I R 1940 Mad 639, *Sankara Menon v. Kuttani*, overruled.)

section.¹⁸ A suit was instituted against the sons for compensation for a tort committed by their deceased father. Their names were struck out from the plaint by impleading the administrator of the estate of the deceased person as a party defendant instead. By a subsequent order the sons were again impleaded as defendants as the earlier order striking out their names was wrong. It was held by their Lordships of the Privy Council¹⁹ that the suit as against the sons must be deemed to be instituted on the date of their re-instatement.

Where, however, the names were first struck out by a *bona fide* mistake²⁰ or were by mistake omitted in the stamped portion of the plaint,²¹ the restoration of the names will relate back to the original date.

7. *Original party not entitled to sue or liable to be sued :*

Where the person originally impleaded had no right to sue or be sued, the addition of the person so entitled or liable will be the addition of a new party. An adjudicated insolvent sued in his own name. After limitation, the Official Assignee was impleaded as a plaintiff. The Official Assignee and not the insolvent being the person legally competent to sue, he is a *new* plaintiff.²² One of the executants of a promissory note died and the plaintiff suing on the promissory note impleaded his widow as his legal representative. It is subsequently discovered that a son and not the widow is the legal representative. An application to implead the son, after limitation, is dismissed as being barred by this section. The case is not one of misdescription or of the estate being adequately represented by the widow at first. It is the addition of an entirely new party.²³

See also the undermentioned cases.²⁴

18. ('42) 29 AIR 1942 Pat 270 (271) : 199 Ind Cas 196 (DB), *Jagdiswar Prasad v. Harsaran Rai*. (The fact that the order expunging the person's name from the array of defendants was made under a mistake does not affect the question.)

('31) 18 A I R 1931 Bom 590 (592) : 135 Ind Cas 423, *Bishamberdas v. Brijlal Arora*. (Names of sons originally impleaded as members of joint family were struck out—They were sought to be impleaded again as partners of a firm.)

('05) 9 Cal W N 883 (885) (DB), *Ramjoy Nath Sarcar v. Shambu Nath Shaha*.

19 ('26) 13 AIR 1926 P C 88 (91) : 96 Ind Cas 887 (PC), *Haveli Shah v. Sheikh Paimda Khan*.

See also Note 5.

20. ('95) 19 Bom 135 (137), *Kirparam Jhumekhrum Modia v. Modia Dayalji Jhumekhrum*. (Name was first struck out by pleader unauthorisedly.)

21. ('27) 14 AIR 1927 Nag 95 (96) : 98 Ind Cas 658, *Shakurkhan v. Sheikh Budhan*. (Amendment has retrospective effect at least from date of application.)

22. ('26) 13 A I R 1926 Bom 366 (366) : 95 Ind Cas 538 (DB), *Sayad Daud v. Mahomed Sayad*.

('14) 1 AIR 1914 Mad 395 (395):23 Ind Cas 813, *Ramasamy Iyengar v. Pavadai Chetty*. (Case of an insolvent under the Provincial Insolvency Act, 1907.)

23. ('32) 19 AIR 1932 Lah 314 (315) : 137 Ind Cas 89 (DB), *Northern Bank of India Ltd. v. Ramesh Chandar*. (*Bona fide* mistake is immaterial.)

24. ('40) 27 AIR 1940 Lah 262 (264):192 Ind Cas 105, *Sita Ram v. Munshi Ram*. (Suit to enforce mortgage bond — Person not entitled to equity of redemption made defendant — Person entitled to such right added subsequently — S. 22 applies.)

('40) 27 AIR 1940 Nag 274 (275): 190 Ind Cas 430, *Mt. Gowarjabai v. Ganpatsa*. (Suit on promissory note instituted by person other than person in whose name it had been executed — Such person substituted after limitation — Suit barred.)

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But where owing to the fact that the right to sue is vested in A and B jointly, either of them is not entitled to sue alone and the suit is originally instituted by A alone but before it comes on for hearing, B's interest also devolves on A with the result that A then becomes entitled to sue alone, he can be allowed to continue the suit although at the time when B's interest devolves on him the period of limitation for the suit has expired. This section does not apply to such a case as there is no addition or substitution of a new plaintiff or defendant.²⁵

Where a party is already on the record either as plaintiff or defendant, an amendment which merely alters the capacity in which he has been impleaded, to one of a different character, does not involve an addition of parties so as to attract the provisions of this section.²⁶

7. "Substituted or added." — The substitution or addition of parties contemplated by sub-section (1) is one consequent on the suit being defective as originally constituted. Where owing to a subsequent devolution of interest the suit becomes defective and new persons are brought on the record to remove the defect, it is not a case of substitution or addition of new parties within the meaning of sub-section (1).¹ Sub-section (2) is based on this principle. See Note 27.

8. New party — Minor.—If a minor is wrongly described as a major and impleaded as a defendant to a suit, and the plaintiff on discovering the mistake has a guardian appointed for him, the minor is a party from the very beginning notwithstanding the defect of non-representation. He does not become a new party by reason of his being treated as a minor with a validly appointed guardian.¹

(37) 24 AIR 1937 Lah 369 (370) : 173 Ind Cas 357, *Mohindar Singh v. Kirpal Singh*. (Bond in favour of A — On A's death, suit on it by his father in his personal right as A's heir — Subsequent application for substitution of A's minor son as plaintiff after limitation — Suit is barred.)

25. ('40) 27 AIR 1940 Mad 412 (416) : 190 Ind Cas 657, *Sornammal v. Thangavelu Mudaliar*. (Right to sue on mortgage devolving on two Hindu sisters jointly—Only one suing—Other dying pending suit — Plaintiff can be allowed to continue suit — S. 22 does not apply.)

26. ('43) 30 A I R 1943 Mad 531 (536) : I L R (1944) Mad 133 : 212 Ind Cas 533 (DB), *Nandaramdas v. Zulika Bibi*. (Hence amendment of plaint converting suit into representative action does not involve addition of new parties.)

Section 22 — Note 7

1. See observations of Privy Council in ('16) 3 A I R 1916 P C 202 (206) : 43 Ind App 113 : 34 Ind Cas 323 (PC), *Meyyappa Chetty v. Supramanian Chettiar*. (Case under Straits Settlement Limitation Ordinance.)

Section 22 — Note 8

1. ('41) 28 AIR 1941 Nag 130 (131) : 193 Ind Cas 805, *Abdul Aziz v. Sheik Amir*. ('30) 17 A I R 1930 All 644 (646) : 128 Ind Cas 438 : 52 All 924 (DB), *Talib Ali Shah v. Piarey Lal*. (Decree obtained with the defendant as major — On objection in execution, suit re-opened under S. 151, C. P. C., and defendant treated as minor and guardian appointed.)

('27) 14 A I R 1927 All 787 (787) : 49 All 869 : 102 Ind Cas 624 (DB), *Har Lal Singh v. Rudra Singh*. (Pre-emption suit — Vendee defendant impleaded as major—Later discovery of minority and guardian appointed after limitation.)

[See ('24) 11 AIR 1924 Lah 157 (158) : 69 I. C. 401, *Mt. Durga v. Gur Narain*.]

[See also ('07) 30 All 55 (56) : 1907 All W N 290 : 3 Mad L Tim 58 (DB),

Where a major is, by a *bona fide* mistake, impleaded as a minor plaintiff and his parent institutes the suit as his next friend, an amendment, after limitation, to recognize him as a major and allow him to continue the suit is only a case of misdescription and not of a "new party," the plaintiff always having been the same.² Conversely, where a minor sues as a major by a *bona fide* mistake, an application for amendment of the mistake and for proper representation may be allowed even if such application is beyond time,³ or if he should have attained majority he may be allowed to continue the suit.⁴

But if the minor is not a party plaintiff⁵ or party defendant⁶ at all, but some one else was a party, the addition of the minor after limitation will be the addition of a new party.

The same principle would apply in appeals also.⁷

9. New relief claimed by a party. — Where a party on record is allowed to set up new facts or put forward a new cause of action, it would not amount to adding a new party.¹

Rupchand v. Dasodha. (A guardian is not himself a party to the suit—Omission to implead guardian may be rectified even after limitation — Case of an appeal.)

('81) 4 All 37 (39) : 1881 All W N 129 : 6 Ind Jur 382 (DB), *Khem Karan v. Hardayal.*

('01) 1901 Pun L R No. 31, p. 99 : 1901 Pun Re No. 18, *Imami v. Saddam.*]

2. ('41) 28 AIR 1941 Oudh 43 (45):191 Ind Cas 150, *Inderpal Singh v. Bhagwati.*

('27) 14 A I R 1927 Cal 477 (478) : 100 Ind Cas 469 (DB), *Narayan Chandra v. Dulab Chandra.* (('09) 37 Cal 229 (PC), *Peary Mohun v. Narendra*, referred to.)

('12) 7 Ind Cas 580 (581) (DB) (Mad), *Arunachellam Chetty v. Prabhayya Chetty.* (Plaintiff wrongly described as minor by mistake—Himself not signing plaint—His subsequent prosecution of suit is not adding new party.)

[See ('04) 1 All L Jour 188 (190) (DB), *Rahim Baksh v. Brijbhukhan Saran.*

('94) 21 Cal 866 (868) (DB), *Taqui Jan v. Obaidulla.*]

[See also ('26) 13 AIR 1926 Lah 82 (82) : 89 Ind Cas 363, *Amritsaria v. Gamun.*

('18) 5 AIR 1918 Mad 916 (917) : 40 Mad 743 : 41 Ind Cas 510 (DB), *Shunmuga Chetty v. Narayana Iyer.* (20 All 90 dissented from.)]

[But see ('97) 20 All 90 (91) : 1897 All W N 203 (DB), *Sheorania v. Bharat Singh.* (Suit dismissed by appellate Court—No question of limitation arose.)]

3. ('84) 1884 Bom P J 262 (DB), *Parikh Gokaldas v. Raval Jalam.*

[See ('24) 11 AIR 1924 Lah 188 (188): 4 Lah 390: 75 I. C 1028 (DB), *Ali Ahmad v. Said Mian.* (Application allowed — Question of limitation not decided.)]

4. See ('23) 10 A I R 1923 Mad 553 (554) : 74 Ind Cas 309 (DB), *Rarichan v. Manakkal Raman.*

5. ('37) 24 AIR 1937 Lah 369 (370) : 173 Ind Cas 357, *Mohindar Singh v. Kirpal Singh.* (Father of deceased suing as heir—Subsequent application to substitute minor son of the deceased as plaintiff—Held addition of new party.)

('75) 12 Bom HC R 17 (22) (DB), *Gopal Kashi v. Ramabai Saheb Patvar.* (Mother suing in her own name without impleading minor son.)

6. ('89) 1889 Pun Re No. 37, *Ude Ram v. Mt. Dyan.*

7. ('21) 8 AIR 1921 Cal 776 (778): 60 Ind Cas 889 : 47 Cal 721, *In re Lal Bihari Shah.* (Appeal by minor without next friend may be amended by inserting name of next friend.)

('26) 13 AIR 1926 Nag 40 (44) : 38 Ind Cas 235, *Dattu v. Bhaoosingh.* (Appeal by major as minor may be amended by striking out guardian's name.)

Section 22 — Note 9

1. ('43) 30 AIR 1943 Mad 531 (536) : ILR (1944) Mad 133 : 212 Ind Cas 533(DB), *Nandaramdas v. Zulika Bibi.* (An amendment which does not seek to bring in

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A purchased some property from X who, however, remained in possession. A sold it to B and B brought a suit against X for mesne profits from the date of A's purchase making A also a *pro forma* plaintiff. B, however, prayed for a decree in his own favour even in respect of the mesne profits due to A before the date of the sale to B. After the period of limitation, B applied for an amendment splitting the relief and praying for a decree in his favour in respect of the mesne profits due to him after the date of the sale to himself. The High Court of Bombay held that it was not a case of a joinder of a new plaintiff seeking relief in respect of a barred claim. The amendment was only directed to claiming the relief severally instead of in favour of one of the plaintiffs alone.²

10. Misdescription. — Where a particular person is *intended* to be impleaded in a suit but is *described wrongly*, it is a case of misdescription.¹ Where the person intended to be sued is described correctly, but the plaintiff finds subsequently that he was under a mistake in thinking that such person was liable to answer his claim, it is not a case of misdescription.² The question in each case is thus one

a new party but only varies the ground on which the relief was originally sought or asks for a different or additional relief without changing the cause of action, does not bring the case within S. 22.)

(25) 12 A I R 1925 Mad 917 (919) : 85 Ind Cas 961, *Venkatasubamma v. Puli-pulla Reddi*.

2. ('29) 16 A I R 1929 Bom 51 (53) : 114 Ind Cas 262, *Bhogi Lal Tarachand v. Jethalal Motilal*.

Section 22 — Note 10

1. ('39) 26 AIR 1939 Pat 40 (41) : 179 Ind Cas 761, *Bhagirath Singh v. Munga Lal*. (Members of joint family carrying on family business describing themselves in plaint by names adding word "firm"—Deletion of word "firm" by Amendment after limitation held did not bar suit.)

('36) 23 AIR 1936 Lah 147(148) : 162 Ind Cas 280, *Girdhari Lal v. Dharam Das*. (One Girdhari Lal answering the name and description of the defendant as in the plaint was summoned — On finding that he was not the intended person the plaint was amended by changing the description and another person of the same name but with new description was summoned—Held this was a case of misdescription and not of substitution.)

2. ('14) 1 AIR 1914 Mad 636 (637) : 23 Ind Cas 764 (DB), *Narayana Sastrigal v. Mangalathammal*.

('28) 15 A I R 1928 Nag 319 (321) : 109 Ind Cas 785, *Deolal v. Tularam Ram Sukh*. (It was presumed that suit was against firm and so it was a case only of substituting real representative.)

('02) 6 Cal W N 218 (220) (DB), *Mandardhar Aitch v. Secretary of State*. (Suit against Executive Engineer—Subsequent addition of Secretary of State as second defendant — Held that Secretary of State was made party only when he was impleaded.)

[See ('28) 15 AIR 1928 Mad 367 (369, 370) : 110 Ind Cas 433, *Devaraja Reddiar v. Liptons Ltd*. (Initials of the defendant's name wrongly given—Amendment after decree.)

('87) 14 Cal 400 (401) (DB), *Subodini Devi v. Cumar Ganoda Kant Roy*. (A instituted suit as manager of B—After limitation A was struck out and B himself was made plaintiff—No bar of limitation.)

('88) 1888 All W N 58 (59) (DB), *Jamna v. Ibrahim*. (Name of respondent in appeal by clerical error, entered as "Nawab Muhammad Umar Daraz Ali Khan" instead of as "Jamna"—Held no new party.)

of intention, namely, which individual was intended to be impleaded when a particular description was given and which was the intended person according to the amended plaint. If there is the same person or legal entity throughout it is a case of misdescription; otherwise it will come under the head of substitution or addition of new party.³ In the following cases, it was held that there was only a misdescription and that the amendment of the plaint by giving the correct description was not the addition of a *new party* :

- (1) Where in a suit by the District Board of Dacca the plaintiff was described as "Chairman of the District Board, Dacca" instead of "District Board, Dacca."⁴
- (2) Where the plaintiff sued on behalf of an idol and in the body of the plaint described himself as *shebait* of the idol and clearly asked for a relief on behalf of the idol, but omitted to describe himself as *shebait* in the cause title.⁵ The same view was taken where the name of the temple was omitted in the cause title.⁶ Where, however, a defendant was sued in his individual capacity and the plaintiff denied title of the idol whose *shebait* he was, the addition of the "idol" as a party defendant was held to be the addition of a *new party*.⁷
- (3) Where the plaintiffs, the owners of a ship, were wrongly described as "H. Hogarth and Sons" instead of as "Hogarth Shipping Co., Ltd." by a *bona fide* mistake.⁸

(25) 12 AIR 1925 Pat 37 (38, 39) : 3 Pat 230 : 78 Ind Cas 312 (DB), *E. I. Ry. Co. v. Ram Lakhan Ram*.]

3. ('39) 26 AIR 1939 Sind 172 (173) : ILR (1939) Kar 275 : 182 Ind Cas 881 (DB), *Mangharam Rupchand Firm v. Haji Sorik Punhoo*. (Contract made by X before he became member of firm Y—Suit on contract by firm Y—Amendment of plaint by substituting X as plaintiff—*Held* this was no case of misdescription.)

4. ('28) 15 A I R 1928 Cal 485 (487) : 112 Ind Cas 24 (DB), *Anukul Chandra v. Dacca District Board*.

[*See also* ('40) 27 A I R 1940 Cal 153 (155) : 187 Ind Cas 605 (DB), *Municipal Commissioners, Dacca v. Gangamani Chaudhurani*. (Suit against Chairman of Municipal Commissioners instead of the Commissioners themselves—*Held* only a case of misdescription.)]

5. ('26) 13 A I R 1926 Cal 417 (419) : 87 Ind Cas 159 (DB), *Dayamayi v. Sankar Nath*.

(19) 6 AIR 1919 Cal 245 (247) : 46 Cal 877 : 50 Ind Cas 525 (DB), *Bidhu Sekhar Banerjee v. Kuloda Prasad Deogharia*. (It is not even necessary to state the representative capacity in the cause title.)

(16) 3 AIR 1916 Cal 164 (166) : 28 Ind Cas 818 (DB), *Kuarmani Singha v. Wasif Ali*. (Do.)

[*See also* ('11) 11 Ind Cas 47 (48) : 33 All 735 (FB), *Jodhi Rai v. Basdeo*.]

6. ('23) 10 AIR 1923 Nag 96(97) : 71 Ind Cas 39, *Bakaram v. Hiralal*. (*H* and *T* mentioned as plaintiffs in plaint—Suit for temple property—Body of plaint stating that they were managers of temple—Omission to mention temple in heading is only mistake in description.)

7. ('30) 17 A I R 1930 Oudh 43 (45) : 123 Ind Cas 894, *Avadh Behari v. Parmeshur Din*.

8. ('26) 13 AIR 1926 Cal 722 (725) : 94 Ind Cas 182 (DB), *Mitsui Bussan Kaisha Ltd. v. Hogarth Shipping Co. Ltd.* (Affirming A I R 1925 Cal 922, *Hogarth Shipping Co. Ltd. v. Mitsui Bussan Ltd.*)

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- (4) Where plaintiff sued the defendant for a dissolution of partnership and for accounts, but by a *bona fide* mistake described the defendant as a firm instead of as an individual.⁹
- (5) Where two of the partners of a firm were described by a single name as Joharmull Manmull instead of being separately described as Joharmull Khemka and Manmull Khemka, and there was no doubt that in the pleadings the individuals were sufficiently clearly indicated and described.¹⁰
- (6) Where in a suit for the correction of an entry in a Record of Rights the plaintiff had impleaded Mr. P. J. Forbes as the defendant instead of Miss P. J. Forbes and the circumstances clearly showed that it was the latter who was intended to be sued.¹¹
- (7) Where the plaintiff was already on record but did not make it clear whether he sued in his private capacity or as managing director of a company and subsequently asked relief in the latter capacity.¹²
- (8) Where a company in liquidation sued as "The Official Liquidator, Himalaya Bank, Ltd., in liquidation" instead of "The Himalaya Bank, Ltd., in liquidation, plaintiff."¹³
- (9) Where in a suit against a Municipal Committee it was by an error made to be represented by its Secretary instead of its President.¹⁴
- (10) Where the Bombay Baroda and Central India Railway Company sued as defendants were described as "Agent, B.B. & C.I. Railway Company" instead of "B. B. & C. I. Railway Company."¹⁵

9. ('24) 11 A I R 1924 Sind 144 (146) : 19 Sind L R 262 : 78 Ind Cas 905 (DB), *Dipchand Daulat Ram v. Paramanand Chimandas Firm*. ("Paramanand Jethanand" described by mistake as "Paramanand Chimandas Firm.")

[See also ('39) 26 A I R 1939 Pat 40 (41) : 179 Ind Cas 761, *Bhagirath Singh v. Mungalal*. (Plaintiffs described by their names with the addition of the word "firm" — On objection being taken as to registration of firm, plaint amended by deletion of the word "firm" — Section 22 does not apply.)]

[See however ('36) 23 AIR 1936 Lah 485 (486) : 163 Ind Cas 734 (DB), *Amrik Singh v. Sant Singh*. (Suit against foreign firms which had, before suit, been dissolved to plaintiff's knowledge — On suit being found not maintainable against foreign firms, plaintiff impleading two partners who were in British India — S. 22 applies — It is a case where no defendants were named in the first instance and not a case of misdescription.)]

10. ('24) 11 A I R 1924 Cal 74 (78) : 50 Cal 549 : 75 Ind Cas 81, *Sheo Doyal Khemka v. Joharmul Manmull*.

11. ('17) 4 AIR 1917 Cal 420 (421) : 32 Ind Cas 872 (DB), *Jogendra Narain Roy v. P. J. Forbes*. (Hindi Record of Rights — The letter frequently used therein both for "Mr." and "Miss" would be the Hindi abbreviation "Mi" — It would be difficult to find out whether the name in the record is that of male or female.)

12. ('17) 4 AIR 1917 Mad 471 (471) : 33 Ind Cas 357 (DB), *Muthukrishna Pillai v. Rajam Aiyangar*. (Affirming on Letters Patent Appeal AIR 1915 Mad 424, *Rajam v. Muthukrishna*.)

13. ('96) 18 All 198 (202, 203) : 1896 All W N 28 (FB), *Muhammad Yusuf v. Himalaya Bank Ltd.* (('95) 17 All 292 (DB), *Ghulam Muhammad v. The Himalaya Bank Ltd.*, overruled.)

14. ('78) 2 All 296 (298) (DB), *Manni Kasundhan v. Crooke*. (Section does not apply to the case of a Committee sued in name of its officer.)

15. ('23) 10 A R 1923 Bom 452 (453) : 47 Bom 785 : 73 Ind Cas 1027 (DB), *Saraspur Manufacturing Co. v. B. B. & C. I. Ry. Co.* (The prayer in the

Where in the first instance the defendant was named as Secretary of State for India but later the plaint was amended altering the description to Governor-General in Council it was held that as in both the cases the claim was against the same Government it was only a case of misdescription.^{15a}

In the undermentioned cases,¹⁶ however, a different view was taken; it was held on the facts and the pleadings in each case that the railway company in question was not originally impleaded, and consequently an amendment on the ground of limitation was refused. In *East India Railway Co. v. Ram Lakhan Ram*,¹⁷ the test was laid down in these words: "When there are two known persons in existence and the plaintiff brings the suit against one of them and afterwards applies to have the other brought on record as a defendant on the ground that he all along intended to sue the other and in substance he sued the other, and no question of representation arises in the case, it is impossible to maintain the view that the case is one of misdescription."

plaint was that the defendant company should pay suit amount — AIR 1921 Pat 485, *Ram Bihari v. E. I. Ry. Co.* dissented from.)

[See ('26) 13 AIR 1926 Cal 612 (614) : 94 Ind Cas 762 (DB), *Gopi Ram Behari Ram v. E. I. Ry. and O. & R. Ry.* (E. I. Ry. Co. as defendant described in plaint as "Agent, E. I. Ry." but company contested without objection.)

('25) 12 AIR 1925 Lah 441 (442) : 6 Lah 252 : 89 Ind Cas 279 (DB), *Nanak Chand Mukandi Lal v. E. I. Ry. Co.* (Defendants described as "Agent N. W. Ry., Lahore" and "Agent E. I. Ry. Calcutta".)

('25) 12 AIR 1925 Nag 155 (156, 157) : 82 Ind Cas 177, *Bulakidas v. B. N. Ry. Co. Ltd.* (B. N. Ry. Co. described as 'agent B. N. Ry. Co.')

('26) 13 AIR 1926 Pat 40 (42) : 5 Pat 128 : 90 Ind Cas 680 (DB), *Radhey Lal v. E. I. Ry.* (The plaint taken as a whole and conduct of the defendant (company) held to lead to finding of misdescription.)]

15a. ('42) 46 Cal W N 18 (20), *Kanailal v. Governor-General in Council*.

16. ('16) 3 AIR 1916 Cal 818 (819) : 43 Cal 441 : 31 Ind Cas 35 (DB), *India General Steam Navigation and Ry. Co. v. Lal Mohan Saha*. (Defendant described as Railway Company "by their Agent A. E. Rogers" — Held, suit was substantially against Rogers — But amendment was allowed as no question of limitation arose.)

('25) 12 AIR 1925 Cal 716 (719) : 52 Cal 783 : 90 Ind Cas 426 (DB), *B. N. Ry. Co. v. Behari Lal Datt*. (The Company did not appear and proceed with the suit but only the agent appeared and objected to frame of suit.)

('21) 8 AIR 1921 Pat 485 (485, 486) : 64 Ind Cas 125, *Sinehai Ram Bihari Lal v. E. I. Ry. Co.* (Suing defendant as "Agent E. I. Ry. Co." held, not against the company in law and amendment after limitation refused — Held, not to be a case of misdescription — Railway Company appeared and contested on merits first.)

('25) 12 AIR 1925 Pat 37 (38, 39) : 3 Pat 230 : 78 Ind Cas 312 (DB), *E. I. Ry. Co. v. Ram Lakhan Ram*. (Personal decree against the Agent was asked for in the plaint — Held, suit was against Agent.)

('68) 10 Suth W R 366 (366, 367) : 2 Beng L R 6a (SN) (DB), *Ram Das Sein v. Mr. Cecil Stephenson*. (Deputy Agent of E. I. Ry. Co. made defendant — Held, Railway Company was not sued.)

('71) 15 Suth W R 534 (535) (DB), *Nubeen Chunder Paul v. Mr. Cecil Stephenson*. (Do.)

17. ('25) 12 AIR 1925 Pat 37 (39) : 3 Pat 230 : 78 Ind Cas 312 (DB). (Per Das J.)

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Where a person intended to be impleaded is as a matter of fact not impleaded, it cannot be said to be a case of misdescription though the omission to implead may be due to a *bona fide* mistake.¹⁸

Where A sued four foreign firms which had, before the suit, been dissolved to his knowledge, and on the suit being found to be not maintainable against foreign firms, he impleaded two partners who were in British India, but after the expiry of the period of limitation, it was held that the naming of the firms in the plaint instead of the individuals was not a misdescription and that the suit was barred.¹⁹

Where a suit was instituted against "Rameshwar Nandlal, a Hindu inhabitant, etc.," instead of "Rameshwar Nandlal Firm" and no individual of the former description ever existed, it was held that this was not a case of mere misdescription.²⁰

11. Parties in representative character. — It has been seen in Note 6 that when a person is already properly and sufficiently represented on record by another, a subsequent addition of his name in the plaint is not the addition of a *new* party.^{1a}

A joint Hindu family manager sufficiently represents the family as a whole and when he acts in the interests of the family the other members are bound by the result of the action in which the manager was made a party.¹ To such an action the other members of the

18. ('25) 12 AIR 1925 Lah 343 (344) : 88 Ind Cas 555, *Jawala Das v. Gopal Lal*. (One of the vendees in pre-emption suit not impleaded. Omission due to a wrong registration copy of sale deed in which that vendee's name was not mentioned. Not a case of misdescription.)

('11) 11 Ind Cas 938 (938) (DB) (All), *Mamraj Singh v. Hirday Ram*. (Pre-emption suit against one Jai Kishen — Later discovery that real vendee was one Shib Charn — Latter not allowed to be substituted after limitation.)

('84) 10 Cal 440 (442, 443) (DB), *Harrington v. Gonesh Roy*. (Suit against proprietor of firm — C known to plaintiff to be not its proprietor, first made defendant — After limitation, H the real proprietor added.)

[See (1900) 28 Cal 180 (185, 187) (DB), *Nritya Gopal Hazra v. Golam Rasool*.

('73) 10 Bom H C R 224 (227), *Kavasji Sorabji v. Barorji Sorabji*. (Wrong persons impleaded as defendants as representatives of deceased debtor — Right representative added after limitation.)]

19. ('36) 23 AIR 1936 Lah 485 (486) : 163 Ind Cas 724 (DB), *Amrik Singh v. Sant Singh*.

20. ('32) 34 Bom L R 1410 (1414), *New East India Press Co. v. Rameshwar*.

Section 22 — Note 11

1a. ('47) 34 AIR 1947 Pat 257 (258) : 227 Ind Cas 570 (DB), *Ramkali v. Kali Prasad*. (Representative suit O. 21, R. 63, C. P. O. under an behalf of creditors.)

1. ('11) 9 Ind Cas 739 (740) : 33 All 272 : 38 Ind App 45 (PO), *Kishen Parshad v. Har Narain Singh*. (('07) 29 All 311 (DB), *Shamrathi Singh v. Kishan Prasad* reversed.)

('14) 1 AIR 1914 P C 136 (137) : 36 All 383 : 41 Ind App 216 : 24 Ind Cas 504 (PC), *Sheo Shankar Ram v. Mt. Jaddo Kunwar*.

('27) 14 AIR 1227 PC 56 (57) : 101 Ind Cas 44 : 51 Bom 450 : 54 Ind App 122 (PC), *Lingongowda v. Basangowda*. (Minor sons bound by judgment against father representing them.)

('16) 3 AIR 1916 Pat 251 (251) : 36 Ind Cas 197 : 1 Pat L Jour 154 (DB), *Mahomed Sadiq v. Khedan Lal*.

[See ('81) 7 Cal 739 (745) : 10 Cal L R 263, *Bungsee Singh v. Soodist Lall*.]

[See also ('06) 33 Cal 1079 (1093) (DB), *Thakur Mani Singh v. Dai Rani Koeri*. (Mere fact that infant member is joined after limitation is not fatal.)]

family are not necessary. In such cases, the addition of the other members does not amount to the addition of new parties within the meaning of this section. But where the member suing is not the manager³ or does not sue as manager,⁴ this rule does not apply. Even the manager can represent other members of the family only in respect of joint family property. He cannot represent them where the suit property is their self-acquired property.^{4a}

A trustee or *shebait* of an idol, or an executor or administrator of an estate sufficiently represents the beneficiaries and the joinder

2. ('11) 9 Ind Cas 739 (741): 33 All 272: 38 Ind App 45 (PC), *Kishen Parshad v. Har Narain Singh*. (Mitakshara joint family being a money lending firm — Managing members of the firm entitled to sue in their own name on contracts entered into with them without adding other members of the firm.)

('04) 1 All L Jour 543 (551, 552) (DB), *Pateswami Pratab Narain Singh v. Rudra Narain Singh*. (Suit by head of impartible raj.)

('04) 28 Bom 11 (19): 5 Bom L R 618 (DB), *Guruvayya v. Dattatraya*.

('22) 9 AIR 1922 Cal 468 (472): 72 Ind Cas 722 (DB), *Kalipada Das v. Raja Sati Prasad Garga*. (Suit for arrears of rent by manager — Section 188, Bengal Tenancy Act, has no application.)

('11) 10 Ind Cas 874 (877, 879): 35 Mad 685 (DB), *Sheikh Ebrahim v. Rama Iyer* (Case law reviewed.)

('94) 17 Mad 122 (126, 127): 4 Mad L Jour 52 (DB), *Ramayya v. Venkataratnam*. (Plaintiff suing as manager — Omission to join his brother is only formal error.)

('96) 6 Mad L Jour 27 (30) (DB), *Gopalasamy v. Periasamy Tevar*. (Per Best, J.)

[See ('22) 9 AIR 1922 Bom 354 (355): 46 Bom 1022: 84 Ind Cas 508 (DB), *Gangaram v. Bapu Saheb*. (Joint family — Rent note to jagirdar — Junior members need not be joined.)]

[See also ('18) 5 AIR 1918 Lah 241 (242): 42 Ind Cas 377: 1917 Pun Re No. 87 (DB), *Sher Muhammad v. Ram Chand*. (Loan from joint family funds — Bond in name of only one member — Other members not necessary plaintiffs.)

('96) 20 Bom 435 (436, 437) (DB), *Hari Vasudeo Kamat v. Mahadu Dad Gauda*. (Do.)]

The following cases are no longer good law.

('08) 7 Cal L Jour 251 (260, 261) (DB), *Mir Topurah Hossein v. Gopi Narayan*. (Suit by *karta* of Hindu joint family for rent not maintainable without adding other members.)

(1900) 23 Mad 190 (194) (DB), *Angamuthu Pillai v. Kolandavelu Pillai*.

(1900) 22 All 307 (317, 320): 1900 All W N 73 (DB), *Muhammad Askari v. Radhe Ram Singh*.

('06) 30 Bom 477 (486): 8 Bom L R 268, *Kashinath Chimnaji v. Chimnaji Sadashiv*. (Minor coparceners will not be bound by proceedings started by manager.)

3. ('83) 6 Mad 27 (28): 7 Ind Jur 10 (DB), *Arunachala Pillai v. Vythilinga Mudaliar*.

('94) 18 Bom 141 (142) (DB), *Dayabhai Lallabhai v. Gopalji Dayabhai*. (Son of a deceased manager not becoming manager cannot sue without impleading other members.)

4. ('13) 20 Ind Cas 262 (263) (DB) (Cal), *Jagat Narain Singh v. Udit Narain Singh*. (Where plaintiff does not sue as *karta* but in his own name and in his own right non-joinder of other members of the family may affect.)

4a. ('40) 27 AIR 1940 Lah 262 (264): 192 Ind Cas 105, *Sitaram v. Munshi Ram*. (Where a mortgagee institutes a suit against the father of the legal representatives of the deceased mortgagor and it is found that he could not be legal representative of the deceased, the property having been gifted to his sons by the mortgagor, the mortgagee cannot implead the legal representatives of the deceased mortgagor after the expiry of the period of limitation.)

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of the latter will not introduce a new party ⁵ ~~there are more~~ shebait than one and in the ~~addition of the remaining shebait as a~~ sufficiently represented ~~the~~ addition of the remaining shebait as a plaintiff will not be an addition of 'new plaintiff'. ^{5a} A person who is made a party to a pending suit in his representative character is as much within the section as a person impleaded in his individual capacity. Thus, where a person who had not obtained letters of administration necessary to sue in his representative character originally instituted the suit (which was one for debt due to the deceased for which under S. 4 of Act VII of 1839 no decree could be passed without the production of a probate or certificate of the nature referred to in the section) and after the expiry of the period of limitation the person with such letters was impleaded, the suit was held to have become barred.⁶

B, the promisee under promissory note executed by A, instituted a suit against C, one of the legal representatives of A, for a simple money decree against the assets of A in his hands. C, however, was only in possession of a *portion* of the assets of A. D and E who were in possession of other portions of the assets were impleaded subsequently as parties, but after the expiry of the period of limitation. It was held that by virtue of C being sued as being in possession of the assets of A, C could not be held to have been sued in a representative capacity, and that the suit as against D and E was barred.⁷

Where after a suit has been instituted a right of suing some other person arises during the pendency of the suit owing to such person acquiring an interest in the subject-matter of the suit and being therefore affected by the doctrine of *lis pendens*, and such person is joined as a defendant to the suit no question of limitation arises.⁸

See also Note 6.

5. ('19) 6 AIR 1919 Cal 245 (246) : 46 Cal 877 : 50 Ind Cas 525 (DB), *Bidhu Sekhar Banerjee v. Kuloda Prasad Dengharia*. (Shebait of an idol.)

('03) 7 Cal W N 817 (820, 821) (DB), *Janhabi v. Brojo Mohini*. (Executrix filing suit—Subsequent addition of beneficiaries is not addition of 'new parties'.)

[See ('28) 15 AIR 1928 Lah 375 (376) : 9 Lah 588 : 110 Ind Cas 384 (DB), *Thakardwara, Amritsar v. Ishar Das*. (But a temple, apart from idol, is not a juridical person and suit with the temple as party is one without any party.)

('11) 11 Ind Cas 47 (48) : 33 All 735 (FB), *Jodhi Rai v. Basdeo Prasad*.

('04) 32 Cal 129 (141) : 31 Ind App 203 : 6 Bom L R 765 : 1 All L Jour 585 : 8 CalWN 809:8 Sar 698(PC), *Jagadindra Nath Roy v. Hementa Kumari Debi*.]

See also Note 5.

5a. ('45) 32 AIR 1945 Cal 268 (278, 279) : 49 Cal W N 37 (DB), *Jyoti Prasad v. Johar Lal*.

6. ('97) 21 Bom 580 (583, 584) : Chitty's S C C 527 (DB), *Fatmabai v. Pirbhai*.

7. ('36) 23 AIR 1936 All 94 (95) : 58 All 594 : 160 Ind Cas 1030, *Manni Gir v. Amar Ja'i Chela*.

8. See ('42) 29 AIR 1942 Pat 185 (2) (188) : 197 Ind Cas 739, *Kunja Behari v. Benudhar Panda*. (Previous to mortgage suit by mortgagee lot No. 2 of mortgaged properties sold for arrears of revenue — Balance of sale proceeds attached by A in execution of his money decree against mortgage and withdrawn after preliminary decree in mortgage suit — Application by plaintiff to implead A and for final decree against him — No question of limitation for impleading A held arose.)

12. Suit or appeal by or against a dead person. — A suit instituted in the name of a sole plaintiff¹ or against a sole defendant² who is dead at the time of such institution is a nullity and the plaint cannot be amended by bringing the legal representatives of such deceased person on record. So also, where there are several plaintiffs or several defendants, but *one* of them is dead on the date of suit, his legal representatives, cannot be added as parties and the suit proceeded with.³ But, in such a case, the suit cannot be said to be void *ab initio* so far as the other parties are concerned.⁴ The proper procedure in such a case is to strike out the dead person's name and proceed with the suit.⁵ If the deceased person was a necessary party, the plaint can be amended by adding his legal representatives as parties.⁶ As has

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1. ('23) 10 AIR 1923 Lah 652 (652) : 79 Ind Cas 284 (DB), *Mt. Boondu v. Moti Chand*. (Suit on behalf of minor who was dead.)
2. ('24) 11 AIR 1924 Bom 109 (111) : 85 Ind Cas 464, *Rampratap Brij Mohandas v. Gavrishankar Kashiram*.
(19) 6 AIR 1919 Cal 257 (258) : 51 Ind Cas 160, *Krista Das Law v. Khirada Kanta Roy*.
(18) 5 AIR 1918 Mad 794 (794) : 42 Ind Cas 539, *Rasa Goundan v. Pichamuthu Pillai*.
(33) 20 AIR 1933 Mad 454 (455) : 143 Ind Cas 596, *Municipal Council, Calicut v. Kunhipathumma*.
(16) 3 AIR 1916 Mad 440 (440, 441) : 30 Ind Cas 679 (DB), *In re Arunachallam Chettiar*.
(14) 1 AIR 1914 Cal 895 (896) : 24 Ind Cas 112 (DB), *Bejoy Chand Mahatap Bahadur v. Amulya Charan Mitra*. (Provisions as to substitution of heirs apply only when defendant was alive when suit was instituted.)
(18) 5 AIR 1918 Oudh 419 (420) : 47 Ind Cas 894, *Nau Nehal Singh v. Deputy Commissioner, Unao*.
(08) 31 Mad 86 (88) : 3 Mad L Tim 12 : 17 Mad L Jour 551, *Veerappan Chetty v. Tindal Ponnann*. (Even though the suit is instituted *bona fide* in ignorance of the death.)
(1900) 1 Cal L Jour 62 (Note), *Tecj Narain Singh v. Ram Krishna Pandey*.
[See ('93) 16 Mad 319 (320) (DB), *Mallikarjuna v. Pullayya*.
(69) 12 Suth W R 45 (46) : 3 Beng L R A C 233, *Mohun Chunder Koondoo v. Azeem Gazee Chowkeedar*.]
3. ('32) 19 AIR 1932 Lah 592 (594) : 140 Ind Cas 387, *Karam Singh v. Mt. Maya Wanti*. (Insertion of dead husband's name does not save limitation against widow.)
4. ('27) 14 AIR 1927 Cal 880 (881) : 104 Ind Cas 623 (DB), *Makram Ali v. Abdul*. (Suit brought in name of two plaintiffs one of whom is dead can be amended.)
5. ('24) 11 AIR 1924 Lah 348 (349) : 72 Ind Cas 670, *Mt. Phillo v. Gopi*. (Suit for damages against wrong-doers — One of them dead at the time of suit — His name may be struck off and the suit proceeded with.)
(26) 13 AIR 1926 Lah 153 (154) : 89 Ind Cas 661, *Firm Pala Mal Narain Mal v. Fauja Singh*.
[See also ('28) 15 AIR 1928 Cal 152 (153) : 105 Ind Cas 284 (DB), *Jatindra Nath v. Narendra Nath*.
(28) 15 AIR 1928 Lah 359 (360) : 9 Lah 526 : 110 Ind Cas 281 (DB), *Roopchand v. Sardar Khan*.]
6. ('27) 14 AIR 1927 Cal 880 (881) : 104 Ind Cas 623 (DB), *Makram Ali v. Abdul*.
(28) 15 AIR 1928 Lah 359 (360) : 9 Lah 526 : 110 Ind Cas 281 (DB), *Roopchand v. Sardar Khan*.

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been seen in Note 5, if the legal representatives are *necessary* parties to the suit, i. e., if the suit will not be a properly constituted one unless they are impleaded, their addition after the period of limitation will entail the dismissal of the whole suit, inasmuch as the suit becomes a properly constituted one only when they are made parties and inasmuch as at that time the suit is barred against all.⁷ Where the legal representatives are only *proper* and not necessary parties, the suit against the other defendants will not be barred. Where the legal representatives are already on the record in some capacity or other, the name of the deceased person may be struck off and the suit can be allowed to go on with such persons as legal representatives of the deceased person.⁸

An *appeal* against a sole respondent who is dead at the time of preferring the appeal is not a valid appeal. But it has been held that as the Court is only acting in a *proceeding in the suit*, it has full powers to allow amendment of the appeal by adding the legal representatives of the deceased respondent as parties.⁹ Where such addition is made after limitation, the Court can under S. 5 of the Limitation Act (which does not apply to suits) excuse the delay in filing the appeal if sufficient cause is shown.¹⁰ The Judicial Commissioner's Courts of Nagpur¹¹ and Sind¹² and the Chief Court of Burma¹³ have held that an appeal by or against a dead person cannot be amended by adding his legal representatives.

13. Question of limitation to be considered, whether before or after addition or substitution. — This section does not in itself deal with the question whether the joinder of parties after the institution of a suit shall in all cases necessarily involve the bar of limitation, if the period prescribed for such a suit has then expired.

7. ('19) 6 AIR 1919 Lah 25 (26) : 1919 Pun Re No 86 : 52 Ind Cas 587 (DB), *Husain Bibi v. Hakim*. (Pre-emption suit — One of the joint vendees dead at institution of suit — Legal representatives joined after limitation — Held that the whole suit was barred.)
8. ('29) 16 AIR 1929 Lah 440 (440) : 117 Ind Cas 899 (DB), *Sher Singh v. Moham-madi*. (Suit for pre-emption against six vendees — Sixth vendee discovered to be dead before suit — Other five vendees were the legal representatives of the sixth vendee.)
- (20) 7 AIR 1920 Sind 82 (83) : 78 Ind Cas 569 (DB), *Manager Encumbered Estates in Sind v. Tharumal*.
9. ('25) 12 AIR 1925 Mad 1210 (1210) : 49 Mad 18 (FB), *Gopal Krishnayya v. Lakshmanarao*. (Overruling ('24) A I R 1924 Mad 56 (DB), *Govinda v. Gauranga*.)
- ('30) 17 AIR 1930 All 131 (132) : 123 Ind Cas 824, *Chatur Prasad v. Baijnath*.
10. See the cases cited in Foot-Note (9).
11. ('29) 16 AIR 1929 Nag 261 (262) : 117 Ind Cas 257, *Surajmal v. Raghunath*. (Appeal in name of dead person.)
12. ('20) 7 AIR 1920 Sind 82 (83) : 78 Ind Cas 569 (DB), *Manager Encumbered Estates in Sind v. Tharumal*. (('07) 31 Mad 86 (DB), *Veerappa v. Tindal Ponnai*, followed.)
13. ('13) 21 Ind Cas 306 (307) : (1913) 1 U B R 175, *Mi Ein Zi v. Mi Ni*. (Amendment that deprives a party of defence of limitation should not be allowed.)

Such a result must depend upon the consideration of the question whether the joinder was necessary to enable the Court to award such relief as might be given in the suit as framed. If fresh parties are merely added for the purpose of safeguarding the rights subsisting as between them and others claiming generally in the same interest, the determination, by the application of this section of the date of institution of the suit as regards such newly joined parties does not ordinarily affect the suit by or against the original parties and would not therefore attract the operation of the general provisions of the Limitation Act.¹ The correct principle is that if a Court finds it necessary to add certain persons as parties, it must add them and then apply S. 22 to see the result on the relief asked for or against the parties added.² A Court's power to add a party is different from its duty to dismiss the suit as time-barred when the question of limitation falls to be considered.³

A different opinion is sometimes expressed, viz., that it is not desirable to add or substitute as parties to an action persons as regards whom the action has already become time-barred.⁴ But it is submitted that the principles stated already should prevail.

Section 22 — Note 13

1. ('04) 28 Bom 11 (17, 18) : 5 Bom L R 618 (DB), *Guruvayya v. Dattatraya*. ('21) 8 AIR 1921 Bom 152 (153, 154) : 45 Bom 1009 : 61 Ind Cas 590 (DB), *Shivubai Rajaram v. Siddeswar Martand*. (Redemption suit filed in time — Other persons interested in equity of redemption may be impleaded after limitation.) ('06) 8 Bom L R 942 (945, 946) (DB), *Damodar v. Nainshukh*.
2. ('29) 16 AIR 1929 All 941 (942) : 52 All 134 : 121 Ind Cas 106 (DB), *Baldeo Prasad v. Bhola Nath*. (Refusal to add as defendant merely because if he were plaintiff his suit would be barred is wrong.) ('12) 14 Ind Cas 35 (37, 38) (DB) (All), *Nathi Lal v. Lala*. [See ('40) 27 AIR 1940 Mad 639 (641), *Sankara Menon v. Kuttani*. (Absence of objection to the amendment substituting new defendants cannot take away any legal defence, including that of limitation, which might be open to the fresh parties brought on the record thereby.) ('24) 11 AIR 1924 Lah 188 (188) : 4 Lah 390 : 75 Ind Cas 1028 (DB), *Ali Ahamed v. Said Mian*. (Minor suing as major — Plaintiff to be amended subject to question of limitation.) ('22) 9 AIR 1922 Nag 213 (215) : 66 Ind Cas 217, *Kuksa v. Dajiba Bhanu*. (Section does not prescribe any period for joinder of a party.) [See also ('49) ILR (1949) 1 Cal 85 (97) : 52 Cal W N 866 (DB), *Moniruddin Ahmed v. Sarat Chandra*. (Transposition of defendant as plaintiff — Transposition should not be refused on ground that if transposed his claim would be barred by limitation.)]
3. ('49) ILR (1949) 1 Cal 85 (97) : 52 Cal W N 866 (DB), *Moniruddin Ahmed v. Sarat Chandra*. ('92) 14 All 524 (528) : 1892 All W N 104 (DB), *Imamud-din v. Liladhar*. See also Article 181 Note 20.
4. ('28) 15 AIR 1928 All 97 (97) : 108 Ind Cas 735 : 50 All 276 (DB), *Equitable Trust Co. v. Hafiz Muhammad Halim & Co.* ('81) 7 Bom 217 (DB), *Kalidas v. Nathu*; ('09) 4 Ind Cas 38 (DB), *Seshan Pattar v. Veera Raghava*; ('97) 21 Bom 580 (DB), *Fatmabai v. Pirbhai*, followed.) ('25) 12 AIR 1925 Mad 917 (918) : 85 Ind Cas 961, *Venkatasubamma v. Pulipulla Reddy*. (Donee under will suing — Executor under will sought to be substituted as plaintiff after limitation.)

Section 22
Notes 14-15

14. "Deemed to have been instituted." — In *Chandrika Roy v. Ram Kuer Thakur*.¹ the view was expressed by Mr. Justice Das that the words "deemed to have been instituted" create a statutory fiction that the suit, in case of an addition or substitution of parties, is instituted on the date of such addition or substitution, implying thereby that otherwise the date of the institution is the date of the original institution. He further proceeded to observe that, accordingly, in cases to which the section does not apply, *e. g.* 'applications,' the date of institution even as regards the added or substituted party is the date of the original institution. It is submitted that such a construction is not sound. The party added or substituted not being a party at the original institution of the suit, it cannot be stated that, in fact, the suit was instituted as regards him on that date. The fiction really seems to be that though a suit can be instituted only once, and that on the date of its original institution, for certain purposes it may be deemed to be "instituted" so far as the new party is concerned on the date of his being impleaded. It is not as if, so far as he is concerned, a suit really instituted against him on an earlier date is to be deemed by a fiction to be instituted at a later date. It is rather that such a suit which was never instituted at all against him is to be deemed as instituted as regards him on the date he is impleaded.

15. "As regards him." — It has been seen in Notes 2 and 13 that all S. 22 says is that as regards a newly added or substituted party the suit shall be deemed to have been instituted on the date of such addition or substitution and not earlier. The section does not purport to lay down that on such date the suit as regards him is barred by limitation or not, or what the effect of such addition or substitution is on the whole suit. These questions will have to be decided with reference to the nature and frame of the suit and the law of parties relating thereto. This section refers only to the parties subsequently added and the suit cannot fail as regards the original parties merely because the remedy as regards the newly added party has been lost, unless such a result follows from the nature of the suit.¹ In other words, the answer will depend upon whether the newly added party is a necessary party to the suit or only a proper party.

Where a party necessary for the constitution of the suit itself is not added in time, the suit must be dismissed in its entirety.² Where

Section 22 — Note 14

1. ('23) 10 AIR 1923 Pat 88 (89) : 6 Pat L Jour 463 : 62 Ind Cas 536 (DB).

Section 22 — Note 15

1. ('31) 18 AIR 1931 Bom 590 (592):135 I. C. 423, *Bishamberdas v. Brijlal Arora*. ('21) 8 AIR 1921 Bom 152 (154) : 45 Bom 1009 : 61 Ind Cas 590 (DB), *Shivubai Rajaram v. Siddeshwar Martand*. (Redemption suit filed in time—Suit should not be dismissed merely because other persons interested in equity of redemption are not joined within limitation.)
[See ('75) 12 Bom H C R 97 (105, 106) (DB), *Dayal Jairaj v. Khatao Ladha*. ('77) 1877 BomPJ 271 (277)(DB), *Nawab Muhammad Bakar v. Mahabu Begam*.]
2. ('33) 20 AIR 1933 Cal 621 (622) : 60 Cal 777 : 146 Ind Cas 259 (DB), *Govind Chandra v. Jamaluddin Mondal*. (Mortgage suit—All mortgagees must be joined as plaintiffs.)

- ('36) 23 AIR 1936 Cal 193 (196) : 62 Cal 324 : 162 Ind Cas 323, *Prabodhlal Mukherji v. Neelratan Adhikari*. (Co-widow of a deceased debtor is a necessary defendant.)
- ('29) 16 AIR 1929 Cal 591 (592) : 125 Ind Cas 109 (DB), *Giris Chandra v. Ram Saran*. (Persons entitled to a share in mortgagee rights.)
- ('37) 24 AIR 1937 Rang 124 (125) : 170 Ind Cas 105 (DB), *Maung Tun The'n v. Maung Sin*. (('03) 28 Bom 11 (DB), *Guruvayya v. Dattatraya*, relied on.)
- ('28) 15 AIR 1928 Lah 33 (34) : 100 Ind Cas 859, *Devi Dayal v. Narain Singh*. (A panchayat, i. e., an unregistered or unincorporated body of persons suing — Some of them not made parties — Whole suit is bad.)
- ('25) 12 AIR 1925 Lah 343 (344) : 88 Ind Cas 555, *Jawala Das v. Gopal Lal*. (Pre-emption suit — Several vendees — One vendee impleaded after time — Whole suit fails.)
- ('24) 11 AIR 1924 Lah 230 (231) : 73 Ind Cas 364, *Niaz Ali Khan v. Md. Afzal Khan*. (Do.)
- ('20) 7 AIR 1920 Lah 72 (73) : 57 Ind Cas 259, *Raushan Rim v. Sheran Khan*. (A necessary party not made respondent in second appeal — Whole appeal fails.)
- ('19) 6 AIR 1919 Lah 3 (3) : 51 Ind Cas 935 : 1 Lah 21 (DB), *Khaira v. Salem Raj*. (Necessary respondent not impleaded in appeal.)
- ('27) 14 AIR 1927 Mad 84 (85) : 98 Ind Cas 549, *Siluvaimuthu Mudaliar v. Muhamad Sahul*. (Joint promisees of a debt are all necessary parties.)
- ('09) 4 Ind Cas 392 (394) : 33 Mad 246 (DB), *Bhagavanulu v. Veeravadambu*. (Partition of joint property — Alienee from a sharer is necessary party.)
- ('92) 14 All 524 (528) : 1892 All W N 104 (DB), *Imam-ud-din v. Liladhar*. (Hundi in favour of firm — All partners are necessary parties.)
- ('87) 14 Cal 791 (794) (DB), *Ramdoyal v. Junmenjy Coondoo*. (Suit for partnership accounts — All partners are necessary parties.)
- ('82) 8 Cal 42 (50) : 8 Ind App 135 : 4 Sar 254 : 5 Ind Jur 548 (PC), *Rajendronath Dutt v. Shaikh Mahomed Lal*. (A co-shebaite who alienated debutter estate is a necessary defendant in a suit to recover the estate.)
- ('81) 6 Cal 815 (826) : 8 Cal L R 457 (DB), *Ramsebuk v. Ramlal Koondoo*. (Suit by members of joint Hindu family carrying on trade in partnership — All members must be joined.)
- ('21) 8 AIR 1921 Pat 498 (498) : 62 Ind Cas 61, *Sumitra Kuer v. Damri Lal*, (Auction-purchaser is necessary party to application under Order 21 Rule 92. C. P. C. — But see ('29) A I R 1929 Mad 763 (DB), *Narayana v. Petamma*.)
- ('02) 1902 Pun Re No. 69, *Ram Chand v. Subban Baksh*.
- ('95) 18 Mad 33 (38) : 4 Mad L Jour 283, *Alagappa v. Vellian Chetty*. (Joint Hindu family firm — All members must join as plaintiffs.)
- ('20) 7 AIR 1920 Oudh 173 (175) : 56 Ind Cas 304 : 23 Oudh Cas 62, *Mahommad Ahmad v. Ansar Mahommad*. (Suit for partition by a Muhammadan heir — Other heirs to be parties.)
- ('07) 1 Sind L R 191 (196) (DB), *Relumat Devlaram v. Chellaram Jodharam*, (Suit on contract in name of individual partner — All partners are necessary parties.)
- [See ('81) 3 Mad 234 (235) (DB), *Kanna Pisharody v. Narayanan Somaya jipad*. (Co-owners — Suit to recover property.)
- ('86) 10 Bom 32 (34) (DB), *Balakrishna Moreshwar Kunte v. Municipality of Mahad*. (Do.)
- ('24) 11 AIR 1924 Mad 771 (772) : 80 Ind Cas 139 (DB), *Kannan Kutty v. Elaya Veetil*. (Suit relating to *Devaswom* property — All the *Uralans* of the *Devaswom* are necessary parties.)
- ('01) 1901 Pun L R No. 74, p. 238, *Ganpat Mal v. Bhagat Ram*.]
- [See also ('33) 20 AIR 1933 Cal 636 (636) : 60 Cal 787 : 145 Ind Cas 836 (DB). *Rajaneekanta Laha v. Atul Chandra Seal*. (Application for pre-emption under Ss. 26-F and 188, Bengal Tenancy Act — Co-sharers not parties in time — Whole suit fails.)]
- See also Note 5.

Section 22
Note 16

the newly added party is not a necessary party but is only a *proper* party, that is to say, when he is impleaded not to *validate* the plaintiff's claim as originally laid but only for a collateral purpose, limitation cannot be pleaded in bar of the entire suit. The reason is that under this section, time is to be reckoned only "as regards him" from the date of his joinder.³

When the plaintiff is not entitled to any relief, against the newly added defendant and does not claim any such relief, and the relief claimed against the existing defendants can be granted independently, the addition of the former after limitation will not affect the suit as against the latter.⁴ In fact, where the newly added party is not a

3. ('30) 17 AIR 1930 All 436 (437) : 128 Ind Cas 7, *Abdul Haq v. Lallu*. (Suit by cosharer landlord for his share of rent — Other cosharers joined as defendants after time — S. 266, U. P. Tenancy Act.)

('21) 8 AIR 1921 Bom 152 (154) : 61 Ind Cas 590 : 45 Bom 1009 (DB), *Shivubai Rajaram v. Shiddeswar Martand*. (Suit for redemption of mortgage — Person interested in the equity of redemption may be added as defendant after limitation.)

('14) 1 AIR 1914 Cal 681 (681) : 22 Ind Cas 798 (DB), *Bhola Roy v. Jung Bahadur Singh*. (Rent suit by manager of joint Hindu family — Infant nephew can be joined after limitation.)

('29) 16 AIR 1929 Lah 505 (506) : 115 Ind Cas 74, *Padam Sain v. Data Ram*. (X and Y, joint family payees under bond — Partition between them and bond falling to share of X — X alone suing on bond — Y made party after time — Suit is not affected.)

('09) 1 Ind Cas 455 (455, 456) : 1909 Pun Re No. 20 (DB), *Gohru v. Amira*. (Debt due to joint family — One coparcener added as defendant after time.)

('10) 8 Ind Cas 890 (890) (Cal), *Bhola Roy v. Jung Bahadoor*. (One of plaintiffs added only to meet possible future objection.)

[See ('03) 26 Mad 239 (242) : 12 Mad L Jour 267 (DB), *Jambu Ramaswami Bhagavathar v. Sundararaja Chetty*. (Acceptor of a bill added after limitation — Suit against drawer is not affected.)]

[See also ('50) 37 AIR 1950 Cal 54 (Pr 12), *Kunja Behari v. Mritunjoy Prosad*. (Application under S. 37A, Bengal Agricultural Debtors Act — Names of present occupiers need not be mentioned therein and therefore addition of such persons beyond limitation cannot attract bar of limitation.)]

Also see Note 5.

4. ('30) 17 AIR 1930 All 309 (311) : 123 Ind Cas 828, *Chaudhari Jahangira v. Sarup*. (Suit by a cosharer for whole rent against tenants — Other cosharers impleaded as defendants after limitation — Plaintiff's claim against tenants so far as his share is concerned is not affected — Agra Tenancy Act, S. 194, sub-sections 2 and 3.)

('27) 14 AIR 1927 Cal 794 (796) : 104 Ind Cas 576 (DB), *Jadu Nath Mandal v. Amulya Krishna Kundu*.

('06) 6 Cal L Jour 558 (563, 570) : 12 Cal W N 84 (DB), *Mahomed Ishaq v. Sheikh Akramul Huq*.

('07) 1907 Pun W R No. 32, p. 92, *Bawa Nanak Singh v. Ali Sher*. (Claim for money maintainable against some of the representatives of a deceased debtor — Addition of other representatives after period of limitation does not bar the suit against the original defendants.)

[See ('37) 24 AIR 1937 Lah 193 (194) : 172 Ind Cas 596, *Bishen Singh v. Pirthi Chand*. (('05) 1905 Pun Re No. 57 (FB), *Labharam v. Kanshi Ram*, followed — Suit by some of members of Hindu joint family on pronote in favour of family — Other members impleaded as defendants but after limitation — Suit against original defendants is not barred.)]

('09) 4 Ind Cas 1160 (1163) : 3 Sind L R 191, *Chelaram v. Baden Marine Insurance Co.*]

necessary party but only a proper party, no question of limitation would ordinarily arise even as regards him.⁵

See also Note 5.

16. Necessary parties. — A necessary party is a person who ought to have been joined as a party. He is a person necessary to the constitution of the suit, i. e., person in whose absence no effective decree at all can be passed.¹

[See also ('22) 9 AIR 1922 Pat 651 (653) : 69 Ind Cas 677 : 2 Pat 175 (DB), *Sital Prasad Ray v. Asho Singh*. (Puisne mortgagee in a suit by a prior mortgagee.)]

5. ('43) 30 AIR 1943 Oudh 164 (166) : 18 Luck 601 : 204 Ind Cas 444 (DB), *Sheo Prasad v. Parkash Rani*.

('34) 21 AIR 1934 Cal 187 (190, 191) : 151 Ind Cas 1076 (DB), *Secretary of State v. Dharendra Nath Roy*. (Suit for possession against trespasser — Secretary of State from whose settlement the trespasser claims is not necessary party though a proper party.)

('27) 14 AIR 1927 Cal 794 (796) : 101 Ind Cas 576, *Jadhu Nath v. Amulya Krishna*. (Not a necessary party and no relief claimed against him.)

('23) 10 AIR 1923 Lah 438 (438) : 75 Ind Cas 781, *Kunj Lal v. Hari Ram*.

('09) 1 Ind Cas 530 (533, 534) (DB) (Cal), *Dursan Singh v. Durbejoy Singh*. (Suit by one member of Mitakshara joint family for declaration that the family property is not liable to be taken in execution — Other members are proper and not necessary parties.)

('35) 22 AIR 1935 Mad 737 (738) : 159 Ind Cas 129, *Adi Lakshmi v. Durgamma*. (Case of a widow as defendant sufficiently representing husband's estate — Daughter and daughter's son claiming under will of husband impleaded after limitation—Section 22 held not to apply.)

[See ('26) 13 AIR 1926 Cal 737 (738) : 91 Ind Cas 657 (DB), *Amiya Pal v. Sharba Mangala Debi*. (Estate properly and fully represented in plaint by executors — Will being subsequently revoked, son added as plaintiff.)]

('22) 9 AIR 1922 Cal 149 (149, 150) : 65 Ind Cas 367 (DB), *Sital Prasad Poddar v. Kaifut Shaikh*.

('29) 16 AIR 1929 Mad 763 (764) : 121 Ind Cas 855: 52 Mad 861 (DB), *Narayana Sahu v. Pattamma*. (Auction-purchaser not necessary party to application under Order 21 Rules 89 and 92, C. P. C. — But see ('21) A I R 1921 Pat 498, *Sumitra v. Damri Lall*.)

('20) 7 AIR 1920 Lah 193 (194) : 57 Ind Cas 52, *Karm Narain v. Salamat Rai*. (Suit by claimant under O. 21 R. 63, C. P. C. — Auction-purchaser not having purchased at the date of decision of claims, is not necessary party to the suit.)

('28) 15 AIR 1928 Lah 414 (417) : 108 Ind Cas 391, *Manigir v. Hazarigir*. (Auction-purchaser not a necessary party under O. 21 R. 92, C. P. C.)

('19) 6 AIR 1919 Cal 510 (510) : 50 Ind Cas 5 (DB), *Ajiuddin Ahmed v. Khoda Bux Khondkar*. (Auction-purchaser is necessary party to application under O. 21 R. 90, C. P. C.)]

[But see ('29) 16 AIR 1929 Cal 188 (189) : 116 Ind Cas 726 (DB), *Hason Ali v. Gurudas Kapali*. (Section 22 applies even to proper party — Subsequent transferees in a mortgage suit. ('09) 36 Cal 675 (DB), *Mathewson v. Ram Kanai*, followed.)]

Section 22 — Note 16

1. ('38) 25 AIR 1938 Cal 324 (324) : 177 Ind Cas 798 (DB), *Dinesh Chandra v. Rajendra Chandra*. (33 All 272 (PC), followed.)

(1900) 27 Cal 493 (497, 498) (DB), *Durga Charan Sarkar v. Jotindra Mohan Tagore*. (Two tests have been laid down to determine whether a party is a necessary party.)

('12) 17 Ind Cas 921 (924) (DB) (Cal), *Jogendra Nath Singh v. Secy. of State*. (Do.)

Section 22
Note 15

A person is a *proper* party if his *presence* before the Court is necessary to enable it to effectually and completely adjudicate upon and settle all the questions involved in the suit.² In other words, the

('29) 16 AIR 1929 Mad 291 (293) : 116 Ind Cas 137 (DB), *Ramakrishnayya v. Satyanarayana*. (Tests laid down for determining whether a party is a necessary party.)

The following cases illustrate who are necessary parties.

('11) 9 Ind Cas 739 (740) : 33 All 272 : 38 Ind App 45 (PC), *Kishan Parshad v. Har Narain Singh*. (Suit by managing members of joint family business—Other members not necessary parties.)

('34) 21 AIR 1934 Pat 106 (106, 107) : 154 Ind Cas 396, *Muhammed Nazim Khan v. Ramjivan Sahu*.

('01) 1901 All W N 14 (14) (DB), *Jit Bhagat v. Seikh Hussaini*. (Suit for declaration of ownership in property sought to be sold in execution—Judgment-debtor is necessary party.)

('74) 6 N W P H C R 208 (210) (DB), *Syud Sukhawat Ali v. Kesho Tewari*. (Vendee of mortgaged property suing for redemption—Heirs of mortgagor are necessary parties.)

('12) 15 Ind Cas 176 (176) : 39 Cal 881 (DB), *Menajuddi Biswas v. Toam Mandal*. (Transferee of property sold in execution is a necessary party in setting aside sale.)

('77) 2 Bom 140 (141) : 2 Ind Jur 319 (DB), *Narayan Bharathi v. Laving*.

('10) 6 Ind Cas 554 (558) (DB) (Cal), *Aghore Nath v. Kamini Debi*. (Endowment—Suit for construction of will—Representatives of original trustees are necessary parties.)

('71) 15 Suth W R 97 (98) (DB), *Ram Taruck Ghossal v. Radha Bullab Sircar*. (Suit for establishing title to land—Defendant alleging land to be in possession of S—S is necessary party.)

('17) 4 AIR 1917 Lah 402 (403) : 42 Ind Cas 420, *Lal Chand v. Mangta Mal*. (Parties to marriage, necessary parties in suit for declaration of invalidity of marriage.)

('82) 1882 Pun Re No. 188, p. 553, *Mela Ram v. Narain Das*. (Appeal from order rejecting application to set aside execution sale—Auction-purchaser is necessary party.)

('26) 13 AIR 1926 Mad 991 (992) : 97 Ind Cas 551, *Vesu v. Kannamma*. (If interests of defendants on record are inseparable from those of necessary parties not brought on record, the decree will be wholly void.)

('23) 10 AIR 1923 Mad 81 (82) : 68 Ind Cas 901 (DB), *Appalacharyulu v. Ramachandracharyulu*. (In a suit to enforce registration even minor executants are necessary parties.)

('25) 12 AIR 1925 Nag 288 (288, 289) : 89 Ind Cas 888, *Pestonji v. Ganpat*. (Creditor of manager of joint Hindu family suing after manager's death—All members are necessary parties.)

('33) 20 AIR 1933 Pat 715 (716) : 147 Ind Cas 452 (DB), *Kamakhyia Narain Singh v. Ramraj Singh*. (Suit for resumption of village by grantor—Minor sons of joint family are not necessary parties when represented by father.)

('32) 19 AIR 1932 Cal 337 (338) : 58 Cal 77 : 132 Ind Cas 904, *Pramathanath Sarkar v. Suprakash Ghosh*. (In an administration suit, the executor is the only necessary party—Other legatees are not necessary parties.)

[See ('83) 9 Cal 704 (710, 711) : 10 Ind App 39 : 12 Cal L R 595 : 4 Sar 419 : 7 Ind Jur 215 (PC), *Omrao Begum v. Government of India*. (Navab Nazim's Debts' Act, XVII of 1873.)]

2. ('05) 30 Bom 156 (161) : 7 Bom L R 811 (DB), *Keshavram Dulavram v. Ranchhod Fakira*.

('27) 14 AIR 1927 All 315 (315) : 100 Ind Cas 679 (DB), *Muhammad Said Khan v. Indarpati Singh*. (Persons having no interest in suit property but whose names appear in the Record of Rights are proper parties.)

('80) 2 All 738 (744) (DB), *Narain Kuar v. Durjan Kuar*.

expression "proper party" means the party who may be interested in the result of the suit and who may have a right to seek the assistance of the Court in coming to a decision on the point in issue.³ It is not necessary that any *relief* should be asked against him,⁴ the object of adding him being to avoid needless multiplicity of suits⁵ and to protect

- ('27) 14 AIR 1927 Bom 470 (473) : 51 Bom 800 : 104 Ind Cas 764 (DB), *Nathu Bhai Ichharam v. Narayancharya*. (Administration suit — Claim for account of partnership carried on by the deceased with the executor and other partners combined—Other partners are neither necessary nor proper parties.)
- ('84) 8 Bom 323 (336) : 8 Ind Jur 680, *Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy*. (Assignee *pendente lite*.)
- ('68-69) 5 Bom H C R (OC) 83 (93), *Bank of Hindustan, China and Japan v. Premchand Raichand*. (Suit by owner against purchaser of property which has been wrongfully attached and sold in execution of decree—Execution creditor is proper party.)
- ('12) 17 Ind Cas 917 (917) (DB) (Cal), *Digambarnanda v. Secretary of State*. (Plaintiff suing for declaration that he was not a tenure-holder but a raiyat — Other persons recorded as raiyats of plaintiff were held proper parties.)
- ('11) 11 Ind Cas 183 (184) (DB) (Cal), *Upendra Chandra v. Sheikh Subhan*. (Rent suit — Defendant pleading *jus tertii* — Such third party is a proper party.)
- ('08) 1908 Pun W R No. 59, *Mrs. Fox v. Secretary of State*.
- ('34) 21 AIR 1934 Cal 187 (190, 191) : 151 Ind Cas 1076 (DB), *Secretary of State v. Dharendra Nath Roy*. (Suit for possession against trespasser — Secretary of State from whose settlement trespasser claims is proper party.)
- ('22) 9 AIR 1922 Pat 651 (653) : 69 Ind Cas 677 : 2 Pat 175 (DB), *Sital Prasa Ray v. Asho Singh*. (Suit by prior mortgagee — Puisne mortgagee is a proper party.)
- ('14) 1 AIR 1914 Mad 272 (275) : 22 Ind Cas 826 : 38 Mad 837 (DB), *Annamalai Velan v. Murugappa Velan*. (Suit to set aside rent sale — Person at whose instance sale was brought about is proper party.)
- ('17) 4 AIR 1917 Cal 330 (343) : 39 Ind Cas 409 (DB), *Secretary of State v. Jadav Chandra*. (Bengal Tenancy Act — Suit for declaration of status as tenant — Under-raiyats may be proper parties.)
- ('34) 21 AIR 1934 Cal 795 (795) : 151 Ind Cas 1088, *Ananda Charan De v. Mahalakshmi De*. (Pre-emption — Landlords petitioning under S. 26F, Bengal Tenancy Act, are proper parties to proceedings for setting aside sale.)
3. ('25) 12 AIR 1925 Cal 1257 (1258) : 89 Ind Cas 57 (DB), *Baikuntha Kumar v. Sarat Chandra Nath*.
[See also ('98) 1898 Pun Re No. 75, p. 257, *Arur Singh v. Mt. Lachmi*.]
4. ('97) 21 Bom 229 (233, 234) (DB), *Kashi v. Sadashiv*.
- ('34) 21 AIR 1934 Lah 328 (328) : 150 Ind Cas 670, *Punjab Co-operative Bank Ltd. v. Lyallpur Bank Ltd*. (Promote in favour of liquidated Bank endorsed in favour of another — Suit by latter against original debtor — Bank may be joined as defendant.)
- ('06) 29 Mad 106 (110) : 15 Mad L Jour 475 (DB), *Chidambaram Chettiar v. Sri Rangachariar*. (('02) 12 Mad L Jour 355 (DB), *Narayanasami v. Irrulappa*, followed.)
- ('94) 18 Mad 53 (58) : 4 Mad L Jour 237 (DB), *Gurulingaswamy v. Rama Lakshamma*.
- ('90) 13 Mad 32 (33) (DB), *Thirthasamy v. Gopala*.
[See ('14) 1 AIR 1914 Lah 187 (192) : 1945 Pun Re No. 3 : 25 Ind Cas 480 (DB), *Shib Nath v. Alliance Bank of Simla, Ltd.*]
5. ('10) 6 Ind Cas 570 (571) (DB) (Cal), *Basli Bibi v. Hanif-ud din*. (Rent suit against some of the tenants — Other tenants may be joined.)
- ('87) 11 Bom 425 (428) (DB), *Bhauddin v. Sheikh Ismail*. (All persons interested in property which it is sought to be redeemed on payment of charge should be joined.)

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his interests or the interests of a party already on record.⁶

As stated in Pomeroy on *Remedies*: "Necessary parties defendants are those without whom no decree at all can be rendered: proper parties defendants are those whose presence renders the decree more effectual: and *all* the proper parties are those by whose presence the decree becomes a complete determination of all the questions which can arise, and of all the rights which are connected with the subject-matter of the controversy."⁷

This subject of necessary and proper parties has been dealt with in these Notes with reference to cases decided under the Limitation Act. For a further and fuller treatment of the subject, see A. I. R. Commentary on O. 1 R. 10 of the Code of Civil Procedure, 5th (1950) Edition, Notes 13 to 27, both inclusive, where the subject of necessary and proper parties has been discussed with reference to various classes of suits.

17. Joinder of parties in mortgage suits. — The principles referred to in Note 15 are of general application and consequently apply to mortgage suits as well. Order 34, Rule 1 of the Code of Civil Procedure specifies the persons who shall be made parties to a suit relating to a mortgage. The rule is, however, "subject to the other provisions of the Code" and is therefore subject to O. 1, R. 9 which enacts *inter alia* that no suit shall be defeated by reason of the *non-joinder* of parties and that the Court may, in every suit, *deal with the matter in controversy so far as regards the rights and interests of the parties actually before it*.

('27) 14 AIR 1927 Cal 352 (353): 101 Ind Cas 539 (DB), *Hashim Ibrahim v. Secretary of State*. (Reference under S. 18 of the Land Acquisition Act for determining valuation of waqf property — Mutwallis can be added as parties.)

('34) 21 AIR 1934 Cal 187 (190): 151 Ind Cas 1076 (DB), *Secretary of State v. Dhirendra Nath*. (Suit for possession from 1st defendant of land as forming part of permanently settled estate — Secretary of State added after limitation for determining the question of revenue as between 1st defendant and Secretary of State under whose *settlement* 1st defendant claimed.)

6. ('08) 31 Mad 236 (250): 35 Ind App 176: 12 Cal W N 946: 8 Cal L Jour 230: 10 Bom L R 781: 18 Mad L Jour 387: 4 Mad L Tim 101 (PC), *Shankaralinga Nadan v. Raja Rajeswara Dorai*. (Worshippers added as proper parties, where trustee did not conduct litigation in the interest of the trust.)

('89) 13 Bom 22 (24) (DB), *Lakshimibai v. San'appa Revappa*.

('02) 26 Bom 301 (304): 3 Bom L R 932 (DB), *Purshotam Devjishet v. Kala Govindji Thaker*. (Suit by one legatee for legacy — Executor can join other legatees.)

('23) 10 AIR 1923 Mad 521 (522): 72 Ind Cas 156. *Rajaratnam Iyer v. Kalasya-sundaram Iyer*. (Suit against Hindu widow — Plaintiff's adoption in question — Reversioners can be joined.)

[See ('37) 24 AIR 1937 Lah 193 (194): 172 Ind Cas 596, *Bishen Singh v. Pirthi Chand*. (Suit by some members of Hindu joint family on pronote in favour of family — Other members impleaded as defendants but after limitation — Suit against original defendants not barred.)

('71) 15 Suth W R 6 (6) (DB), *Kristo Sunker Dut Roy v. Koylashnath Dutt Roy*.]

7. ('06) 30 Bom 156 (161): 7 Bom L R 811 (DB), *Keshavram Dulavram v. Ranchhod Fakira*. (Passage from Pomeroy quoted.)

There are, however, certain cases where the Court cannot, by reason of the nonjoinder of certain parties, deal with the matter in controversy even so far as regards the rights and interests of the parties actually before it.¹ A case arising under S. 45 of the Contract Act where the interests of *joint promisees* are involved, is an instance of the class of cases mentioned above. In such a case a claim cannot be enforced by only one of several joint promisees. A suit by one only of such promisees, without making the other promisees parties, whether as plaintiffs or as defendants, is not a validly constituted suit at all, and no relief can be given to any of the parties. The suit will have to be dismissed, not on the ground of misjoinder, but on the ground that no valid decree can be passed in the suit as constituted.² See also Note 23.

Where the mortgagee-right under a mortgage is vested in several persons jointly, one of them alone cannot, on the principles referred to above, institute a suit on mortgage without impleading the others also as parties, either as plaintiffs or defendants.³ A suit instituted in contravention of this rule is not a validly constituted one and must be dismissed.⁴ If the persons omitted in the first instance are added as parties subsequently, but at that time the suit is barred against them, the whole suit must be dismissed,⁵ the reason being that the suit

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1. See Notes 13 and 41 to Order 1 Rule 10 in A I R Commentary on the Code of Civil Procedure, 5th (1950) Edition.
2. ('19) 6 AIR 1919 Bom 135 (136) : 51 Ind Cas 223 : 43 Bom 575 (DB), *Sabdur-alli v. Sadasiv Supde.*
- ('22) 9 A R 1922 Pat 651 (652) : 69 Ind Cas 677 : 2 Pat 175 (DB), *Sital Prasad Ray v. Asho Singh.*
3. ('22) 9 AIR 1922 Pat 651 (652) : 69 Ind Cas 677 : 2 Pat 175 (DB), *Sital Prasad Ray v. Asho Singh.*
- ('16) 3 AIR 1916 Pat 310 (311) : 36 Ind Cas 542 (543) : 1 Pat L Jour 468 (DB), *Girwar Narain v. Makbulunissa.*
- [See however ('40) 27 AIR 1940 Mad 412 (416) : 190 Ind Cas 657, *Sornammal v. Thangavelu Mudaliar.* (Entire mortgagee right becoming vested in plaintiff before suit comes on for hearing—Suit may be decreed though at the time when the plaintiff becomes solely entitled to the mortgagee right the period of limitation for the suit has expired—This is not a case of substitution or addition of a *new* party and S. 22 does not apply—See Note 6.)]
4. ('33) 20 AIR 1933 Cal 621 (622) : 60 Cal 777 : 146 Ind Cas 259 (DB), *Govind Chandra Ghose v. Jamaluddin Mondal.*
- ('14) 1 AIR 1914 Nag 31 (31) : 10 Nag L R 72 : 24 Ind Cas 831, *Nagorao v. Nago.*
- ('16) 3 AIR 1916 Pat 411 (413, 414) : 36 Ind Cas 77 (DB), *Baghela Koer v. Abdul Rahman.*
- ('14) 1 AIR 1914 Cal 455 (456) : 41 Cal 727 : 22 Ind Cas 570, *Sidheshuri Pershad Narain Singh v. Dharamjit Narain Singh.* (Suit by manager of joint Hindu family without joining nephew.)
5. ('50) 37 AIR 1950 All 598 (Prs. 26, 31) : 1950 All L Jour 632 (FB), *Rameshwar Bux v. Ganga Bux.* (AIR 1948 Bom 211 : ILR (1948) Bom 158 (FB), *Adivappa v. Racappa*, Rel. on.)
- ('48) 35 A I R 1948 Bom 211 (219) : I L R (1948) Bom 158 (FB), *Adivappa v. Fa-happa.* (Simple mortgage in favour of joint mortgagees—Subsequent partition among mortgagees—Suit by one of them for recovery of mortgage debt

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becomes a validly constituted one only when all the omitted persons are made parties, and at that time the suit is barred by limitation. It has, however, been held in the undermentioned cases⁶ that a suit by some only of several mortgagees to enforce a mortgage cannot be considered not to be a validly constituted suit in the sense that no relief can be given to the plaintiffs. It was accordingly held that the subsequent addition of the other co-mortgagees as defendants after limitation does not necessitate the dismissal of the suit. It is submitted that this view is incorrect. Section 45 of the Contract Act has not been adverted to and the decision is clearly contrary to the principle involved in that section.

On the same principle, a mortgagor cannot, in a suit for redemption, implead only *some* of the mortgagees. The suit will not be a properly constituted one, and no relief can be given even so far as the parties actually on record are concerned, without affecting parties not on record.⁷ The addition of the other mortgagees after the expiry of the period of limitation will not prevent the dismissal of the whole suit.⁸

The absence in a suit to enforce a mortgage of all the persons *interested in the equity of redemption*, does not make the suit not a duly constituted one. A decree *can* be given so far as the interests of the parties actually on the record are concerned, and such decree will not in any way affect the interests of the persons who have not been made parties.⁹ The addition of such persons after the period of

without joining his co-mortgagees as parties — Co-mortgagees added as defendants after expiry of limitation—Whole suit fails.)

(29) 16 AIR 1929 Cal 591 (592) : 125 Ind Cas 109 (DB), *Girish Chunder v. Ram Saran*.

(33) 20 AIR 1933 Cal 621 (622) : 60 Cal 777 : 146 Ind Cas 259 (DB), *Govind Chandra Ghose v. Jamaluddin Mondal*.

(16) 3 A I R 1916 Pat 310 (311, 312) : 36 Ind Cas 542 (543) : 1 Pat L Jour 468 (DB), *Girwar Narain v. Makbulunnissa*.

6. (29) 16 AIR 1929 All 941 (942) : 121 Ind Cas 106 : 52 All 134 (DB), *Baldeo Prasad v. Bhola Nath*. (He can be added as pro forma defendant.)

[See also (32) 19 AIR 1932 Cal 34 (35, 36) : 134 Ind Cas 1068, *Haider Ali Khondkar v. Muhammad Shajuddin Kazi*. (Obiter—All the necessary parties were added in the case.)]

7. (18) 5 AIR 1918 Pat 154 (155) : 45 Ind Cas 650, *Dhuri Patak v. Timal Singh*. (Claim withdrawn against one of the mortgagees.)

(14) 1 AIR 1914 All 109 (111) : 24 Ind Cas 25, *Saeeduddin v. Hira Lal*.

(27) 14 AIR 1927 All 290 (290) : 100 Ind Cas 198, *Karrar Hussain v. Jai Narain Rai*. (But it will not be fatal if a decree can be passed which will not injuriously affect absent party.)

8. (27) 14 AIR 1927 All 290 (290) : 100 Ind Cas 198, *Karrar Hussain v. Jai Narain Rai*.

9. (24) 11 AIR 1924 All 928 (928) : 84 Ind Cas 262, *Sheo Kumar Pandey v. Babu Nandan Dube*.

(24) 11 AIR 1924 All 107 (108) : 74 Ind Cas 943, *Prashadi Lal v. Laiq Singh*. (Subsequent mortgagee not added.)

(33) 20 AIR 1933 Cal 325 (328) : 60 Cal 87 : 143 Ind Cas 315 (DB), *Umesh Chandra v. Hemanga Chandra*. (One of the defendants owning the equity of redemption dying and all his heirs not being brought on the record.)

limitation has expired against them will bar the suit *as against them*, but will not necessitate the dismissal of the whole suit.¹⁰

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Where there are several persons entitled to redeem, each one of them is entitled to sue on the whole mortgage. Consequently, the failure to implead all such persons is not fatal to the constitution of the suit. Relief can be given in such suit so far as the parties actually

- '31) 18 AIR 1931 Pat 164 (167) : 10 Pat 341 : 132 Ind Cas 100 (DB), *Mt. Wale-yatunnissa Begum v. Mt. Chalakhi*. (One of the heirs of the mortgagor not impleaded.)
- ('25) 12 AIR 1925 Pat 59 (61) : 3 Pat 829 : 80 Ind Cas 34 (DB), *Parameshwar Pandey v. Raj Kishore Prasad Narayan Singh*. (Suit on mortgage by karta of joint Hindu family—Some members of the family not added as defendants.)
- ('22) 9 AIR 1922 Pat 450 (473) : 66 Ind Cas 945 : 1 Pat 506 (DB), *Hari Prasad Singha v. Babu Sourendra Mohan Sinha*. (Per Bucknill, J.)
- ('21) 8 AIR 1921 Cal 554 (554) : 66 Ind Cas 312 (DB), *Har Chandra Roy v. Mahumed Husein*. (('06) 33 Cal 613 (DB), *Imam Ali v. Baij Nath*, followed.)
- ('22) 9 AIR 1922 Pat 651 (653) : 69 Ind Cas 677 : 2 Pat 175 (DB), *Sital Prasad Ray v. Asho Singh*. (Subsequent mortgagee not added.)
- ('19) 6 AIR 1919 Bom 135 (136) : 51 Ind Cas 223 : 43 Bom 575 (DB), *Sabduralli v. Sadashiv Supde*. (Some heirs of mortgagor not made parties.)
- (25) 12 AIR 1925 Cal 152 (153) : 82 Ind Cas 638 (DB), *Kherodamoyi Dasi v. Habib Shaha*. (One heir of mortgagor not impleaded.)
- ('27) 14 AIR 1927 All 488 (488) : 101 Ind Cas 775 (DB), *Jwala Prasad v. Sher Singh*. (Subsequent mortgagee not added.)
- ('23) 10 AIR 1923 Nag 234 (235) : 72 Ind Cas 458, *Hirasa v. Onkar*. (Some heirs of mortgagor not added.)
- ('12) 13 Ind Cas 38 (39) (DB) (All), *Bala Prosad v. Partap Singh*. (Sons of mortgagor not impleaded.)
- ('31) 18 AIR 1931 All 235 (236) : 132 Ind Cas 31 (DB), *Haibat Shah v. Bohra Tarachand*. (Legal representative of deceased mortgagor not impleaded in time.)
- ('13) 19 Ind Cas 614 (614) : 35 All 247, *Ganesh Lal v. Charan Singh*. (Some of the mortgagors holding distinct share not added.)
- ('13) 21 Ind Cas 271 (272) : 35 All 484 (DB), *Alam Singh v. Gokal Singh* (Subsequent mortgagee not added.)
- ('08) 12 Cal W N 911 (914) (DB), *Basiruddin Biswas v. Debendra Nath Biswas*. (Some of the heirs of a deceased vendee of a portion of mortgaged property not impleaded in time.)
- ('29) 16 AIR 1929 Cal 188 (189) : 116 Ind Cas 726 (DB), *Hason Ali v. Gurudas Kapali*. (Do—('09) 36 Cal 675 (DB) *Mathewson v. Ram Kanai*, followed.)
- ('32) 1932 Mad W N 330 (331), *Bhaskrunni Bangaru v. Punnayya*. (The suit is barred as against the puisne mortgagee added after limitation.)
- ('06) 33 Cal 1079 (1093) (DB), *Thakur Mani Singh v. Dai Rani Koeri*. (Purchaser of small portion of mortgaged property not added till limitation.)
- ('13) 20 Ind Cas 41 (43) : 35 All 441 (DB), *Sanwale Singh v. Ganeshi Lal*. (Mortgagor dead—His two sons dividing hypotheca—Suit for entire mortgage amount against only one son and his share of property—*Held* suit not bad.)
- ('14) 1 AIR 1914 Nag 79 (80) : 10 Nag L R 173 : 26 Ind Cas 720, *Narayan v. Mahadev*. (Foreclosure suit—Subsequent mortgagee joined after time—Suit against him fails even though he was impleaded on his own application.)
10. ('19) 6 AIR 1919 Bom 135 (137) : 51 Ind Cas 223 : 43 Bom 575 (DB), *Sabduralli v. Sadashiv Supde*.
- ('06) 33 Cal 613 (621) : 3 Cal L Jour 576 : 10 Cal W N 551 (DB), *Imam Ali v. Baij Nath Ram Sahu*.
- ('15) 2 AIR 1915 Bom 272 (272) : 39 Bom 729 : 31 Ind Cas 180 (DB), *Virchand v. Kondu*.
- ('21) 8 AIR 1921 Bom 152 (154) : 45 Bom 1009 : 61 Ind Cas 590 (DB), *Shivu Bhai v. Shidheswar*. (('08) 28 Bom 11 (DB), *Guruvayya v. Dattatraya*, followed.)

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before the Court are concerned.¹¹ The addition of the other persons after limitation will not result in the dismissal of the whole suit. Where the parties on the record represent in law the absent persons interested in the mortgage right or equity of redemption, the latter are constructively parties and their nonjoinder does not affect the validity of the suit and even if they are added, their addition is not the addition of *new* parties.¹² As to suits relating to mortgages by or against the manager of a joint Hindu family, see Note 11 and the undermentioned cases.¹³

18. Necessary parties in suits relating to firms. — A firm is not an artificial person distinct from the members composing it. In this respect it differs from a company incorporated under the statute, such a company being a corporation separate in law from its shareholders. The word 'firm' is a short collective name for the individuals constituting the partnership. The law of procedure, however, has provided a convenient mode of instituting suits against or on behalf of firms. Order 30 Rule 1 of the Civil Procedure Code prescribes that suits by or against firms of two or more persons may be brought in the name of the firm. A suit so brought in the name of the firm is in the eye of law a suit by or against all the partners thereof.¹

Accordingly where a suit is brought in the name of the firm by one of its members as its agent, the fact that the other partners are made co-plaintiffs after limitation will not mean the addition of *new*

11. ('34) 21 AIR 1934 Oudh 220 (221) : 148 Ind Cas 903 : 10 Luck 70 (DB), *Mohammad Ali Khan v. Ali Mirza Khan*. (('32) A I R 1932 Cal 34, *Haidar Ali v. Md. Shafiuddin*, relied on.)

12. See Note 41 to Order 1 Rule 10 in A. I. R. Commentaries on the Civil Procedure Code, 5th (1950) Edition.

[See also ('42) 29 AIR 1942 Pat 185 (2) (188) : 197 Ind Cas 739, *Kunja Behari v. Benudhar Panda*. (Joining of person, who is affected by doctrine of *lis pendens* raises no question of limitation.)

('43) 30 AIR 1943 Oudh 218 (222) : 19 Luck 133 : 207 Ind Cas 72 (DB), *Gur Charan v. Ram Bharose*. (All heirs of mortgagor are proper parties—If all are not joined Court can still grant effective relief to plaintiff — Non-joinder of some does not necessarily result in dismissal of suit — Estate properly represented—Suit directed against estate — No personal relief sought — Suit can be decreed against estate though some heirs are not joined.)]

13. ('12) 15 Ind Cas 126 (129) : 34 All 549 (FB), *Hori Lal v. Nimman Kunwar*. (Manager represents other members.)

('12) 15 Ind Cas 138 (139) : 34 All 572 (FB), *Madan Lal v. Kishen Singh*. (Do.)

('12) 13 Ind Cas 38 (39) (DB) (All), *Bala Proshad v. Partab Singh*. (Do.)

('13) 18 Ind Cas 848 (852) : 9 Nag L R 1, *Gore v. Kashiram*. (Do.)

('12) 13 Ind Cas 197 (200) (DB) (All), *Gendan Lal v. Babu Ram*. (Contra.)

('12) 14 Ind Cas 35 (38) (DB) (All), *Nathi Lal v. Lala*. (Contra.)

('86) 10 Bom 592 (594) (DB), *Govind Bhaichand v. Kalnak*. (Contra.)

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1. ('24) 11 AIR 1924 Bom 109 (111) : 85 Ind Cas 464, *Rampratab Brijmohan Das v. Gavrishankar*.

('24) 11 AIR 1924 Bom 155 (156) : 77 Ind Cas 1055 (DB), *Motilal Jasraj v. Chandmal Hindumal*.

('85) 7 All 284 (287) : 1885 All W N 40 (DB), *Pragi Lal v. Maxwell*.

[But see ('89) 1889 Pun Re No. 140, *Naubat Rai v. Seva Ram*. (All partners must sue in time—Before Civil Procedure Code of 1908.)]

parties.² Similarly, where all the partners of a firm are on the record either as plaintiffs or defendants the suit is properly constituted and the fact that the name of the firm is added as co-plaintiff after limitation will not make it barred by limitation under this section.^{2a}

In the case of a Mitakshara joint family carrying on business as a firm, the managing member or members thereof can sue, in their own name, on contracts entered into with them, without impleading the other members.³

Where there is really no firm but it is the case of only a single individual trading under the name and style of a firm, a suit with the firm name and not the individual as the party, is not properly constituted and in case the individual happens to have died before the suit, it is a suit by or against a dead man and is a nullity.⁴

If the intention to implead the firm is clear, a misdescription in the cause title is immaterial.⁵

2. ('16) 3 AIR 1916 Mad 649 (649) : 28 Ind Cas 210, *Marayya Chetty v. Swami Chetty*.

('93) 17 Bom 413 (416, 417) (DB), *Kasturchand Bahiravdas v. Sagarmal Shriram*. (Suit in name of firm—One of the partners suing as manager.)

[See ('29) 16 AIR 1929 Rang 310 (311) : 7 Rang 558 : 120 Ind Cas 910 (DB), *Maung Shwe Htein v. Ma Lon Ma Gale*.]

[But see ('92) 14 All 524 (527, 528) : 1892 All W N 104 (DB), *Imam ud-din v. Liladhar*. (Before Civil Procedure Code of 1908.)

('77) 1 All 453 (454) (DB), *Dulurchand v. Balram Dass*. (Do.)]

2a. ('50) 37 AIR 1950 Cal 236 (Prs. 19, 26, 29) (DB), *Rameswarlal v. Bezonji Barjorji*.

3. ('11) 9 Ind Cas 739 (740) : 33 All 272 : 38 Ind App 45 (PC), *Kishan Parshad v. Har Narain Singh*. (('07) 29 All 311 (DB), *Shamrathi Singh v. Kishan Prasad*, reversed.)

('12) 13 Ind Cas 873 (874) (DB) (Lah), *Badri Das v. Santa Singh*.

('12) 17 Ind Cas 193 (195) : 37 Bom 340 (DB), *Lalji Nensey Ludha v. Keshoji Punja*. (Necessary parties are those who actually contracted with defendant.)

('04) 27 All 361 (362, 363) : 2 All L Jour 3 : 1904 All W N 282 (DB), *Gopal Das v. Badri Nath*. (Do.)

('99) 26 Cal 349 (355, 356) : 3 Cal W N 190, *Lutchmanen Chetty v. Siva Prokasa*.

('82) 1882 Pun Re No. 58, *Sadulla Khan v. Bhana Mal*.

[See also ('10) 5 Ind Cas 767 (768) : 32 All 183 (DB), *Durga Parshad v. Damodar Das*. (Joint family firm—One member suing on contract entered in his name only—Others not necessary parties.)

('03) 27 Bom 157 (161) : 4 Bom L R 968 (DB), *Vadilal Lallubhai v. Shah Khushal Dalpatram*. (Fact that person carrying on business is coparcener does not necessarily mean that other coparceners are his partners in the business.)]

[But see ('83) 7 Bom 217 (220) : 7 Ind Jur 428, *Kalidas Kevaldas v. Nathu Bhagwan*.

('06) 1906 Pun L R No. 118, p. 385 (390, 392) : 1906 Pun Re No. 69 (DB), *Rattan Chand v. Ram Parshad*.

('95) 18 Mad 33 (36, 37) : 4 Mad L Jour 283 (DB), *Alagappa v. Vellian*.]

4. ('24) 11 AIR 1924 Bom 109 (111) : 85 Ind Cas 464, *Rampratab Brijmohan Das v. Gavrishankar*.

[See ('28) 15 AIR 1928 Nag 319 (320, 321) : 109 Ind Cas 785, *Deo Lal v. Tularam Ramsukh*.]

5. ('24) 11 AIR 1924 Bom 155 (156) : 77 Ind Cas 1055 (DB), *Motilal Jasraj v. Chandmal Hindumal*. (Cause title mentioning name of manager and owner of firm.)

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Where a partnership is re-constituted and it files a suit in respect of a contract with the old firm, a substitution of the old firm after limitation is substitution of a new party.⁶

In a suit against a dissolved partnership, the date of the institution of the suit, for purposes of limitation, is the date of the suit and not the date of the service of summons on individual partners subsequent to the suit.⁷

A suit by one partner for a dissolution of partnership or for accounts must be laid against all the other partners. If one or more of the other partners⁸ or one or more of the legal representatives of a deceased partner⁹ is or are not made parties to the suit within time, the whole suit must fail. A contrary view has, however, been expressed in the undermentioned case.¹⁰ (See also section 7 Note 23.)

19. Necessary parties in suits relating to firms — Disclosure of partners' names. — It has been seen in Note 18 that a firm can sue or be sued in the name of the firm without the partners being named or mentioned in the plaint. But under O. 30, R. 2, Civil Procedure Code, in the case of a suit instituted by partners in the name of a firm, where there is an application for the disclosure of the partners and the declaration is made, the partners so declared are deemed to be parties to the suit from the date of suit.¹ If a partner's

[See ('28) 15 AIR 1928 Nag 319 (321) : 109 Ind Cas 785, *Deolal v. Tularam Ramsukh*. (This was a case of a sole proprietor trading in style of a firm — It is not clear how it was taken to be a firm by the Court.)]

6. ('24) 11 AIR 1924 Sind 47 (48) : 76 Ind Cas 119 : 17 Sind L R 263 (DB), *Manghumal Jethanand v. Aratmal Satramdas*. (('22) A I R 1922 Sind 13, *Manghoomal v. Aratmal*, affirmed in appeal.)

7. ('28) 15 AIR 1928 Sind 57 (60) : 105 Ind Cas 854 : 23 Sind L R 54, *Detaram Ratumal v. Vishindas Tarachand*.

See also Order 30 Rule 3 Proviso of the Civil Procedure Code.

8. ('33) 20 AIR 1933 Sind 121 (122) : 143 Ind Cas 900 (DB), *Pahloomal v. Paramanand*.

('87) 14 Cal 791 (794) (DB), *Ramdoyal v. Junmenjoy Coondoo*.

[See also ('18) 5 AIR 1918 Cal 294 (299) : 43 Ind Cas 893 (DB), *Kali Das Chaudhuri v. Danpadi Sundaree Dasses*.

('86) 1886 Pun Re No. 8, *Dallu Ram v. Nibahu Mal*.]

See also Note 5.

9. ('14) 1 AIR 1914 Cal 132 (132) : 19 Ind Cas 963 (DB), *Ambika Charan Guha v. Tarini Charan Chanda*. (Some of the legal representatives alone cannot fully represent the deceased partner's interests — Ignorance of a legal representative immaterial.)

('17) 4 AIR 1917 Mad 197 (198) : 33 Ind Cas 564 (DB), *Bavachutty v. Kunhi Pathumma*. (Heirs of deceased partner as plaintiffs.)

('07) 7 Cal L Jour 266 (267) (DB), *Srinath Pal v. Hari Charn Pal*.

10. ('37) 24 AIR 1937 All 502 (503, 504) : 170 Ind Cas 743, *Mt. Jamna Kunwar v. Kunj Behari Lal*. (Necessary partner could be impleaded as *pro forma* defendant after claim against him was barred — Limitation against contesting partners not affected — Submitted not correct — A necessary party is *ipso facto* not a *pro forma* defendant — See also Note 5.)

Section 22 — Note 19

1. ('35) 22 AIR 1935 Sind 225 (227) : 159 I. C. 933, *Hampson v. Jeewanmall Bros*.

name is omitted from such a declaration the Court may allow a fresh declaration to be made. But if at the time of the fresh declaration the period of limitation has elapsed, the partner will be deemed to be a *newly* added party within the meaning of this section.²

20. Necessary parties in pre-emption suits. — All the vendees are necessary parties to a suit for pre-emption in the sense that in the absence of any of them, no relief could be given to the plaintiff. If therefore any one of them is not impleaded in time, the whole suit should fail,¹ unless from the evidence in the case and the nature of the transaction it is possible to give relief against the party impleaded,² as for example where the share and the price paid by each vendee is separately specified in the sale deed.³

As to an *application* for pre-emption under S. 26F and S. 188 of the Bengal Tenancy Act, 1885, by some only of the cosharers entitled to pre-empt, without impleading all the cosharers as parties, see the undermentioned cases.⁴ See also Article 10 Note 14.

21. Necessary parties in suits by or against clubs and corporations. — A suit by or against a club not being a body incorporated under law must be laid by or against *all its members* and not its Secretary or Managing Board unless the latter have become

2. ('34) 21 A I R 1934 Cal 253 (255) : 60 Cal 1217 : 149 Ind Cas 22, *Bhairobux Mangilal v. Deo Karan*.

Section 22 — Note 20

1. ('21) 8 A I R 1921 Oudh 252 (254) : 24 Oudh Cas 320 : 63 Ind Cas 558, *Jai Jai Ram v. Darshan Lal*. (Legal representatives of one of the vendees joined after limitation.)

('24) 11 AIR 1924 Lah 230 (231) : 73 Ind Cas 364, *Naiz Ali Khan v. Md. Afzal Khan*. (Minority of plaintiff and carelessness of his next friend no excuse.)

('19) 6 A I R 1919 Lah 25 (26) : 52 Ind Cas 587 : 1919 Pun Re No. 86 (D B), *Mt. Hussain Bibi v. Hakim*. (Legal representatives of one of vendees not brought on record before limitation.)

('25) 12 AIR 1925 Lah 343 (344) : 88 Ind Cas 555, *Jawala Das v. Gopal Lal*. (Omission due to error in copy of sale-deed supplied to plaintiff.)

('11) 11 Ind Cas 938 (939) (DB) (All), *Mamraj v. Hirday Ram*. (Third person wrongly named as vendee — Correct vendee brought on record after limitation.)

('81) 4 All 145 (147) : 1881 All W N 153 : 6 Ind Jur 486, *Habib-ul-lah v. Achaibar Pandey*. (Vendee purchasing in his own name and as guardian of minor — Minor impleaded after limitation.)

('89) 1889 Pun Re No. 149, *Ram Chand v. Rana*. (If one of them is dead, all his legal representatives must be impleaded.)

2. ('25) 12 AIR 1925 Oudh 369 (370) : 87 I. C. 17, *Ram Pher v. Ajudhia Singh*. See also Section 45, Transfer of Property Act.

3. ('09) 1 Ind Cas 91 (92) (DB) (Lah), *Brij Lal v. Massan*. (('03) 1903 Pun Re No. 25, *Nabi Bakhsh v. Fakir Muhammad*, distinguished.)

4. ('38) 25 AIR 1938 Cal 324 (325) : 177 Ind Cas 798 (DB), *Dinesh Chandra v. Rajendra Chandra*. (All co-sharer landlords are necessary parties.)

('33) 20 AIR 1933 Cal 636 (636) : 60 Cal 787 : 145 Ind Cas 836 (DB), *Rajanikanta Laha v. Atulchandra Seal*. (Application for pre-emption without joining other co-sharers within limitation is not maintainable.)

('33) 20 AIR 1933 Cal 460 (460, 461) : 145 Ind Cas 121 (DB), *Barkatulla Pramanik v. Ashutosh Ghose*. (Do.)

Section 22
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personally entitled or liable.¹ In an old case of the Punjab Chief Court² where an unregistered body was sued by its manager, the Court held that as the intention was to implead the whole body of members as defendant, all the members were comprised in the designation of the institution and that the addition of the names of the members after time was not the addition of new parties. This view was followed recently by the Lahore High Court.³ It is submitted that this view of the law cannot be supported except on a straining of the rule of "misdescription" of parties. See also Note 6.

As regards corporations, see Note 10 and also Note 18.

22. Necessary parties in suits between landlord and tenant. — As to who are and who are not necessary parties in suits for rent, see A. I. R. Commentary on the Civil Procedure Code, 5th (1950) Edition, Order 1, Rule 10, Note 20.

In a suit for ejectment of a sub-tenant's sub-tenant, if the former is not impleaded in time the whole suit should fail.¹ The reason is that without the first sub-tenant, there is no cause of action against his sub-tenant. The cause of action is only against the first sub-tenant and if he is made a party after limitation, the suit is barred against him.

Under the Tenancy Acts of some provinces, anything which a landlord is required or authorised to do must be done by the whole body of the landlords or by an agent acting duly on their behalf. Some of them alone cannot maintain an application or a suit in respect of such acts.²

Section 22 — Note 21

1. ('98) 20 All 497 (498) : 1898 All W N 138 (DB), *The N. W. P. Club v. Sadullah*.
- ('99) 21 All 346 (347) : 1899 All W N 123 (DB), *Ganesha Singh v. Mundi Forest Company*.
2. ('96) 1896 Pun Re No. 29, *Moti v. Syed Ahmad Shafi*.
3. ('24) 11 A I R 1924 Lah 495 (497) : 5 Lah 109 : 83 Ind Cas 180 (D B), *Gokal Chand v. Sanwal Das*.

Section 22 — Note 22

1. ('15) 30 Ind Cas 795 (795, 796) (DB) (U P B R), *Fakhrunnissa Bibi v. Imdad*. See also Note 5.
 2. ('21) 8 AIR 1921 Nag 12 (14) : 63 Ind Cas 352, *Deokaran v. Nathu*. (C. P. Tenancy Act, 1898—(1900) 13 C P L R 113, *Gopal v. Govind*, followed.)
 - ('11) 11 Ind Cas 397 (398) (DB) (Cal), *Kirtibash Das v. Umesh Chandra Datta*. ("Common manager" under the Bengal Tenancy Act represents co-owners.)
 - ('03) 8 Cal W N 214 (216) (DB), *Sibo Sundari Ghose v. Bag Mohan Guhoo*. (Bengal Tenancy Act—Common manager can sue on behalf of all co-owners for possession of land.)
 - ('81) 7 Cal 751 (752) (DB), *Gopal v. Macnaghten*. (Bengal Tenancy Act—Suit for enhanced rent—All sixteen annas proprietors must be made parties.)
 - ('78) 3 Cal 26 (28) : 2 Ind Jur 213 (DB), *Boydonth Bag v. Girish Chunder Roy*.
 - ('97) 21 Bom 154 (158, 159), *Balakrishna Sakharam v. Moro Krishna*. (One co-sharer alone cannot sue for enhanced rent and possession, though he may be manager with consent of other co-sharers.)
 - '21) 8 AIR 1921 Cal 591 (592, 593) : 61 Ind Cas 549 (DB), *Sati Prosad Garga v. Sanaton Dhara*.
- [See also ('16) 3 A I R 1916 Pat 251 (251) : 36 Ind Cas 197 : 1 Pat L Jour 154 (DB), *Mohammad Sadiq v. Khedan Lal*. (*Quære*—Whether manager of Mitakshara joint family can sue alone under Bengal Tenancy Act for possession against trespasser.)

23. Joint promisors and promisees and owners of joint right of action. — The general rule of law is that if several persons have a joint right of action all must join in suing. If any of them will not come in as plaintiff, he must be added as defendant.¹ For a detailed discussion of the subject of necessary parties to a suit in respect of property owned by several persons jointly, see Note 18 to O. 1 R. 10 in A. I. R. Commentary on the Civil Procedure Code, 5th (1950) Edn. and also the undermentioned cases.^{1a} If a suit is brought to recover a debt due to joint promisees, all of them must, as has been seen in Note 17, be impleaded and the suit must be for the entire debt. If one or more of such persons are impleaded after limitation the whole suit must fail.²

Section 22 — Note 23

1. ('22) 9 A I R 1922 Mad 317 (318) : 70 Ind Cas 645 (DB), *Thina Shanmugha Moopnar v. Subbayya Moopnar*. (Joint trustees — Suit to recover properties of temple.)
- ('23) 10 AIR 1923 Mad 337 (337) : 72 Ind Cas 63 (DB), *Mohana Velu Mudaliar v. Annamalai Mudaliar*. (Joint executors as plaintiffs.)
[See ('85) 7 All 313 (315) : 1885 All W N 34 : 9 Ind Jur 314 (FB), *Kandhiya Lal v. Chandar*.]
- [See also ('21) 8 A I R 1921 Mad 124 (124) : 62 Ind Cas 360 (DB), *Saminatha Pillai v. Rajagopala Mudaliar*. (Joint trustee.)
- ('21) 8 A I R 1921 Mad 528 (529) : 63 Ind Cas 104 (DB), *Sreeranga Thanni v. Vaithilinga Mudaliar*. (Co-executors of a will.)]
[See however ('05) 1905 Pun L R No. 76, p. 298 : 1905 Pun Re No. 57 : 1905 Pun W R No. 42 (FB), *Labhu Ram v. Kanshi Ram*. (One co-promisee can sue without impleading others in time even as defendants.)]
- 1a. ('97) 1897 All W N 36 (36), *Behari Lal v. Girdhari Lal*. (Suit against some only of several persons in joint possession — Other defendants joined after limitation — Plaintiff can get decree jointly with latter.)
- ('81) 7 Cal 284 (287) (DB), *Obhoy Churn Nundi v. Kritarthamoye Dossee*. (Suit for possession of land held by numerous persons — Only one of them made defendant in time — Suit dismissed against rest.)
- ('94) 18 Bom 505 (506) (DB), *Krishnaji Malji v. Vithu*. (Suit by purchaser at execution sale of co-sharer's interest; — Other co-sharers impleaded after limitation — He can get a decree for joint possession with them.)
2. ('27) 14 AIR 1927 Mad 84 (85) : 98 Ind Cas 549, *Siluvaimuthu v. Muhammad Sahul*. (Even where the debt has been divided as between the joint promisees — ('12) 36 Mad 544, *Annapurnamma v. Akkayya*, relied on.)
- ('32) 19 AIR 1932 Mad 583 (588) : 137 Ind Cas 274 (DB), *Sobhanadri Appa Rao v. Parthasarathi Appa Rao*. (Tort arising out of contract — One of the promisees not impleaded in time.)
- ('16) 3 AIR 1916 Pat 411 (414) : 36 Ind Cas 77 (DB), *Bhagela Koer v. Abdul Rahman*. (All heirs of mortgagee must join in a suit on mortgage debt.)
- ('25) 12 AIR 1925 Sind 181 (182) : 17 Sind L R 324 : 79 Ind Cas 914 (DB), *Ralliram Shewaram v. Budharam Parmanand*. (One partner suing for his share of money from dealer — Other partner joined after limitation — Claims being joint, whole suit to fail.)
- ('81) 6 Cal 815 (824) : 8 Cal L R 457 (DB), *Ramsebuk v. Ramlal Koondoo*.
- ('02) 25 Mad 26 (35) (DB), *Ahinsa Bibi v. Abdul Kader Saheb*. (The legal representatives of a deceased obligee are joint claimants.)
- ('38) 25 AIR 1938 Oudh 61 (62) : 172 Ind Cas 542, *Ram Singh v. Radha Krishna*. (Joint promisees — Suit by one — Other promisee joined after period of limitation — Suit is time barred.)
[See ('21) 8 AIR 1921 Mad 528 (529) : 63 Ind Cas 104 (DB), *Sreerangathanni v. Vaithilinga Mudaliar*. (Co-executor of a will added as party defendant after limitation — Whole suit fails.)]

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In the case of joint promisors their liability is, under S. 43 of the Contract Act *joint and several* and any one or more of such promisors may be compelled to perform the whole of the promise. Any one of them may therefore be sued for the whole debt at the option of the promisee.³

24. Torts. — Where several persons are entitled to sue in respect of a wrong, independent of contract, done to them jointly, it is not necessary for all of them to join as plaintiffs. Any one of them is entitled to sue separately in so far as he is damnified by the alleged tort.¹ Similarly, where there are several joint tort-feasors it is not

(’20) 7 AIR 1920 Pat 464 (468) : 5 Pat L Jour 151 : 55 Ind Cas 841 (DB), *Ban-mali Satpathi v. Talua Ramhari*. (Joint heir of mortgagee — Payment to one without concurrence of others does not amount to discharge.)

(’83) 7 Bom 217 (220) : 7 Ind Jur 428 (DB), *Kalidas Kevaldas v. Nathu Bhagwan*. (Suit by one member of joint Hindu family for recovery of joint debt—Suit not maintainable without joining other members within limitation.)

(’06) 1906 Pun Re No. 79 : 1906 Pun W R No. 124, *Motan Mal v. Kripa Mal*. [See also (’99) 26 Cal 409 (412) : 3 Cal W N 271 (F B), *Pyari Mohun Bose v. Kedarnath Roy*.]

[See however (’32) 19 A I R 1932 Lah 652 (653) : 141 Ind Cas 190, *Khairati Shah v. Diwan Singh*. (Only one of the legal representatives of a deceased creditor suing for whole amount — Other legal representatives impleaded after time as plaintiffs—*Held* suit not bad—(’05) 1905 Pun Re No. 57 (FB), *Labh-ram v. Kanshiram*, relied on.)]

(’37) 24 A I R 1937 Lah 193 (194) : 172 Ind Cas 596, *Bishen Singh v. Pirthi Chand*. (Suit by members of Hindu joint family on pro-note executed in favour of joint family—Other members added as defendants after limitation—Suit not barred—1905 Pun Re No. 57 (FB), followed.)

(’09) 1 Ind Cas 455 (456) : 1909 Pun Re No. 20 (DB), *Gohru v. Amira*. (Suit by members of Hindu joint family for debt due to family — One coparcener made defendant after limitation — Suit not barred — 1905 Pun Re No. 57 (FB), followed.)]

See also Note 5.

3. (’98) 21 Mad 256 (257) (DB), *Narayana Chetty v. Lakshmana Chetty*. (Any one partner of a firm may be sued.)

(’05) 1905 Pun L R No. 116, p. 439: 1905 Pun Re No. 81: 1905 Pun W R No. 100 (DB), *Jawahir v. S. Hari Singh*. (Suit against one co-promisor not bad because others impleaded after time.)

Section 22 — Note 24

1. (’12) 14 Ind Cas 478 (479) (DB) (Cal), *Fatik Chandra Rai v. Atlas Bibi*. (Suit by a cosharer landlord against an occupancy raiyat for damages for value of trees improperly cut and appropriated.)

(’98) 25 Cal 285 (289) (DB), *Jagdeo Singh v. Padarath Ahir*. (Suit for compensation for illegal distraint of crops.)

(’04) 2 Cal L Jour 496 (498) (DB), *Ram Gopal Dey v. Raghu Nath Ghosal*. (Even where the tort is damage done to land owned jointly.)

(’07) 6 Cal L Jour 383 (388, 392) (DB), *Harihar Pershad v. Bholi Parshad*. (Similarly, anyone of joint tort-feasors may be sued without the others being impleaded.)

(’97) 2 Cal W N 80 (80) (DB), *Hrisikes Singha v. Sadhu Charan Lahar*. (Suit by cosharer in a mahal for damages for the cutting down of trees by tenant.)

[See (’08) 35 Cal 495 (509) : 12 Cal W N 490 (DB), *A. S. Barrow v. Hem Chandra Lahiri*. (Suit for libel—More than one plaintiff—All but one struck off—No question of limitation as regards the one.)]

(’98) 21 Mad 373 (380, 381) : 8 Mad L Jour 139 (DB), *Mahabala Bhatta v. Kunhanna Bhatta*.

necessary to join all of them as defendants in a suit for damages, because their liability is joint and several.²

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Notes 24-25

24a. Necessary parties in suit for specific performance of contract to sell. — A agrees to sell certain property to X and thereafter sells the property to B who has notice of the agreement in favour of X. X sues A for specific performance of the contract within three years of the breach of contract. On objection by A, B is also impleaded, but more than three years after the breach of the contract. Is the suit barred? It has been held by the High Court of Madras that it is not barred.¹ Their Lordships observed as follows :

"It is not necessary for us to decide whether he is a necessary party or merely a proper party, for, even on the supposition that he is a necessary party, we do not see how it can be said that the suit is barred against him unless he is able to show that it has been instituted against him more than three years after the refusal on *his* part to join in the conveyance in performance of the contract. He is not the person who is primarily the party to perform the contract. He is joined under the provisions of s. 27, Specific Relief Act, in order that the plaintiff may have full reliefs and may not be driven to a separate suit against him."

25. Objection to non-joinder of parties. — It has been seen already that where a necessary party is added after the expiry of the period of limitation, the whole suit will have to be dismissed.

Order 1 Rule 13 of the Civil Procedure Code runs as follows :

"All objections on the ground of nonjoinder or misjoinder of parties shall be taken at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived."

Where the nonjoinder is of persons who are proper but not necessary parties, the objection, if raised at a late stage, will, under the above Rule, be disregarded and relief will be given so far as the parties on the record are concerned.¹

(‘68) 9 Suth W R 279 (281) (DB), *Gopee Kishen Gossain v. W. H. Ryland*. (One member of joint Hindu family can sue for compensation for wrongful demolition of house.)]

[See also (‘28) 15 AIR 1928 Mad 1215 (1219) : 114 Ind Cas 636, *Subramaniya Iyer v. United India Life Insurance Co. Ltd., Madras*.]

2. (‘24) 11 AIR 1924 Lah 348 (349) : 72 Ind Cas 670, *Mt. Phillo v. Gopi*.

Section 22 — Note 24a

1. (‘20) 7 AIR 1920 Mad 96 (96) : 55 Ind Cas 533 (DB), *Kesavalu v. Rajaram*.

Section 22 — Note 25

1. (‘04) 26 All 528 (535) : 1904 All W N 119 (DB), *Pateshri Partab Narain Singh v. Rudra Narain Singh*. (Suit by one co-owner against trespasser—Non-joinder will amount to waiver—Affirmed in (‘10) 6 Ind Cas 981 (PC), *Imdad Ahmad v. Partab Narain*.)

(‘08) 30 All 538 (540) : 5 All L Jour 554 : 1908 All W N 246 : 4 Mad L Tim 447 (DB), *Hazarimal v. Bhawani Ram*.

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Note 25

Does this rule apply to nonjoinder of *necessary* parties? In other words, does this rule apply to cases where the constitution of the suit is itself invalid in the absence of parties and no relief could be given even so far as the parties actually before the Court are concerned? There is a conflict of decisions on the point. In *Dursan Singh v. Durbejoy Singh*,² the learned Judges of the Calcutta High Court observed as follows :

"This provision does not entitle the plaintiff to a measure of relief larger than the right he really possesses. For instance, if A sues for recovery of possession upon the allegation that he is the *exclusive owner* of the property but it is established by the evidence that he is entitled to only a half share and that the other half belongs to a co-owner, B, who is not a party to the suit, the mere omission of the defendant to take the objection, that B ought to have been joined as a party defendant, would not entitle the plaintiff to obtain a decree for the whole There is a well marked distinction between nonjoinder of *necessary or indispensable* parties, and nonjoinder of proper but not indispensable parties; and where, as here, the parties omitted are necessary only for the purpose of protecting the defendant from further litigation, the Court may, in its discretion, disregard the objection, if not raised at the proper stage."

In the case of nonjoinder of indispensable parties, the result, according to the above decision, would be otherwise. The failure to object to the nonjoinder at the proper stage would not mean that the plaintiff would be entitled to a decree. The suit would nevertheless have to be dismissed as the constitution of the suit, in the absence of the necessary parties, would be such that no relief could be given even so far as the parties actually on the record are concerned. In *Heiniger v. Droz*,³ Mr. Justice Batty observed that s. 34 of the Civil Procedure Code of 1882 corresponding to the present O. 1, R. 13 referred to objections to want of parties or nonjoinder or misjoinder, and not to objections on the ground of a cause of action or the right of suit in the plaintiff which might not be disclosed until the case had been proceeded with and evidence had been taken. In *Mata Din v. Kazzim Hussain*,⁴ where in a mortgage suit certain parties held to be indispensable under s. 85 of the Transfer of Property Act corresponding to O. 34 R. 1 of the Civil Procedure Code, had not been made parties, and no objection had been taken to the nonjoinder, Sir John Edge, Chief Justice, observed : "Notwithstanding s. 34 of that Code, (now O. 1 R. 13) I am of opinion that we must act upon the imperative words in s. 85 of Act IV of 1882." The principle of the decision will, it is submitted, even now become applicable in the case of nonjoinder of parties without whose presence no effective decree can be passed at all even so far as the parties actually on the record are concerned.

2. ('09) 1 Ind Cas 530 (531, 532, 533) (DB) (Cal).

3. ('01) 25 Bom 433 (467) : 3 Bom L R 1.

4. ('91) 13 All 432 (465) (FB).

In *Kasiyanna Goundan v. Thimma Naicken*,⁵ the High Court of Madras seems to have taken a different view, namely, that even where the case is one of non-joinder of indispensable parties the failure to object on the part of the defendant will enable a decree to be passed in favour of the plaintiff. The reasoning of the decision is not clear, and the decision cannot be accepted as correct. See also the under-mentioned case.⁶

26. "When he was so made a party." — When a person is added as a party on an application made for the purpose, the addition must be deemed to take effect from the date of the presentation of the *application*.¹ It is so even when the final order impleading him is made only on revision or appeal.² (See also Note 5.) A different view has been held in some cases.³ It has been held that as regards

5. ('18) 5 AIR 1918 Mad 535 (536, 537) : 41 Ind Cas 527 (DB). (Order 1 Rule 13 applies even to cases where plaintiff claims a joint right with others but does not make them parties.)

6. ('91) 15 Bom 297 (298, 299) : 1890 Bom P J 300 (DB), *Shirekuli Timapa Hegade v. Ajjibal Narashinv Hegade*. (A suit is not time barred because the proper parties were not joined in time to prevent the claim being barred, if the objection for the want of parties was not taken at any stage of the proceedings and no issue was raised for that purpose.)

Section 22 — Note 26

1. ('45) 32 AIR 1945 Nag 57 (59, 60) : I L R (1944) Nag 768 (DB), *Praful Kumar v. Gajendra Singh*.

('27) 14 AIR 1927 Mad 468 (469) : 100 Ind Cas 680 : 50 Mad 372 (DB), *South India Industrials Ltd. v. Narasimha Rao*. (A I R 1925 Mad 487, *Ammaya v. Narayana*, dissented from; ('93) 17 Bom 29, *Ramkrishna v. Ramabai*, followed.)

('30) 17 AIR 1930 Sind 259 (260) : 128 Ind Cas 675 : 32 Cri L Jour 174 : 25 Sind L R 107 (DB), *Hassanand v. Nandi Ram*. (Do.)

('27) 14 AIR 1927 Nag 95 (96) : 98 Ind Cas 658, *Shakurkhan v. Sheikh Budhan*. (Amendment of plaint is retrospective at least from date of application.)

('37) 24 AIR 1937 Rang 175 (177) : 171 Ind Cas 876 (DB), *Mohomed Sultan v. Abdul Rahman*. (Written statement asking for addition of parties was treated as an application and the parties added were taken to have been made parties on the date of the written statement.)

[See ('93) 3 Mad L Jour 53 (53) (Jour). (Critical Note on 17 Bom 29, *Ramkrishna v. Ramabai*.)

('10) 5 Ind Cas 931 (931) : 33 Mad 115 (DB), *Subbaraya v. Vathinatha*. (Such amendment could not be dated earlier than the date of application.)]

2. ('27) 14 AIR 1927 Mad 468 (469) : 50 Mad 372 : 100 Ind Cas 680 (DB), *South India Industrials Ltd. v. Narasimha Rao*. (Revision — A I R 1925 Mad 487, *Ammaya v. Narayana*, dissented from.)

('93) 17 Bom 29 (32) (DB), *Ramkrishna Moreshwar v. Ramabai*. (Appeal.)

3. ('25) 12 AIR 1925 Mad 487 (488) : 86 Ind Cas 187, *Ammaya Pillai v. Narayana Chetty*. (The question whether the date is the date of 'order' impleading him or the date the applicant is actually placed on record or the date on which he is served, left open — Dissented from in A I R 1927 Mad 468 (DB), *South India Industrials Ltd. v. Narasimha Rao*.)

('96) 1896 Bom P J 553 (555), *Ganesh v. Kamalabai*.

('96) 20 Bom 767 (776), *Rampartab Samrathrai v. Foolibai*. (Material date is when party was brought on record and not when order was passed.)

('85) 9 Bom 1 (9), *Fisher v. Pearse*. (They are not parties till date of order.)

('66) 6 Suth W R 298 (299) (DB), *Raj Kishori Dassi v. Buddun Chunder Shaw*.

[See also ('18) 5 AIR 1918 Mad 1122 (1123) : 38 Ind Cas 169, *Paramasivan Pillai v. Aristotle Chakona*.]

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a newly added party, limitation ceases to run only when he is *made* a party and not on the date of the application to implead him, the reason being that the language of sub-s. (2) which says "when he was *so made a party*" is clear on the point. But it is submitted that these words are not irreconcilable with the principle that when an application is made to Court for a particular order, the order when made is to be deemed to have been made on the date on which the jurisdiction of the Court is rightly invoked. For, otherwise, the party will have to be held responsible for the delay caused by the time necessarily to be taken by the Court before passing an order, especially where the final order happens to be made by a Court of final appeal or revision long after the date of the application.

The rule in O. 1, R. 10 (5) that the proceedings against a newly added defendant should be deemed to have begun on the service of summons on him is subject to S. 22 of the Limitation Act as the said rule itself provides.⁴ Hence, although for purposes other than those of limitation, a suit must be deemed to have been instituted against a newly added defendant on the date of the service of summons on him, for purposes of *limitation*, the suit must be deemed to have been instituted when he is made a party.

27. Sub-section (2). — In the corresponding sections of the old Acts, there were two provisos to the effect that where a party died and the suit was continued by or against his *legal representatives*, the suit must be deemed to have been instituted by or against such legal representatives when it was instituted by the deceased plaintiff or against the deceased defendant as the case may be. There was a difference of opinion as to whether the substitution of a person on whom the interests of a party devolve or to whom they are assigned *pendente lite*, is the substitution of a *new* party within the meaning of the section.¹ The present sub-section now makes it clear that

4. ('27) 14 AIR 1927 Mad 468 (468) : 50 Mad 372 : 100 Ind Cas 680 (DB), *South India Industrials, Ltd. v. Narasimha Rao*.

('11) 12 Ind Cas 586 (587) (DB) (Bom), *Mahomed Bhai v. Ismail Haji Halimbhai*.

Section 22 — Note 27.

1. ('10) 5 Ind Cas 115 (116) (DB) (Cal), *Mohamed Mehdihasan Khan v. Phul Kuar Mahton*. (Yes.)

('98) 25 Cal 409 (412) (DB), *Harak Chand v. Deo Nath Sahay*. (Yes.)

('07) 34 Cal 612 (616) : 5 Cal L Jour 486 : 11 Cal W N 521 : 2 Mad L Tim 312 (FB), *Abdul Rahman v. Amir Ali*. (Yes.)

('09) 36 Cal 675 (688) : 1 Ind Cas 626 (DB), *Mathewson v. Ram Kanai Singh Deb*. (Yes.)

('81) 1881 Bom P J 304 (DB), *Narayana Rao v. Rajya*. (Doubted.)

('01) 23 All 331 (335) : 1901 All W N 91 (DB), *Chunni Lal v. Abdul Ali Khan*. (No.)

('08) 12 Cal W N 8 (11) (DB), *Mohunt Padmalav Ramanuja Das v. Lukmi Rani*. (No.—Executors of an estate which was represented by a limited owner impleaded pending suit against the latter.)

('80) 5 Cal 720 (724) : 6 Cal L R 62 (DB), *Suput Singh v. Imrit Tewari*. (No.)

('08) 1908 Pun L R No. 3, p. 7 : 1907 Pun Re No. 3 : 1906 Pun W R No. 153 (Vol. 1), *Fatteh Muhammad v. Said Ahmad*. (No.)

it is not.²

A transferee *pendente lite* who acquires an interest in the subject-matter of suit in *conflict* with the rights of the plaintiff cannot plead limitation on the ground that the suit should be deemed to have been instituted against him only on the date he was impleaded.³

This sub-section is not, however, intended to interfere with the discretion of the Court in rejecting an application for addition or substitution of assignees on the ground of *laches*.⁴

See also Notes 28 and 29.

28. "Assignment or devolution." — An assignment or devolution must, in order to fall under sub-section (2), be "during the pendency of a suit." An assignee from a successful claimant under O. 21, R. 58, Civil Procedure Code, who takes the transfer after the claim is allowed and attachment raised and before a suit by the defeated decree-holder is laid under Order 21 Rule 63, is an assignee during the pendency of the suit, as the claim suit is deemed to be a continuation of the claim petition for the doctrine of *lis pendens*.¹ Consequently, such assignee if made a party after limitation for the suit under O. 21 R. 63 has expired, cannot take the plea that the suit is barred against him under the provisions of cl. (1) of this section.²

('69) 12 Suth W R 122 (123) (DB), *Wilson v. The Government*. (No.)

('72) 18 Suth W R 438 (438) (DB), *Troyluckhonath Banerjee v. Brindaban Chunder Sirkar*. (No.)

('16) 3 AIR 1916 Mad 1029 (1033, 1034) : 40 Mad 722 : 29 Ind Cas 634, *Arunachala Ambalan v. R. G. Orr*. (Decision under the Act of 1877—No.)

[See also ('16) 3 AIR 1916 P C 202 (205, 206) : 43 Ind App 113 : 35 Ind Cas 323 (PC), *Meyappa Chetty v. Supramaniyan Chetty*. (No — Case under S. 22 of the Straits Settlement Limitation Ordinance, VI of 1896, corresponding to S. 22 of the old Act of 1877.)]

2. ('50) 37 AIR 1950 Kut 83 (Pr 3), *Dhanji Karsan v. Manji Meghji*. (The addition of heirs is governed by O. 22, C. P. Code and if an application is made by one of the heirs in time, it would not matter if all the others are added later on.)

[See ('09) 1 Ind Cas 626 (629, 630) : 36 Cal 675 (DB), *Mathewson v. Ram Kanai Singh*.]

3. ('30) 17 AIR 1930 All 597 (599) : 133 Ind Cas 23 (DB), *Zahurul Hasan v. Badri Narain*. (Wakf of property by mortgagor after final decree.)

[See ('30) 17 AIR 1930 Oudh 51 (52) : 119 Ind Cas 366, *Harnarain Das v. Gajraj Singh*.]

4. See ('25) 12 AIR 1925 Lah 574 (575) : 94 Ind Cas 926, *Allah Jawaya v. Lajpat Rai*. (Assignment disputed and long delay in application.)

Section 22 — Note 28

1. ('39) 26 AIR 1939 Pat 138 (139) : 17 Pat 588 : 180 Ind Cas 983 (DB), *Bas Kuar v. Gaya Municipality*. (A I R 1915 Mad 495, followed.)

('15) 2 AIR 1915 Mad 495 (498, 500) : 25 Ind Cas 11 : 38 Mad 535 (DB), *Krishnappa Chetty v. Abdul Khader Sahib*. (('07) 35 Cal 202 (PC), *Phul Kumari v. Ghanshyam*, followed.)

2. ('40) 27 AIR 1940 Lah 497 (498) : 192 Ind Cas 663, *Sardar Begum v. Harsukh Rai*. (A I R 1915 Mad 495, referred.)

('39) 26 AIR 1939 Pat 138 (139) : 17 Pat 588 : 180 Ind Cas 983 (DB), *Bas Kuar v. Gaya Municipality*. (A I R 1915 Mad 495, followed.)

'15) 2 AIR 1915 Mad 495 (498) : 38 Mad 535 : 25 Ind Cas 11 (DB), *Krishnappa Chetty v. Abdul Khader*.

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Notes 28-29

An assignment must also be from a person who is already a party to the suit. In a suit for the recovery of property, the third defendant was impleaded originally in the plaint under the impression that he was the owner of one of the items of the property. Subsequently, it was however found that the third defendant had transferred his interests therein to another person even *before* the suit. An application was made to implead that other person as the fourth defendant. During the pendency of that application the said item of property was again transferred to a third person. A further application was made to implead the last person as the fifth defendant. By that time the period of limitation had expired. The last assignment was held not to be from a party to the suit but only from a person who was only sought to be made a party.³

29. Transposition of parties. — Sub-section (2) says *inter alia* that nothing in sub-s. (1) shall apply where a plaintiff is made a defendant or *vice versa*. These words are plain and are not subject to any conditions. In some cases, however, a restriction has been sought to be imposed on the language of the section. It has thus been held that the rule in regard to transposition can be availed of only in cases where the plaintiff and the defendant to be transposed have a joint cause of action,¹ that is to say, where the claim is identically the same whether preferred by the plaintiff or the defendant.² Looking, however, at the plain language of the section, the rule that the transposition of a person from the rank of a defendant to that of the plaintiff or *vice versa* stands as an absolute rule and not subject to any qualifications,³ and no question of limitation arises in a case of transposition.⁴ As regards the party so transposed, the date of the

3. ('25) 12 AIR 1925 Mad 487 (488) : 86 Ind Cas 187, *Ammaya Pillai v. Narayana Chetty*.

Section 22 — Note 29

1. ('35) 22 AIR 1935 Mad 240 (243) : 156 Ind Cas 455, *Periakaruppan Chetty v. Mottaiya Mudali*.

2. See ('35) 22 AIR 1935 Mad 95 (96) : 154 Ind Cas 747, *Koman Nair v. Moolacheri Nair*. (Suit by assignee of rent — Assignor originally made a defendant and subsequently transposed after limitation.)

3. ('15) 2 AIR 1915 Cal 759 (759) : 30 Ind Cas 34 (DB), *Dwarka Nath Dass v. Monmothan Topedar*.

[See ('19) 6 AIR 1919 Mad 30 (30) : 49 Ind Cas 139, *Bhimanagoud v. Easwara goud*. (Administration suit — Defendant, entitled to share in property, transposed as plaintiff.)]

4. ('09) 4 Ind Cas 249 (251) : 34 Bom 91 (DB), *Narsinha Krishnaji v. Vaman Venkatesh*. (('09) 4 Ind Cas 369 (Cal) (DB), *Nagendra Bala v. Tarapada Acharjee*, followed.)

('27) 14 AIR 1927 Mad 204 (204) : 99 Ind Cas 687 (DB), *Ponnammal v. Pichai*.

('32) 19 AIR 1932 Pat 304 (305) : 139 Ind Cas 535, *Rambeas Tewari v. Akhauri Raj Mohan*.

('16) 3 AIR 1916 Mad 310 (313) : 28 Ind Cas 45 (DB), *Municipal Council of Kumbakonam v. Veeraperumal Padayachi*.

('34) 21 AIR 1934 Oudh 462 (463, 464) : 10 Luck 203 : 151 Ind Cas 452 (DB), *Bhagat v. Madho Prasad*.

('27) 14 AIR 1927 Oudh 484 (485) : 105 Ind Cas 473 : 3 Luck 241 (DB), *Mool Chand Gupta v. Bhup Singh*.

suit is still the date of its institution.^{4a} In some cases this rule is sought to be supported on the ground that a defendant transposed as a plaintiff is not a "new plaintiff" under sub-s. (1).⁵ Such a person may not be a new *party* to the suit but it is difficult to see how he is not a new 'plaintiff,' having been, before the transposition, only a 'defendant.' However this may be, it is unnecessary to support the rule on any other ground than the plain meaning of the enactment.

The benefit of this rule is rightly extended even to the case of transposition of a defendant, as co-plaintiff, when the original plaintiff has no right to sue at all.^{5a} Where, in a suit by an assignee from an Official Receiver of certain claims to damages in favour of the insolvent, it was objected that a claim for damages not being assignable, the assignee plaintiff had no right to sue at all, the Court allowed the Official Receiver, who was a *pro forma* defendant, to be transposed as the rightful plaintiff after limitation.⁶ Where a promissory note

('26) 13 AIR 1926 Pat 28 (28, 29) : 90 Ind Cas 82, *Raj Kishore Lal Nand Keolyar v. Alam Ara Begum*. (Being 'party' on the date of the institution of the suit, law of limitation will not bar the suit.)

('30) 17 AIR 1930 All 786 (787) : 133 Ind Cas 17 (DB), *Gopinath v. Rupram*.

[See ('31) 18 AIR 1931 All 725 (726) : 133 Ind Cas 410 (DB), *Mangal Sen v. Prag Das*. (Section 22 does not apply to applications for filing awards but principle of the section is applicable — There is no limitation in case of application for transposition.)

('94) 17 Mad 12 (13) : 3 Mad L Jour 176 (DB), *Khadir Moideen v. Rama Naick*. (Section does not apply where Court *suo motu* orders defendant to be made plaintiff.)

('21) 8 AIR 1921 Mad 124 (124) : 62 Ind Cas 360 (DB), *Saminatha Pillai v. Rajagopala Mudaliar*. (Co-trustees — One trustee suing, adding the other as defendant — Plaintiff dies — Co-trustee defendant transposed as plaintiff.)

('24) 11 AIR 1924 All 605 (609) : 80 Ind Cas 737 (DB), *E. I. Ry. Co. v. Janki Prasad*.]

[See also ('37) 24 AIR 1937 Cal 332 (333, 334) : 173 Ind Cas 896 (DB), *Bhujanga Bhusan v. Kalidas Das*. (Co-sharer defendant made co-plaintiff under S. 148A, Ben. Ten. Act.)]

[But see ('95) 18 Mad 189 (192) : 4 Mad L Jour 106 (DB), *Srirengachariar v. Ramaswami Iyengar*.

('87) 10 Mad 44 (51) (DB), *Krishna v. Mekam Peruma*.]

4a. ('12) 14 Ind Cas 566 (568) : 1912 Pun Re No. 84 (DB), *Bhagwan Das v. Bhana Mal*. (This is expressly so after the Act of 1908.)

[See ('47) 51 Cal W N 907 (908), *Bibhuti Bhusan v. Tarakeswar Jew*. (Removal of defendant to category of plaintiff — Plaintiff subsequently returned and represented in proper Court — Defendant again transposed to category of plaintiff, — Suit must be deemed to have been instituted by such defendant when the plaintiff was represented and if on that date it was barred by limitation, it must be dismissed unless he can invoke S. 14.)]

5. ('09) 4 Ind Cas 369 (370) : 35 Cal 1065 (DB), *Nagendra Bala v. Tarapada Acharjee*. (Suit for rent by a fractional co-sharer making the other co-sharer a *pro forma* defendant — Latter transposed.)

('10) 8 Ind Cas 837 (841) : 38 Cal 342 (DB), *Hussainara Begum v. Rahmannessa Begam*. (*Pro forma* defendant transposed as plaintiff.)

5a. ('23) 10 AIR 1923 Mad 180 (180) : 69 Ind Cas 413 (DB), *Parappan Kidavu v. Karuppala Thottala*. (A defendant transposed as co-plaintiff, original plaintiff in Court's view being not entitled to sue.)

6. ('21) 8 AIR 1921 Sind 59 (60) : 66 Ind Cas 873 : 16 Sind L R 71, *Firm Gerimal Hari Ram v. Firm Rughnath Kalianji*. (Provided there was *bona fide* mistake in instituting suit in wrong person's name.)

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Note 29

stood in the name of a *benamidar* and a suit was instituted by the beneficial owner on the note making the *benamidar* a defendant, the latter was allowed to be transposed as a plaintiff.^{6a}

But the transposition of a person from the category of a defendant to that of a plaintiff which has the effect of bringing on record a new plaintiff with a cause of action and a relief entirely distinct from that in the original plaint is not saved by sub-section (2).⁷

The fact that by the transposition the plaint claim is enhanced is, however, no ground against the operation of sub-section (2). For example, in a suit by an eight-anna sharer for his share of rent making the other sharer a defendant, the latter was transposed as plaintiff and allowed to claim his share of the rent also.⁸ If on such transposition the value of the suit should exceed the jurisdiction of the Court, the proper course is to return the plaint to be presented to the proper Court.⁹

Where a defendant seeks transposition as a plaintiff and where a separate suit by him against other defendants on the same cause of action would be barred by limitation, the Court must not disallow such transposition. The object of sub-s. (2) is to provide for cases of this nature and if transposition is not allowed on the ground that it would affect limitation the provisions of sub-s. (2) would be rendered nugatory.¹⁰

6a. ('32) 19 AIR 1932 Pat 346 (349) : 11 Pat 616 : 140 Ind Cas 572 (DB), *Surajman Prasad v. Sadanand Misra*. (('28) AIR 1928 Pat 24, *Ram Das v. Chhota Lal*, held not to have decided this point — AIR 1928 Pat 24 overruled on the point whether transposition of defendant should be allowed after expiry of time.)

7. ('49) ILR (1949) 1 Cal 85 (91, 92): 52 Cal W N 866 (DB), *Moniruddin Ahmed v. Sarat Chandra*.

('25) 12 AIR 1925 Sind 207 (211, 215) : 78 Ind Cas 23 : 18 Sind L R 149 (DB), *Usman v. Asat*. (The defendant so transposed was himself a party added subsequent to plaint and who asserted a title independently of the original plaintiff.)

[See also ('06) 5 Cal L Jour 527 (533, 534) (DB), *Kokilasari Dasi v. Mohunt Rudranund Goswami*. (Plaintiff suing as sole shebait making his brothers defendants — Plaintiff and brothers bound to be joint shebait — Transposition of brothers as co-plaintiffs disallowed as the original plaintiff had not admitted any title in the brothers.)]

8. ('32) 19 AIR 1932 Pat 304 (305) : 139 Ind Cas 535 (DB), *Rambeas Tewari v. Akhauri Raj Mohan*. (The plaint as originally laid asked alternatively for a decree for the whole rent in case such defendants paid court-fee for it and claimed it.)

9. ('26) 13 AIR 1926 Pat 28 (29) : 90 Ind Cas 82, *Raj Kishore Nand Keolyar v. Alam Ara Begum*.

10. ('33) 20 AIR 1933 Pat 239 (241) : 149 Ind Cas 760, *Devji Goa v. Tricumji Jivandas*. (AIR 1932 Pat 346, relied on.)

('32) 19 AIR 1932 Pat 346 (349) : 11 Pat 616 : 140 Ind Cas 572 (DB), *Surajman Prasad v. Sadanand Misra*. (Overruling ('28) AIR 1928 Pat 24, *Ram Das v. Chhota Lal*.)

23.* In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.

Synopsis

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. Scope of the section. 2. Section does not apply unless there is a wrong and the wrong is a continuing one. 3. Continuance of the effect of wrong is not a continuing wrong. 4. Applicability of section to declaratory suits. 5. Breach of contract to keep building in repair. 6. Breach of covenant for title. 7. Breach of covenant for quiet possession. 8. Non-payment of money under a contract. 9. Breach of obligation to give possession. | <ol style="list-style-type: none"> 10. Breach of continuing guarantee. 11. Other cases of breaches of contracts. 12. Obstruction to watercourse and to the flow of water. 13. Obstruction to right of way. 14. Obstruction to right of ferry. 15. Refusal of conjugal rights. 16. Trespass and ouster. 17. Procuring wrongful attachment under Section 146 of the Criminal Procedure Code. 18. Other cases of continuing wrongs independent of contract. 19. Successive breaches of contract. 20. Successive wrongs independent of contract. |
|---|---|

* Act of 1877 : S. 23.

Same as above.

Act of 1871 : Ss. 23 and 24.

Computation where there are successive breaches of contract.

Computation where the breach is continuing.

23. In the case of a suit for the breach of a contract, where there are successive breaches, a fresh right to sue arises, and a fresh period of limitation begins to run upon every fresh breach; and where the breach is a continuing breach, a fresh right to sue arises, and a fresh period of limitation begins to run, at every moment of the time during which the breach continues.

Nothing in the former part of this section applies to suits for the breach of contracts for the payment of money by instalments, where, on default made in payment of one instalment, the whole becomes due.

Illustrations.

(a) A contracts to pay an annuity to B for his life by quarterly instalments. A fails to pay any of the instalments. Here, upon every fresh failure, a fresh right to sue arises and a fresh period of limitation begins to run : and this Act may bar the remedy on the earlier breaches, without affecting the remedy on the later breaches.

(b) A, a tenant, covenants with B, his landlord, to keep certain buildings in repair. At every moment of the time during which the buildings continue out of repair and B retains his right of entry, a fresh right to sue arises and a fresh period of limitation begins to run.

24. In the case of a continuing nuisance a fresh right to sue arises, and a fresh period of limitation begins to run at every moment of the time during which the nuisance continues.

Illustration.

A diverts B's water-course. At every moment of the time during which the diversion continues and B retains his right of entry, a fresh right to sue arises and a fresh period of limitation begins to run.

Act of 1859.

No corresponding provision.

Section 23

Note 1

TOPIC INDICATOR

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| Continuing cause of action. See Notes 2 and 3. | Wrong entry in village papers against a person's right. See Note 18. |
| Continuing wrong—Test. See Note 1. | Wrong and not right to be continuing one. See Note 2. |
| Infringement of trade mark. See Note 18. | Wrongful seizure of property under legal process. See Note 16. |

1. **Scope of the section.** — A right, in jurisprudence is an interest, respect for which is a *duty* and the violation or disregard of which is a *wrong*.¹ Rights and duties are necessarily correlative. There can be no right without a corresponding duty or duty without a corresponding right. Similarly, duties and wrongs are correlative. The commission of a wrong is a breach of a duty and the performance of a duty is the avoidance of a wrong.²

Where rights and duties are created by the terms of a *contract* between parties, a breach of such a duty is a wrong arising out of contract. Where they are created otherwise than under a contract the breach of a duty is a *wrong independent of contract*. A breach of either of these duties is thus a wrong and the tests applicable to find out what is a "continuing wrong" are equally applicable to find out what is a "continuing breach of contract."

As regards the meaning of the words "wrong independent of contract," it has been held in the undermentioned case^{2aa} that the word "wrong" in the section is used in a restricted sense and implies something in the nature of a tort. It is doubtful if such a narrow interpretation is justifiable.

Where the wrong consists of a breach of *positive duty*, i. e., to do something, the test to find out whether there is a continuing wrong is to see whether the duty is *to continue to do that thing*.^{2a} If so, the omission to do that thing is a continuing wrong during the time the omission lasts.

Where the wrong consists of a breach of *negative duty*, i. e., to refrain from doing something, the test to find out whether there is a

Section 23 — Note 1

1. Salmond's "Jurisprudence," 8th Edition, pages 236, 237.

('10) 6 Ind Cas 881 (882) : 3 Sind L R 228 (F B), *Goverdhandas v. Naraindas*, (Per Crouch A. J. C.)

2. Salmond's "Jurisprudence," 8th Edition, page 240.

2aa. ('44) 31 A I R 1944 Oudh 139 (147) : 19 Luck 515 : 216 Ind Cas 276 (D B), *Md. Ata Husain v. Husain Ali*. (Trustees under settlement making monthly payment to male heirs to exclusion of female heirs—Suit for declaration of title by female heirs — Cause of action arises on first effective denial of title — No fresh cause of action on each monthly payment — S. 23 does not apply: NOTE. — The decision may be supported also on the ground that the wrong in the case is not a *continuing* one as the monthly payment is not a *continuous* act.)

2a. ('49) 36 AIR 1949 Orissa 1 (9) : 14 Cut L Tim 73 (DB), *Radhakrishna Das v. Radharamana Swami*. (('92) 16 Bom 714, *Baisari v. Sankla* and ('90) 13 All 126, *Binda v. Kaunsilia*, Ref. to.)

(1928) 1 K B 421 (426) : 97 L J K B 263 : 138 L T 481 : 44 T L R 91, *Konskier v. Goodman Ltd.* (There can be no continuing negligence without a continuing duty.)

See Article on "Continuing wrongs" in 3 Madras Law Journal, page 3 (Jour).

continuing wrong is to see whether the wrongful act *produces a state of affairs, every moment's continuance of which is a new wrong (i. e., which is a continuing source of injury)* and is of such a nature as to render the doer of it responsible for the continuance. If the wrongful act is of such a nature, it is a continuing wrong.³ Where the wrongful act does not produce such a state of affairs but is a fleeting or evanescent act like a slander uttered or a slap on the cheek, it is not a continuing wrong.⁴ In *Gaya Prasad v. Jagadish Chandra*,⁵ the test suggested by one of the learned Judges was that where the wrong is capable of being corrected and is not corrected it is a wrong which continues. In *Secretary of State v. Venkaya*⁶ the Madras High Court laid down that the test whether a breach of contract was a continuing one or not was to see whether the person committing the breach was entitled to resume performance and compel the other party to accept such performance, after the breach.

In the case of *negative duties*, the fact that the correlative *right is a continuing one*, such as the right of a co-owner of common property to partition of the joint property,⁷ does not necessarily make

3. ('50) 37 AIR 1950 E P 21 (22), *Thaman Singh v. Sohna*.

('49) 36 AIR 1949 Orissa 1 (9) : 14 Cut L Tim 73 (DB), *Radhakrishna Das v. Radharamana Swami*. (Continuance of injurious effects and of legal injury, distinguished—Trespass amounting to complete ouster is not a continuing wrong — Property of idol and idol itself taken possession of — It is not a continuing wrong.)

('41) 28 A I R 1941 Pat 181 (182) : 19 Pat 852 : 194 Ind Cas 243 (D B), *Akhauri Haliwant v. Deo Narain*.

See Article on "Continuing wrongs" in 3 Madras Law Journal, page 3 (Jour).

('16) 3 A I R 1916 Cal 751 (754) : 31 Ind Cas 242 (D B), *Brojendra Kishore v. Bharat Chandra Roy*.

('35) 22 AIR 1935 Mad 967 (972, 973) : 161 Ind Cas 653 : 59 Mad 75 (DB), *Ponnu Nadar v. Kumar Reddiar*. (('03) 26 Mad 410 (DB), *Rajah of Venkatagiri v. Subbiah*, followed.)

('33) 20 A I R 1933 Pat 224 (233) : 12 Pat 261 : 149 Ind Cas 561 (DB), *Jurawan Singh v. Ramsarekh Singh*. (Following ('15) AIR 1915 Cal 661 (DB), *Brojendra Kishore v. Abdus Sobhan*.)

4. ('49) 36 AIR 1949 Orissa 1 (9) : 14 Cut L Tim 73 (DB), *Radhakrishna Das v. Radharamana Swami*.

See Article on "Continuing wrongs" in 3 Madras Law Journal, page 3 (Jour).

('35) 22 AIR 1935 Mad 967 (972) : 161 Ind Cas 653 : 59 Mad 75, *Ponnu Nadar v. Kumar Reddiar*.

5. ('40) 27 A I R 1940 Pat 561 (561) : 19 Pat 844 : 188 Ind Cas 495 (DB). (Per Agarwala, J. — For instance where an obstruction to watercourse is caused, the wrong to the persons entitled to the use of the water continues until the obstruction is removed.)

6. ('17) 4 A I R 1917 Mad 465 (470) : 40 Mad 910 : 35 Ind Cas 254 (DB). (Per Srinivasa Iyengar, J. — The test laid down by Coutts-Trotter, J., although differently worded, amounts to the same — For a full discussion of this case, see Note 7.)

7. ('15) 2 AIR 1915 All 1 (2) : 37 All 155 : 27 Ind Cas 694 (DB), *Kanhai Lal v. Mul Chand*.

('05) 1 Cal L Jour 73 (76) (DB), *Mohabharat Shaha v. Abdul Hamid Khan*. (Obiter.)

('06) 10 Cal W N 839 (840) (D B), *Madon Mohan Mondul v. Baikunta Nath*. (('91) 13 All 309 (DB), *Nasrat-ullah v. Mujib-ullah*, followed.)

Section 23
Note 1

the breach of it a "continuing wrong," though every such breach being a wrong will give rise to a fresh cause of action.⁸

The articles of the first schedule of the Act prescribe the period of limitation for a suit or other proceeding in respect of various causes of action that may arise from the wrongful acts of parties. This section provides that in the case of a *continuing breach of contract*, or of a *continuing wrong independent of contract*, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues. The underlying principle of the section is that a plaintiff is not bound to launch an endless succession of suits each day a continuing wrong persists. He can wait and include in the action all damages down to the date of the suit. Equally he can sue again for any fresh loss occurring after suit in respect of the same continuing loss.^{8a} By virtue of section 3 of the Act, all the articles in the first schedule must be read subject to this section.⁹ The contrary view held in *Dhanjibhoy Bomanji v. Hirabai*,¹⁰ that if there is a repugnancy between a particular article

('20) 7 AIR 1920 Lah 184 (186) : 56 Ind Cas 701 (DB), *Ziaul Haq v. Muhammad Ibrahim*.

('26) 13 AIR 1926 Mad 1018 (1018) : 97 Ind Cas 622 : 49 Mad 939 (DB), *Madhura Gramani v. Sesha Reddi*.

('22) 9 AIR 1922 Pat 489 (490, 491) : 1 Pat 228 (DB), *Mt. Ram Dei v. Mt. Bahu Rani*.

8. ('38) 25 AIR 1938 Lah 227 (228, 229) : 181 Ind Cas 199 (DB), *Rura v. Banta*. (Fresh invasion of right amounting to repetition of old invasion—No distinction between new invasion and repetition of old one and plaintiff is entitled to a fresh period of limitation.)

('27) 14 A I R 1927 Lah 119 (119) : 8 Lah 22 : 100 Ind Cas 732 (DB), *Smail v. Bahab*. (Suit for declaration that entire property belonged to plaintiff and that defendant was not entitled to demand partition—Application for partition is an act of invasion which gives new cause of action.)

('81) 1881 Bom P J 106, *Divakor v. Harbhat*. (The right of officiating as Upadhyaya is a continuing right.)

('18) 5 AIR 1918 Lah 265 (266) : 44 Ind Cas 31 (DB), *Harnam Singh v. Makhan Singh*. (Every fresh appropriation of the income of property by one cosharer to the exclusion of others gives rise to a fresh cause of action to the other cosharers for a suit for a declaration of their rights.)

('33) 20 AIR 1933 Lah 920 (922) : 146 Ind Cas 136 (DB), *Ram Lal v. Thakurji Mandir*. (Every denial of existing title gives rise to a fresh cause of action.)

('33) 20 A I R 1933 Mad 699 (700) : 145 Ind Cas 961 : 57 Mad 250, *Rangappaiya Aithala v. Shiva Aithala*. (Widow's right to maintenance is a continuing right.)

('03) 2 Low Bur Rul 113 (114, 115) (DB), *Aga Muhammad v. Edward Peltzer*. (Every infringement of a trade mark gives rise to a fresh cause of action.)

('09) 4 Ind Cas 159 (159) : 12 Oudh Cas 320, *Jevanand v. Beni Madho*. (('97) 20 All 35 (FB), *Francis v. Rambaran Singh* and ('98) 1898 All W N 215, *Ilahi Bakhsh v. Harnam Singh*, relied on.)

8a. ('47) 34 A I R 1947 Nag 224 (226) : 1 L R (1947) Nag 726, *Firm Sitaram Bindraban v. G. I. P. Rly.*

9. ('40) 27 A I R 1940 Pat 561 (562, 563) : 19 Pat 844 : 188 Ind Cas 495 (D B), *Gaya Prasad v. Jagadish Chandra*.

10. ('01) 25 Bom 644 (648, 649) : 3 Bom L R 371 (FB).

[See also ('39) 26 A I R 1939 Nag 145 (146) : 182 Ind Cas 613, *Superintendent Leprosy Asylum v. Ramsahaigir*. (Section 23 should be so construed as not to conflict with the provisions of Articles 142 and 144.)]

See also Note 3 to Article 41.

and this section, the article being a special provision will prevail, is, it is submitted, not correct. Their Lordships did not in that case advert to section 3 of the Act.¹¹

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At the same time, it must be noted that the section does not apply to every case in which the cause of action for a suit is based on a continuing wrong or in which relief is claimed in respect of a continuing wrong. The words "in the case of a continuing wrong" refer to cases in which limitation has to be reckoned from the time when a continuing wrong is committed, i. e., to cases in which the law simply provides that limitation is to run from the time of the commission of a continuing wrong but does not say anything as to from what point of time in the course of such commission limitation must be computed. The section does not apply to cases in which a specific point of time in the course of the commission of the continuous wrong is given as the starting point of limitation. Thus, though Arts. 19 and 41 deal with suits based on a continuing wrong this section does not create a recurring starting point of limitation in such cases, because a specific point of time is given as the starting point of limitation under the above articles.^{11a} But under Art. 37 which deals with a suit for compensation for obstructing a way or watercourse the period of limitation is directed to run from "the date of the obstruction." In cases in which the obstruction may be of a continuous character, the article does not provide that limitation must be reckoned from any particular point of time in such obstruction. This section is intended to apply to such cases and under it, a fresh period of limitation will begin to run at every moment of the time during which the obstruction continues.

Though a wrong may be a continuing wrong and the plaintiff may be entitled to a recurring start of limitation under this section, the plaintiff's right itself may be extinguished in some cases after the lapse of a certain period from the time when the wrong was first committed. Thus, the obstruction of an ancient light may be a continuing wrong liable to be compensated in damages but continued

11. See ('35) 22 AIR 1935 Cal 405 (406) : 156 Ind Cas 390 (DB), *Sarat Chandra Mukerjee v. Nerode Chandra*.

11a. See Art. 19 Note 2 and Art. 41 Note 2. It is not correct to say that the reason for the non-applicability of the section to cases coming under Art. 41 is that in such cases, the suit is one to restrain *future* acts of waste and no relief is asked for in respect of any wrong actually committed. For the suits covered by Art. 19 are clearly suits in which relief is asked for in respect of a continuing wrong (the suit being one for compensation for false imprisonment) and yet the section does not apply to such cases. Hence, neither the test as to the cause of action being a continuing wrong nor that as to relief being claimed in respect of a continuing wrong seems to be the correct test in determining the applicability of the section. The only correct test seems to be that given above.

In this connection, reference may be made to the observations of Jenkins, C. J., in *Dhanjibhoy's case* (above referred to) in which his Lordship observed that there is nothing repugnant in the imposition of a bar on a suit for a particular remedy, even though the cause of action be continuing, and cited Art. 41 as an illustration of this. This shows that in his Lordship's opinion also, the mere fact that the *cause of action* for a suit is a continuing wrong is not sufficient to furnish a recurring start of limitation.

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for twenty years it will create a right in the old wrong-doer to continue the act. But such extinguishment of the plaintiff's right has nothing to do with the determination of the question whether the wrong itself was a continuous one.¹²

The section makes no distinction between private suits and public or representative suits and applies to both kinds of suits.¹³

The section applies to suits under the Chota Nagpur Tenancy Act.¹⁴

2. Section does not apply unless there is a wrong and the wrong is a continuing one. — (See also Note 1) Where the act complained of is not a wrong at all, or ceases to be a wrong, obviously there cannot be a cause of action and there is no scope for the applicability of this section.¹ Thus, where a Magistrate acting on a police report passes an order prohibiting certain persons from taking processions along particular routes until they get an order from the civil Courts affirming their right, it cannot be said that any wrong has been committed. If the plaintiffs try to disobey that order and are obstructed by the defendants, the latter cannot be said to obstruct the plaintiffs in the exercise of a *subsisting right* and consequently they cannot be said to commit any wrong, much less a continuing wrong.² Again, the violation of a continuing right need not, as has been seen in Note 1, be a continuing wrong. The criterion for the applicability of the section

12. ('93) 3 Mad L Jour (Journal) pages 8, 9.

[See ('40) 27 A I R 1940 Pat 449 (453, 455) : 19 Pat 208 : 190 Ind Cas 46 (DB), *Bibhuti Narayan Singh v. Mahadev Asram*. (Where a right is completely extinguished, there is no question of any wrong continuing — If the wrong ceases to be a wrong it cannot be said any longer to continue — Such rights may arise under Part IV of the Act.)]

13. ('40) 27 A I R 1940 Pat 449 (452, 454) : 19 Pat 208 : 190 Ind Cas 46 (DB), *Bibhuti Narayan Singh v. Mahadev Asram*. (There is nothing in S. 23 on which to base a distinction between public, quasi-public and private rights — Whether the wrong is continuing or not must depend upon the nature of the wrong itself and not upon the nature of the land over which it is committed.)

('41) 28 A I R 1941 Pat 181 (182) : 19 Pat 852 : 194 Ind Cas 243 (DB), *Akhauri Haliwant v. Deo Narain*.

14. ('40) 27 A I R 1940 Pat 560 (563) : 19 Pat 844 : 188 Ind Cas 495 (DB), *Gaya Prasad v. Jagadish Chandra*. (Section not inconsistent with provisions of the Act.)

Section 23 — Note 2

1. ('38) 25 AIR 1938 Lah 369 (385, 386) : 175 Ind Cas 945 (FB), *Masjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar*. (Sikhs acquiring by adverse possession right to Muhammadan mosque — Muhammadans refused right to pray — No wrong is committed.)

('09) 2 Ind Cas 107 (110) : 1909 Pun Re No. 53 (DB), *Yad Ali v. Mubarak Ali*. (Change of religion by Imam of mosque is not a wrong constituting the invasion of the civil rights of the worshippers.)

('06) 4 Cal L Jour 568 (572, 573) : 11 Cal W N 186 (DB), *Shyamanand Das v. Raj Narain Das*. (('05) 1 Cal L Jour 73, *Mohabharat v. Abdul Hamid*, followed.)

[See ('97) 21 Bom 394 (396), *Gopalrao v. Mahadeorao*. (Plaintiff's right to land lost by twelve years' adverse possession.)]

2. ('35) 22 AIR 1935 Mad 967 (972, 973) : 161 Ind Cas 653 : 59 Mad 75 (DB), *Ponnu Nadar v. Kumaru Reddiar*. (('03) 26 Mad 410 (DB), *Rajah of Venkatagiri v. Subbiah*, followed.)

is not whether the *right* or its corresponding obligation is a continuing one, but whether the *wrong* is a continuing one.³

To a suit for declaration that the marriage of the plaintiff with the defendant is null and void Art. 120 applies and the right to sue accrues under that Article as soon as the wedding ceremony is performed or as soon as the defendant has claimed marital rights. This section does not apply to such a case.⁴

3. Continuance of the effect of wrong is not a continuing wrong. — The continuance of the *effect* of a wrong is itself not a continuing wrong.¹ Thus, where A throws sulphuric acid on B's face with the result that B after some time loses one of his eyes, A's act cannot be said to be a continuing wrong, though the effect continues, inasmuch as it cannot be said that the state of affairs produced by the act gives rise from moment to moment, to a *fresh wrong* (i. e., an infringement of right). The cause of action arises once and for all on the throwing of the acid.² Where, as a result of the defendant (a District Board) heaping stones on the roadway, the plaintiff's trap dashed against it as a result of which the plaintiff's leg had ultimately to be amputated, it was held that the cause of action for the plaintiff arose on the date when his trap dashed against

3. ('51) 38 AIR 1951 Nag 327 (Para 100) : ILR (1950) Nag 633 (DB), *Abid Ali Khan v. Secretary of State for India*. (Per Mudholkar J.)

('49) 36 AIR 1949 Orissa 1 (9) : 14 Cut L Tim 73 (DB), *Radhakrishna Das v. Radharamana Swami*.

('03) 26 Mad 410 (416) (DB), *Rajah of Venkatagiri v. Subbiah*. (('93) 20 Cal 906, *Chukkun Lal v. Lolit Mohan* dissented from.)

('35) 22 AIR 1935 Mad 967 (972, 973) : 161 Ind Cas 653 : 59 Mad 75 (DB), *Ponnu Nadar v. Kumar Reddiar*.

('30) 17 AIR 1930 Bom 61 (63) : 54 Bom 4 : 124 Ind Cas 773 (DB), *Krishnaji v. Annaji*.

4. ('45) 32 AIR 1945 Cal 484 (485) : ILR (1946) 1 Cal 32, *Sophy Auerbach v. Shivaprosad*.

Section 23 — Note 3

1. ('50) 37 AIR 1950 East Punj 21 (22), *Thaman Singh v. Sohna*.

('49) 36 AIR 1949 Orissa 1 (9) : 14 Cut L Tim 73 (DB), *Radhakrishna Das v. Radharamana Swami*.

('42) 29 AIR 1942 Pat 188 (189) : 197 Ind Cas 818 (DB), *Kuseshwar Jha v. Uma Kant*.

('40) 27 AIR 1940 Lah 359 (360) : ILR (1941) Lah 22 : 191 Ind Cas 42 (FB), *Khair Md. Khan v. Mt. Jannat*. (Injury must be distinguished from the effect of the injury — Erection of *chabutra* on common land held not to be a continuing wrong — According to Tek Chand, J., in this case, an encroachment on land by means of a *permanent* structure will not be a continuing wrong while an obstruction which is not of a permanent nature may be a continuing wrong — *Thorpe v. Brumfitt*, (1873) 8 Ch A 650 referred.)

('40) 27 AIR 1940 Pat 449 (452) : 19 Pat 208 : 190 Ind Cas 46 (DB), *Bibhuti Narayan Singh v. Mahadev Asram*. (A distinction must be made between the continuance of a legal injury and the continuance of its injurious effects — Encroachment by an act such as the building of a wall which is over and done with when once it is completed is not continuing wrong.)

2. ('24) 11 AIR 1924 Bom 290 (291, 293) : 84 Ind Cas 796 (DB), *Abdulla Mahomed v. Abdulla M. Zulaikhi*.

See also Note 3 to Article 22.

Section 23
Notes 3-4

the heap of stones and that the continuance of the effect of the injury did not make the defendant's act a continuing wrong.³ See also the undermentioned cases.⁴ See also Note 16.

4. Applicability of section to declaratory suits. — There is nothing in the section itself preventing its applicability to any particular kind of suits. The section is quite general in its application to all kinds of suits, provided they are based on a continuing breach of contract or on a continuing wrong independent of contract. The section will therefore apply to declaratory suits also if they are based on a wrong which can be said to be a continuing one as explained in Note 1. In *Chukkun Lal Roy v. Lalit Mohun Roy*,¹ which was reversed by the Privy Council on another point,² it was held that a suit by Hindu reversioners, after the death of the widow of the testator, for the construction of his will and for a declaration of the plaintiffs' rights, cannot be barred so long as the right to the property in respect of which the declaration is sought is a subsisting and continuing right, and that the right may be claimed within the statutory period from the time when the plaintiffs become entitled to the consequential relief. In that case the cause of action actually arose within six years of the suit. That case was followed in the undermentioned case.^{2a} In *Rajah of Venkatagiri v. Isakapalli Subbiah*,³ their Lordships of the Madras High Court observed with reference to *Chukkun Lal Roy's* case¹ :

"If the ruling of the Calcutta High Court be that a suit for a declaration of title to immovable property cannot be held to be barred so long as the plaintiff's right to such property is a subsisting right and that for purposes of limitation, the right to bring such a suit is a continuing right so long as the right to the property in respect of which declaratory relief is prayed for

3. ('20) 7 AIR 1920 Pat 324 (327, 328) : 5 Pat L Jour 359 : 58 Ind Cas 749 (DB), *Allan Mathewson v. District Board of Manbhum*.

See also Note 1 to Section 24.

4. ('40) 27 AIR 1940 Lah 359 (360) : ILR (1941) Lah 22 : 191 Ind Cas 42 (FB), *Khair Md. Khan v. Mt. Jannat*. (Encroachment by joint owner by building chabutra on common land claiming it as his own is not continuing wrong—Suit for injunction is governed by Art. 120 and not by S. 23.)

('30) 17 AIR 1930 Pat 528 (529) : 122 Ind Cas 153, *B. & N. W. Ry. Co. Ltd. v. Mohammad Abdul Halim*. (A subsequent aggravation of the damage caused by a tort without any act or omission on the part of the defendants does not furnish a cause of action.)

('91) 18 Cal 91 (96) (DB), *Dwarka Nath Gupta v. The Corporation of Calcutta*. (All damages resulting from one and the same cause of action must be recovered at one and the same time.)

Section 23 — Note 4

1. ('93) 20 Cal 906 (924, 925) (DB).

2. ('97) 24 Cal 834 : 24 Ind App 76 : 7 Sar 155 : 1 Cal W N 387 (PC), *Lalit Mohan Roy v. Chukkun Lal Roy*.

2a. ('21) 8 AIR 1921 Nag 74 (76) : 17 Nag L R 169 : 64 Ind Cas 775, *Kunjilal v. Chandarsingh*.

3. ('03) 26 Mad 410 (416) (DB).

is not extinguished, we are unable to concur in it. The criterion is not whether the *right* is a continuing one but whether the *wrong* is a continuing one."

See also the undermentioned case,^{3a} in which the above opinion was concurred in.

In *Moulvi Muhammad Fahimal Huq v. Jagat Ballav Gosh*,⁴ it was held that the principle of S. 23 could have no application to a declaratory suit. It is submitted that this view cannot be accepted as correct. The infringement of a right giving a cause of action for a declaratory suit may or may not be a continuing wrong. If it is not, then S. 23 cannot apply; but if it is, then S. 23 will apply. In each case, therefore, the question would be whether the wrong on which the suit is based is a continuing wrong or not. See the undermentioned cases⁵ in which S. 23 was applied to declaratory suits. See also Note 17.

It was held in the undermentioned case that the word "wrong" in this section implies something in the nature of a tort and that the section does not apply to a suit for declaration of *title*.⁶ The section does not apply to a suit for declaration that the plaintiff's marriage with defendant is null and void.⁷

3a. ('05) 1 Cal L Jour 73 (81) (DB), *Mohabharat Shaha v. Abdul Hamid*.

4. ('23) 10 AIR 1923 Pat 475 (480) : 2 Pat 391 : 74 Ind Cas 403 (DB).

5. ('26) 13 AIR 1926 Cal 1022 (1025) : 97 Ind Cas 73 (DB), *Rohini Nandan v. Jadunandan*. (Suit to establish fishery rights.)

('05) 1 Cal L Jour 73 (76) (DB), *Mohabharat Shaha v. Abdul Hamid*. (Suit for declaration of title to immovable property.)

('16) 3 AIR 1916 Cal 751 (754) : 31 Ind Cas 242 (DB), *Brojendra Kishore v. Bharat Chandra*. (Property attached under S. 146, Criminal Procedure Code—Suit for declaration of title.)

('33) 20 AIR 1933 Pat 224 (233) : 12 Pat 261 : 149 Ind Cas 561 (DB), *Jurawan Singh v. Ramsarikh Singh*. (Order passed under S. 145, Criminal Procedure Code—Suit for declaration of title.)

('22) 9 AIR 1922 Cal 419 (420) : 65 Ind Cas 200 : 49 Cal 544 (DB), *Panna Lal Biswas v. Panchu Ruidas*. (Case of attachment under S. 146, Cr. P. C.)

('16) 3 AIR 1916 Cal 733 (734) : 29 Ind Cas 385 (DB), *Nazimulla v. Wazidulla*. (Wrongful interference with a right of way constitutes a continuing nuisance.)

('34) 21 AIR 1934 Pat 34 (34, 35) : 146 Ind Cas 408, *Bhagwan Dutt v. Asharfi Lal*. (Obstruction to public way is continuing wrong.)

('35) 22 AIR 1935 Cal 201 (202) : 155 Ind Cas 75, *Aptabuddin Khan v. Johar Ali*. (Limitation does not apply in a case of obstruction to a right of way.)

('35) 22 AIR 1935 Cal 405 (406) : 156 Ind Cas 390 (DB), *Sarat Chandra v. Nerode Chandra*. (('23) AIR 1923 Cal 356 (DB), *Dwarka Nath v. Tara Prasanno* relied on.)

('19) 6 AIR 1919 Cal 807 (808) : 49 Ind Cas 93 (DB), *Ashutosh Sadukhan v. Corporation of Calcutta*. (Held that the right of the Municipal Corporation was barred under Art. 146.)

6. ('44) 31 AIR 1944 Oudh 139 (147) : 19 Luck 515 : 216 Ind Cas 276 (DB), *Md. Ata Husain v. Husain Ali*. (Suit for declaration of right to share in monthly allowance—Cause of action arises when effective denial of title first takes place.)

7. ('45) 32 AIR 1945 Cal 484 (485) : ILR (1946) 1 Cal 32, *Sophy Auerbach v. Shivaprosad*. (Where suit is not one under Divorce Act, exception in S. 29 does not apply and Limitation Act applies to suit—S. 23 does not apply—Art. 120 applies and right to sue accrues as soon as wedding ceremony is performed or as soon as defendant has claimed marital rights.)

Section 23
Notes 5-7

5. Breach of contract to keep building in repair. — The wrong in this class of cases is a breach of a *positive* duty to *continue to do something*, viz., to keep the building in repair. A violation of this duty is, therefore, a continuing breach of contract within the meaning of this section so long as the building is out of repair.¹

6. Breach of covenant for title. — A covenant for title is a contract by the seller with the buyer of property that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same.¹ It cannot be said in this class of cases that the duty of the seller is to continue to do something under the contract. The case is not one of continuing wrong and the breach occurs once and for all where on the date of the sale the seller has no title to the property sold or the title is defective.²

7. Breach of covenant for quiet possession. — A covenant for quiet possession is a contract by the covenantor with the covenantee that the latter's possession will not be disturbed by any one.¹ The duty of the covenantor is a negative one and has a continuous operation throughout the period of the contract. The covenant presupposes that possession has been given to the covenantee. Where, therefore, no possession is given in the first instance to the covenantee, the covenant for quiet enjoyment does not come into play at all and consequently the covenantee cannot sue upon the covenant.²

Section 23 — Note 5

1. ('87) 10 All 85 (91) : 1887 All W N 292 (DB), *Mansab Ali v. Gulab Chand*.
'17) 4 AIR 1917 Mad 465 (470) : 35 Ind Cas 254 : 40 Mad 910 (DB), *Secretary of State v. Venkayya Garu*.
(1900) 2 Ch D 156 (162) : 69 L J Ch 493 : 83 L T 191, *Jacob v. Down*.

Section 23 — Note 6

1. See Section 55 (2) of the Transfer of Property Act, 1882.
2. ('78) 2 Bom 273 (293) : 2 Ind Jur 762, *Raju Balu v. Krishnarav*.
('01) 25 Bom 593 (603) : 3 Bom L R 190 (DB), *Ardesir v. Vajesingh*.
('02) 26 Bom 750 (754) : 4 Bom L R 571 (DB), *Tulsiram v. Murlidhar*.
('15) 2 AIR 1915 Mad 766 (766, 767) : 21 Ind Cas 740 (DB), *Ramanatha Iyer v. Raman Nambudripad*.
('16) 3 AIR 1916 Mad 480 (481) : 31 Ind Cas 179, *Samu Pathan v. Chidambara Oadayan*.
('17) 4 AIR 1917 Mad 465 (467, 470) : 35 Ind Cas 254 : 40 Mad 910 (DB), *Secretary of State v. Venkayya Garu*. (Obiter — *Turner v. Moon*, (1910) 2 Ch 825, followed.)
('15) 2 AIR 1915 Nag 46 (47) : 31 Ind Cas 877 : 11 Nag L R 186, *Pirbhu v. Mt. Vazirbi*.

See also Dait on "Vendors and Purchasers," Chapter XIV, Section 5.

[But see ('87) 10 All 85 (91, 92) : 1887 All W N 292 (DB), *Mansabali v. Gulabchand*. (Submitted not correct.)

('19) 6 AIR 1919 Mad 849 (850) : 47 Ind Cas 924 (DB), *Venkataramayya v. Ramabrahman*. (Injured party not bound to sue at once — He can exhaust possible means of reparation and then sue — It is a continuing covenant.)]

Section 23 — Note 7

1. See Section 108 (c) of the Transfer of Property Act, 1882.
2. ('01) 25 Bom 593 (596, 598) : 3 Bom L R 190 (DB), *Ardesir v. Vajesingh*.
(1893) 41 W R (Eng) 471 (474) : L R 2 Ch 75 : 62 L J Ch 586 : 68 L T 428, *Wallis v. Hands*.

But even where possession has been given to the covenantee and he is subsequently dispossessed, it is conceived that on the principles discussed in Note 16, the case will not be one of a *continuing* breach of contract.^{2a} As seen in Note 1, the question whether a wrong is a continuing one depends on the same principles whether the wrong is based on a breach of contract or is independent of contract.

Where possession has not been given to the transferee at all, he cannot, as has been said already, sue on the covenant for quiet enjoyment. In the case cited below³ in which a lessee had not been given possession under the lease, the Madras High Court, while not dissenting from the above proposition, considered the question whether even if the position were otherwise, the failure to give possession would be a continuing breach of the covenant for quiet possession. It was held that such failure would not be a continuing breach. The decision proceeds on the ground that a continuing breach necessarily implies the right of the person committing the breach to resume performance of the contract and that in cases of failure to deliver possession, the lessor, if he fails to deliver possession at the commencement of the term, cannot subsequently insist on performance. The view can also be supported on the other tests suggested in Note 1. For the obligation in such a case is a positive one, viz., to put the lessee in possession and not to *continue* to put him in possession.⁴

In *Raju Balu v. Krishnarav*,⁵ the Bombay High Court had to deal with a covenant for quiet enjoyment which provided *inter alia* that the premises conveyed should be enjoyed by the grantee "free and discharged from all estates and encumbrances" etc., created by the grantor. It was found that the property had already been gifted by

('02) 26 Bom 750 (754, 755): 4 Bom L R 571 (DB), *Tulsiram v. Murlidhar*. ('92) 19 Cal 123 (PC), *Hanuman v. Hanuman*, followed.)

2a. See ('17) 4 AIR 1917 Mad 465 (471): 40 Mad 910: 35 Ind Cas 254 (DB), *Secretary of State v. Venkayya Garu*. (Per Srinivasa Iyengar, J.—Eviction of lessee by landlord or by third party claiming paramount title will not amount to continuing breach of covenant for quiet possession — The view proceeds on the ground that a continuing breach implies the right of the person committing the breach to resume performance of the contract and that after eviction, the landlord cannot insist on resuming the relationship of landlord and tenant.)

3. ('17) 4 AIR 1917 Mad 465 (468, 470): 40 Mad 910: 35 Ind Cas 254 (DB), *Secretary of State v. Venkayya Garu*. (Per Srinivasa Iyengar, J.—Coutts-Trotter, J., lays down the test whether the lessee would be entitled, on the breach, to sue for the whole of the damage accrued and prospective, or only to sue for the damages actually accrued upto the date of suit and says that in the former case the breach is not a continuing one while in the latter case it is a continuing one — As will be clear from the remarks of the learned Judge further down, the above is, in substance, only the test as to the right of the person committing the breach to resume performance of the contract — For, if he has such a right, the covenantee cannot sue for the whole of the damage.)

4. See ('17) 4 AIR 1917 Mad 465 (469): 40 Mad 910: 35 Ind Cas 254 (DB), *Secretary of State v. Venkayya Garu*. (Per Srinivasa Iyengar, J.—From the nature of the obligation, it is clear that there cannot be a continuing breach; for, the covenant or contract is not a continuing one.)

5. ('77-78) 2 Bom 273 (293): 2 Ind Jur 762.

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the grantor, at the time of the grant, to another person. In a suit for damages based on the above covenant, Green, J., observed as follows:

"As to the second branch of the covenant (the relevant portion of which has been referred to above), it would seem to be one of those covenants admitting of a continuing breach, so that under S. 23 of the Limitation Act a suit would not be barred so long as the breach continues, and that, therefore, the suit, if otherwise maintainable, would not be barred by reason of the Limitation Act."

It is submitted that the above view is not correct. The above clause in the covenant is virtually only a covenant for title, a breach of which, the same learned Judge held in the same case, would not be a continuing breach. (See Note 6.) Moreover, the fact that a covenant is of a continuous nature or "admits of a continuing breach," does not necessarily mean that the particular breach is a continuing breach. The question whether the breach is a continuing one or not depends on the nature of the breach in each case.⁶ See also Note 2.

8. Non-payment of money under a contract. — In the case of contracts for the payment of money, the duty to pay is a positive one, but it cannot be said that the duty of the obligor is to *continue to pay* the amount to the obligee. The non-payment of the money, therefore, is not a continuing breach of the contract. The cause of action arises once and for all on the non-payment on the date fixed for payment.¹ A contrary view, has, however, been held in the

6. ('17) 4 AIR 1917 Mad 465 (467, 470, 471): 40 Mad 910 : 35 Ind Cas 254 (DB), *Secretary of State v. Venkayya Garu*. (Per Coutts-Trotter, J.—Nature of remedy available to a tenant under a covenant for quiet enjoyment depends upon the *nature of the breach*—Per Srinivasa Iyengar, J. — A breach of a covenant for quiet enjoyment does not necessarily constitute a continuing breach, though such a covenant is a continuing covenant The dictum of Green, J., in (1877-78) 2 Bom 273, *Raju Balu v. Krishnarav*, does not apply to every case of a breach of the covenant for quiet enjoyment irrespective of the fact as to whether the breach consists in mere disturbances in the enjoyment by the landlord or in wrongful eviction by the landlord or by a third party by virtue of a paramount title.)

Section 23 — Note 8

- 1.** ('87) 10 All 85 (91, 92) : 1887 All W N 292 (DB), *Mansab Ali v. Gulab Chand*. (The decision as to the liability for interest, has however been overruled by the Privy Council in ('97) 19 All 39 (PC), *Mathura Das v. Narindar Bahadur*.)
 - ('89) 11 All 416 (423): 1889 All W N 165 (DB), *Bhagwant Singh v. Daryao Singh*. (Do.)
 - ('21) 8 AIR 1921 All 73 (74): 64 Ind Cas 447 (DB), *Ram Kumar v. Nem Chand*. (Money paid for illegal object being returnable to person who paid it—Cause of action for return arises as soon as the money was paid.)
 - ('25) 12 AIR 1925 All 488 (490): 87 Ind Cas 804, *Ram Narain v. Nihal Singh*. (Vendee undertaking to clear prior mortgage—Non-performance on date of sale is breach of covenant—Breach is not continuous one.)
- [See also ('51) 38 AIR 1951 Mad 291 (Pr 12) : (1950) 2 Mad L Jour 453 (DB), *Kumaraswami v. Chinnathambi*. (The starting point for computing limitation in a suit for the return of the share money contributed by a person to an unregistered association of more than 20 members would be the date on which the money was paid and there would be no recurring cause of action. AIR 1921 All 73, *Ram Kumar v. Nem Chand*, Foll.)]

undermentioned case,² namely that such a breach is a continuing one. It is submitted that the view is not correct. Where a mortgage bond did not specifically provide for the payment of interest after the date fixed for the payment of the principal and the lower Court had held that there was no contract to pay *post diem* interest, their Lordships of the Privy Council observed as follows :

"Supposing the construction put by the Courts below on the deed to be correct, the appellants still ask why they should not recover six years' arrears of interest by way of damages. It is very difficult to see why. The principal debt was not time-barred, and it was not paid. Every day that it remained unpaid there was a breach of contract, and the bar of time applies only to breaches occurring six years before suit."³

These observations of their Lordships cannot be taken to mean that non-payment of the amount under the contract is a continuing breach of the contract to pay. The words "the principal debt was not time-barred" imply that their Lordships assumed that notwithstanding the debt remained unpaid the principal debt may become barred, which would not be the case if the breach of the contract is a continuing one. It is, however, somewhat difficult to understand what their Lordships meant by stating "every day that it remained unpaid there was a breach of the contract." The case was decided on another ground also that there was an *agreement* to pay *post diem* interest.

9. Breach of obligation to give possession. — Where A is bound under a contract to give possession to B of certain properties, it cannot be said that the duty of A is to *continue to give possession*. The failure to give possession is therefore not a continuing breach of the contract.¹ Where on redemption being made, a usufructuary mortgagee was bound to give back possession to the mortgagor but failed to do so, it was observed in the undermentioned case² as follows: "The mortgagee was under an obligation to put the mortgagor in possession of the property and that is in the nature of a continuing obligation which cannot be said to cease so long as the mortgagor's right to redeem is not barred. That being so, this case falls under Arts. 115 and 116 of the Limitation Act read with S. 23 of that Act." It is submitted that this view is not correct. As has been seen in Note 2, the mere fact that a *right* or its corresponding obligation is a continuing one does not make the section applicable. The question in

2. ('84) 6 All 457 (460): 1884 All W N 168 (DB), *Imdad Ali v. Nijabat Ali*.

3. ('97) 19 All 39 (47): 23 Ind App 138 : 6 Mad L Jour 214 : 1 Cal W N 52 : 7 Sar 88 (PC), *Mathura Das v. Raja Narindar Bahadur*.

Section 23 — Note 9

1. ('17) 4 AIR 1917 Mad 465 (467, 468, 469) : 35 Ind Cas 254 : 40 Mad 910 (DB), *Secretary of State v. Venkayya Garu*.

('88) 1888 All W N 15 (17) (DB), *Bal Govind Das v. Barkat Ali*. (This was a suit for foreclosure of a mortgage by a registered deed of conditional sale.)
See also Note 16 and Article 116, Note 10.

2. ('09) 3 Ind Cas 433 (434) : 33 Mad 71 (DB), *Shiva Chidambara Mudeley v. Kamakshi Ammal*. (Case under Act of 1877.)

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Notes 9-11

each case is whether the *wrong* is a continuing one. As stated already in the beginning of this Note, the failure to give possession is not a continuing wrong.

10. Breach of continuing guarantee. — Under s. 129 of the Contract Act a guarantee which extends to a *series* of transactions is called a continuing guarantee. It will be clear from this that a breach of this contract can only be at *successive* intervals as and when the guarantee is broken in respect of each transaction in the series.¹ It is not a case of continuing breach of contract within the meaning of this section.

11. Other cases of breaches of contracts. — Where the directors of a company registered under the Companies Act, 1913, omitted to come to any conclusion whatsoever on an important piece of business duly proposed for the decision of the Board of Directors, it was held that the obligation was one arising out of contract implied in the Articles of Association and that the breach of duty is a continuing one so long as the decision is deferred.¹ It is submitted that the decision is not correct. There is no duty to *continue to come to a conclusion*, which is the test to be applied. Once the Board comes to a conclusion, there would be no further duty of the same kind. It is therefore not a case of a continuing breach.

The failure on the part of a lessee to plant certain trees within the time fixed in the contract is not a continuing breach of the contract; there is a failure to perform the contract only if on the last day it is found that the trees have not been planted.² So also, the failure of a lessee to build within the time fixed in the covenant is not a continuing breach of contract but the contract is broken once for all at the expiry of the time limited.^{2a}

Where A contracts with B to allow B to take forest produce for a certain period from certain forests, A is under a duty to continue to allow B to take the produce during the period. A breach of this obligation is therefore a continuing breach of the contract during the period fixed in the contract.³

Where under the Articles of Association of a company registered under the Companies Act, 1913, a director was under a positive duty to cause true accounts to be kept by his agents and he negligently

Section 23 — Note 10

1. ('28) 15 AIR 1928 Cal 204 (205) : 55 Cal 154 : 109 Ind Cas 752 (DB), *Durga Priya v. Durga Pada*. (('20) A I R 1920 P C 35 (PC), *S. N. Sen v. Bank of Bengal*, distinguished.)

Section 23 — Note 11

1. ('33) 20 AIR 1933 Sind 103 (109, 110): 143 Ind Cas 713, *Karachi Bank Ltd. v. Shewaram*.
2. (1869) 11 Suth W R 452 (452) : 3 Beng L R App 47 (DB), *Kalee Komul Mojomdar v. Jumut Ali*.
- 2a. (1900) 2 Ch D 156 (161): 69 L J Ch 493 : 83 L.T 191 : 48 W R 441 : 64 J P 552, *Jacob v. Down*. (Cited in ('17) AIR 1917 Mad 465 (DB), *Secy. of State v. Pemmaraju*.)
3. ('99) 1899 Pun Re No. 16, *Gurmuck Singh v. Secretary of State*.

failed to do so, it was held that the wrong committed by the director was a continuing one.⁴

Section 23
Notes 11-12

The erection and maintenance of huts for the occupation of workmen on an occupancy holding contrary to the terms of the tenancy are a continuing wrong which continues so long as the huts remain standing.⁵

Marriage, under the Mahomedan law, is a civil contract and a husband's impotency is a continuing breach of the contract of marriage.⁶

Deterioration of goods consigned for carriage over a railway due to continued negligence of the servants of the railway company is a continuing wrong.⁷

12. Obstruction to watercourse and to the flow of water. — Where A has got a right to the unobstructed flow of water in a watercourse, there is a corresponding duty on all others not to obstruct the watercourse. If B puts a dam across it or otherwise obstructs the flow of water, there is a change in the state of affairs (the duty being a negative one), every moment's continuance of which is a fresh wrong for which the obstructor is responsible. The wrong is therefore a continuing one. The leading case on the point is *Rajrup Koer v. Abdul Hossein*.¹ That was a case where the defendants had obstructed a watercourse thereby committing an infringement of the plaintiff's right, and the suit was for the removal of the obstruction. Their Lordships observed as follows: "The obstructions which interfered with the flow of water to the plaintiff's *mehal* were in the nature of continuing nuisances, as to which the cause of action was renewed *de die in diem*, so long as the obstructions causing such interference

4. ('30) 17 AIR 1930 Bom 572 (585): 54 Bom 226 : 127 Ind Cas 305 (DB), *Govind Narayan v. Rangnath Gopal*.

5. ('40) 27 AIR 1940 Pat 561 (562, 563): 19 Pat 844: 188 Ind Cas 495 (DB), *Gaya Prasad v. Jagadish Chandra*. (Case under Chota Nagpur Tenancy Act.)

[See also ('39) 26 AIR 1939 Pat 149 (150): 179 Ind Cas 482, *Surja Gorain v. Gnanendra Nath*. (Case under Chota Nagpur Tenancy Act—Tenant building house on holding contrary to terms of tenancy—*Held*, building was a continuing wrong and limitation did not begin to run from the moment the first operation of the building was commenced but began to run when the building was finally erected—NOTE: The latter part of the decision is not correct—The wrong will not cease on the completion of the building but will continue so long as the building remains standing—See A I R 1940 Pat 561 cited above.)]

6. ('39) 26 AIR 1939 Lah 454 (454): 185 Ind Cas 744, *Mt. Sahibzadi v. Abdul Ghafoor*.

7. ('47) 34 AIR 1947 Nag 224 (226): I L R (1947) Nag 726, *Firm Sitaram Bindraban v. G. I. P. Rly.* (A plaintiff is not bound to launch an endless succession of suits each day a continuing wrong persists. He can wait and include in the action all damages down to the date of the suit. Equally he can sue again for any fresh loss occurring after suit in respect of the same continuing loss. (1861) 30 L J C P 305, *White House v. Fellows* and (1894) 1 Ch 293, *Hole v. Chard Union*, Rel. on.)

Section 23 — Note 12

1. ('81) 6 Cal 394 (404): 7 Ind App 240 (248): 4 Sar 199: 7 Cal L R 529: 4 Ind Jur 530: 3 Suth 816: 4 Shome L R 7 (PC).

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Note 12

were allowed to continue." And this view has been taken in numerous decisions.²

On the same principle the following also will be continuing wrongs :

- (1) An obstruction to the plaintiff's right to the discharge of surface water of the plaintiff's land over the defendant's land.³
- (2) The closing of a drain by the defendant through which the plaintiff is entitled to throw the water from his house.⁴
- (3) Obstruction of the passage in which the plaintiff is entitled to discharge the rain water of his house as well as the water from his *moris* (drains).⁵

2. ('42) 29 AIR 1942 All 77 (78) : 198 Ind Cas 532, *Masooma Bibi v. Mohammad Said Khan*.

('82) 6 Bom 20 (23) (DB), *Punja Kuvarji v. Bai Kuvar*. (('81) 6 Cal 394 (PC), *Rajrup Koer v. Abdul Hossein*, followed.)

('86) 1886 Bom P J 79 (DB), *Vinayak v. Bhiva*. (The erection of a dam causing a deficiency of water is a continuing wrong.)

('89) 1889 Bom P J 280 (DB), *Krishnarao v. The President of the City Municipality, Ahmednagar*. (Putting a plug in plaintiff's water-pipe running from an aqueduct is an obstruction of the nature of a continuing nuisance.)

('19) 6 AIR 1919 Lah 119 (120): 50 Ind Cas 299, *Kania Lal v. Narain Singh*. (Defendant wrongfully irrigating from a watercourse.)

('77) 1 Mad 335 (340) : 1 Ind Jur 802 (DB), *Subramaniya Iyer v. Ramchandra*.

('05) 28 Mad 72 (77, 82) : 15 Mad L Jour 32 (DB), *Sankaravadivelu Pillai v. Secretary of State*. (Calingula constructed by Government—Necessary effect was to cause water to flood plaintiff's lands—It is a continuing wrong.)

('66) 3 Mad H C R 111 (113) (DB), *Rajendra Devu Garu v. Charana Samantaraaya Garu*. (A suit to recover damages for loss caused by interference with plaintiff's right to the flow of water from a canal.)

('68) 5 Mad H C R 6 (24) (DB), *Ponnusamy Tevar v. Collector of Madura*.

('35) 22 AIR 1935 Mad 668 (668, 669): 158 Ind Cas 987, *Muthalagappa Chettiar v. Navaneetheswara Gurukkal*. (('82) 5 Mad 253 (DB), *Suryanarayana v. Jaganada* and ('16) AIR 1916 Mad 1001 (DB), *Muthu Goundan v. Anantha*, distinguished.)

('25) 12 AIR 1925 Nag 189 (190) : 82 Ind Cas 482, *Sona Patil v. Laxman*.

('17) 4 AIR 1917 Pat 65 (68): 43 Ind Cas 235 : 3 Pat L Jour 51 (DB), *Krishna Dayal Gir v. Mt. Bhawani Koer*.

('10) 6 Ind Cas 881 (882, 885): 3 Sind L R 228 (FB), *Goverdhandas v. Naraindass*. (Affirming('08) 1 Sind L R 238, *Goverdhandas v. Naraindas*.)

('38) 25 AIR 1938 Mad 180 (183, 184): 174 Ind Cas 229 (DB), *Secretary of State v. Zamindar of Saptur*. (Obstruction to water by accumulation of silt due to construction of dam—Injury to lower riparian owner is continuous.)

('27) 14 AIR 1927 Nag 85 (86): 98 Ind Cas 679, *Hardeo v. Ramchandra*. (Obstruction from taking water from well is continuing injury—Where damage consequent on an act is actionable rather than the act itself, every damage is actionable.)

3. ('18) 5 AIR 1918 Cal 422 (423): 41 Ind Cas 863 (DB), *Kaseswar Mukherjee v. Annoda Prosad Patra*.

4. ('26) 13 AIR 1926 Lah 242 (243) : 92 Ind Cas 994 (DB), *Chiranji Lal v. Shib Lal*.

5. See ('17) 4 AIR 1917 Bom 14 (15): 42 Bom 260 : 44 Ind Cas 913 (DB), *Ramchandra Gangadhar v. Mahadev Moreshwar*.

[See also (1928) 1 K B 421 (426) : 97 L J K B 263 : 138 L T 481 : 44 T L R 91, *Konskier v. Goodman Ltd*. (Building operation—Rubbish and debris falling on roof of next house—License permitting this—Failure to remove the rubbish

- (4) Obstruction caused by closing the main sluice of a tank through which the plaintiff takes water to his lands.⁶

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13. Obstruction to right of way. — There is no distinction in principle between the obstruction to a watercourse and obstruction to a right of way so far as the applicability of this section is concerned.¹ An obstruction to a right of way is, therefore, a continuing nuisance as to which a cause of action will be renewed *de die in diem* so long as the obstruction continues.²

At the same time, if the obstruction to the right of way amounts to a complete *dispossession* of the plaintiff as where a permanent building is constructed blocking the land which has been in the enjoyment of both the parties and which they have set apart for their common use as a pathway, the defendant's act will not be a continuing wrong.³ (See Note 16.) In this view, the undermentioned decisions⁴ require re-consideration.

In *Khair Mohammad Khan v. Mt. Jannat*,⁵ Tek Chand, J., seemed inclined to think that the question whether an obstruction to a right of way amounted to a continuing wrong or not depended on whether the obstruction is of a *permanent* nature or not. It is

within a reasonable time made it a continuing trespass and when the rubbish was washed down by rain and found its way into a gully in the basement of the next house and blocked the gully so that the basement became flooded in rain, an action for damages on the basis of the continuing trespass was maintainable.]]

6. ('25) 12 AIR 1925 Nag 189 (190): 82 Ind Cas 482, *Sona Patil v. Laxman*.

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1. ('16) 3 AIR 1916 Cal 733 (734): 29 Ind Cas 385 (DB), *Nazimulla v. Wazidulla*. ('96-97) 1 C W N 96, *Soojan Bibi v. Shamed Ali* followed.)
2. ('42) 29 AIR 1942 All 77 (78, 79): 198 Ind Cas 532, *Masooma Bibi v. Mahammad Said Khan*. ('34) 21 AIR 1934 Pat 34 (35): 146 Ind Cas 408, *Bhagwan Dutt v. Asharfi Lal*. ('27) AIR 1927 Pat 265, *Jagroshan v. Madan* relied on.) ('35) 22 AIR 1935 Cal 201 (202): 155 Ind Cas 75, *Aptabuddin Khan v. Johar Ali*. (('16) AIR 1916 Cal 733 (DB), *Nazimulla v. Wazidulla* followed.) ('35) 22 AIR 1935 Cal 405(406): 156 Ind Cas 390 (DB), *Sarat Chandra v. Nerode Chandra*. (('81) 6 Cal 394 (PC), *Rajrup v. Abdul* relied on.) ('96-97) 1 Cal W N 96 (97, 98), *Sreemati Soojan Bibi v. Shamed Ali*. (('81) 6 Bom 20 (DB), *Punja v. Bai Kuvar*, followed.) ('09) 2 Ind Cas 410 (412) (DB) (Cal.), *Nerode Kanta v. Bharat Chandra*. ('23) 10 A I R 1923 Cal 356 (358): 76 Ind Cas 328 (DB), *Dwarkanath Sen v. Taraprasanno Sen*. (Cosharers — Common way — Obstruction by one — Section 23 applied.) ('21) 8 A I R 1921 Cal 405 (406): 69 Ind Cas 910, *Harish Chandra v. Prannath Chakraverty*. (Article 144 applied.) ('37) 24 AIR 1937 Lah 94 (94): 171 Ind Cas 509, *Mehar Chand v. Sain Gaman*. (Obstruction to plaintiff's access to high way.)
3. ('40) 27 A I R 1940 Lah 359 (362): ILR (1941) Lah 22: 191 Ind Cas 42 (FB), *Khair Mohammad Khan v. Mt. Jannat*.
4. ('23) 10 AIR 1923 Cal 356 (358): 76 Ind Cas 328 (DB), *Dwarkanath Sen v. Taraprasanno Sen*. ('09) 2 Ind Cas 410 (412) (DB) (Cal.), *Nerode Kanta v. Bharat Chandra*.
5. ('40) 27 AIR 1940 Lah 359 (362): ILR (1941) Lah 22: 191 Ind Cas 42 (FB).

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submitted that this view is not correct.⁶ The true test is not whether the obstruction is permanent or not but whether the plaintiff has been ousted from possession. If the obstruction amounts to ouster, the defendant's act is not a continuing wrong.

Where the plaintiff is not entitled to *possession* but only to a *right of way*, there can be no question of *dispossession*. Hence in such a case, the obstruction to the right of way will be a "continuing wrong" although it may be caused by an act which completely prevents passage, like the building of a wall or putting up a wire fencing.^{6a}

In *Bibhuti Narayan v. Mahadeo Asram*,⁷ the Patna High Court expressed the view that the obstruction of a watercourse which was in question in the Privy Council decision in *Rajrup Koer v. Abdul Hossein*⁸ was not analogous to the obstruction of a right of way and so the above decision of the Privy Council cannot rightly be cited—as is usually done—as authority for the proposition that an obstruction to a right of way is a continuing wrong.⁹ At the same time, it was conceded that an obstruction to a right of way which is continued by the wrongdoer will be a continuing wrong. But it was not accepted that there was any distinction between cases where the obstruction amounted to a dispossession of the plaintiff and those in which it did not amount to such dispossession. At the same time, it was pointed out that the right of suit under S. 23 cannot be perpetual and that where by virtue of the provisions of Part IV the defendant acquired a right by lapse of time, the plaintiff's right of action would come to an end.¹⁰

In considering the question whether the obstruction of a right of way is a continuing wrong, the question whether the right is a public or a private one is irrelevant. The section applies whether the right infringed is public or private. (See Note 1.) But at the same time it should be noted that in the case of a *public* way, there can be no question of *dispossession* of the plaintiff as the plaintiff would not be entitled to *possession*.¹¹

6. See ('35) 22 AIR 1935 Mad 668 (668, 669) : 158 Ind Cas 987, *Muthalagappa Chettiar v. Navaneetheswara Gurukkal*. (Even a *permanent* obstruction may be a continuing wrong—Case relating to watercourse.)

6a. ('42) 29 A I R 1942 All 77 (78, 79) : 198 Ind Cas 532, *Masooma Bibi v. Mohammad Said Khan*. (Obstruction of a public highway.)

7. ('40) 27 AIR 1940 Pat 449 (454; 455) : 19 Pat 208 : 190 Ind Cas 46 (DB).

8. ('81) 6 Cal 394 (405) : 7 Ind App 240 : 4 Sar 199 : 7 Cal L R 529 (PC).

9. See ('40) 27 A I R 1940 Lah 359 (362) : I L R (1941) Lah 22 : 191 Ind Cas 42 (FB), *Khair Md. Khan v. Mt. Jannat*. (In this case also, the correctness of the view that there is no distinction between an obstruction to a watercourse and one to a way was doubted.)

10. For a fuller discussion of the question whether dispossession is a continuous wrong, and also the question of the extinguishment of the plaintiff's right of action by lapse of time in the case of continuing wrongs, see Note 16.

11. See ('42) 29 A I R 1942 All 77 (78, 79) : 198 Ind Cas 532, *Masooma Bibi v. Mohammad Said Khan*. (Building of a wall etc. on a public pathway no dispossession—Wrong is a continuing wrong.)

14. Obstruction to right of ferry. — The violation of a right of ferry by setting up another ferry is, on the same principle, a continuing wrong so long as the latter ferry is allowed to remain.¹

15. Refusal of conjugal rights. — A husband or wife has a right to the society of his or her spouse. The duty of the latter is a continuing duty inasmuch as it is a duty to *continue to give* the society. A breach of this obligation is a continuing wrong within the meaning of this section and time will begin to run at every moment of the time during which the society is withheld.¹

Under the Acts of 1871 and 1877, there were two articles prescribing the periods of limitation for suits for the recovery of a wife and for suits for the restoration of conjugal rights.² In the former class of suits, time ran from the day the possession was *demand and refused* and in the latter from the day when the restitution was demanded and refused, the parties being of full age and sound mind. There were differences of judicial opinion on the question whether S. 23 applied to suits falling within the scope of the said articles. In the under-mentioned cases³ it was held that the articles must be confined to suits in cases where a demand is an essential element of the cause of action and that S. 23 could be applied to other cases of restitution of conjugal rights. In other cases it was held that the articles were overridden by the provisions of this section.⁴ In a third class of cases it was held that S. 23 would apply normally to suits for restitution of conjugal rights not based on any demand and refusal, but not to suits based on such demand and refusal.⁵ The conflict arose from the fact that the result

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1. ('91) 18 Cal 652 (664) (DB), *Nityhari Roy v. Dunne*. (A case under the Act of 1877.)
- ('11) 9 Ind Cas 846 (847) (Cal), *Abdul Khoyrat v. Hem Chandra Roy Choudhary*. ('81) 6 Cal 394 (PC), *Rajrup v. Abdul* followed.)

Section 23 — Note 15

1. ('22) 9 A I R 1922 Oudh 109 (111, 112) : 65 Ind Cas 452, *Muhammad Hamid-ullah Khan v. Mt. Fakhri Jahan Begum*. (But the cause of action for dissolution of marriage or for divorce is not a continuing cause of action.)
2. See Articles 41 and 42 of the Limitation Act, 1871 and Articles 34 and 35 of the Limitation Act, 1877.
3. ('91) 13 All 126 (148, 149, 150, 151, 153) : 1891 All W N 18 (DB), *Binda v. Kaunsilia*. (A case under the Act of 1877.)
[See also ('92) 1892 Pun Re No. 80, *Khair-ud din v. Mt. Budhi*. (Do.) ('92) 16 Bom 714 (716) (DB), *Bai Sari v. Hirachand*. (13 All 126 followed.)]
4. ('79) 1879 Pun Re No. 60, *Ghizani v. Mt. Mehran*. (Section 23 overrides Article 35.)
[See also ('99) 23 Bom 307 (310, 311) : 1896 Bom P J 369 (DB), *Fakirgauda v. Gangi*. (Quære.)]
5. ('01) 25 Bom 644 (648, 649, 654) : 3 Bom L R 371 (FB), *Dhanjhibhoy v. Hirabai*. (A suit under the Parsi Marriage and Divorce Act of 1865 by a wife for the restitution of conjugal rights is barred by lapse of time when restitution has been demanded and refused more than two years prior to suit.) ('78) 1878 Bom P J 6 (DB), *Basapa v. Ningi*. ('07) 34 Cal 79 (81, 82) : 11 Cal W N 437 (DB), *Asirunnissa Khatun v. Buzloo Meah*.

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of giving section 23 its normal effect was to render the articles entirely inoperative, a result assumed not to have been intended by the Legislature. The said articles have not been reproduced in the present Act. There is, under the present Act, no difficulty in holding that S. 23 read with Art. 120 would apply to a suit for restitution of conjugal rights.

See also Note 11.

16. Trespass and ouster.—Where A is entitled to the possession of a certain property and he is in such possession, there is a corresponding negative duty on all other persons to refrain from interfering with his possession. A trespass on the property is a breach of this duty and is a wrong. It may or may not be a *continuing* wrong. If it is a fleeting act as where A walks across B's flower garden, it is no doubt a trespass but is not a continuing wrong.¹ If on the other hand the trespass creates a state of affairs, every moment's continuance of which is a wrong for which the trespasser is responsible, it is a continuing wrong. Thus, if A throws a heap of stones or builds a wall or plants posts or rails on B's land and there leaves them, it is a continuing wrong.^{1a} Where, however, the trespass amounts to a *complete ouster* or dispossession, it is not a continuing wrong.² The

('04) 28 Mad 436 (437) (DB), *Saravanai Perumal Pillai v. Poovayi*. (('91) 13 All 126 (DB), *Binda v. Kaunsilia* dissented from.)

('12) 17 Ind Cas 629 (631, 632) : 37 Bom 393 (DB), *Mohammad Mehdi Faya v. Sakinabai*.

[See ('01) 28 Cal 37 (45, 46) : 5 Cal W N 195 (DB), *Surajyamani v. Kali Kanta*.]

[See also ('10) 8 Ind Cas 412 (413, 414) : 34 Mad 398 (DB), *Krishna Iyer v. Balammal*.]

Section 23 — Note 16

1. ('40) 27 AIR 1940 Pat 449 (454) : 19 Pat 208 : 190 Ind Cas 46 (DB), *Bibhuti Narayan Singh v. Mahadeo Asram*. (Single acts of obstruction or trespass are not continuing wrongs.)

('25) 12 AIR 1925 Nag 189 (190) : 82 Ind Cas 482, *Sona Patil v. Laxman*.

[See ('41) 28 AIR 1941 Pat 181 (182, 183) : 19 Pat 852 : 194 Ind Cas 243 (DB), *Akhauri Haliwant v. Deo Narain*. (Trespass or nuisance may or may not be continuing wrong, according to circumstances.)]

1a. Addison on "Torts" 5th Edition, p. 50 and pp. 331, 332 cited in ('88) 10 All 498 (504, 505) (DB), *Ramphal Rai v. Raghunandan*.

[See ('75) 24 Suth W R 97 (98), *Ramphul Sahoo v. Misree Lall*. (If no adverse possession is taken by the defendant then each act of trespass on plaintiff's land would constitute a fresh cause of action.)]

[See also ('50) 37 A I R 1950 East Punj 21 (Pr 10), *Thaman Singh v. Sohna*. (Defendants fixing Persian wheel over well which was common property of defendant and plaintiff—It was held that it was only a trespass and not ouster of plaintiff.)]

(1928) 1 K B 421 (426) : 97 L J K B 263 : 138 L T 481 : 44 T L R 91, *Konskier v. Goodman Ltd*. (Defendant throwing rubbish on the roof of plaintiff's house — It is a continuing trespass — In this case, the defendant was originally acting under the license of the occupier of the house — But it was held that the failure to remove the rubbish within a reasonable time made it continuing trespass.)]

[But see ('40) 27 A I R 1940 Pat 449 (452) : 19 Pat 208 : 190 Ind Cas 46 (DB), *Bibhuti Narayan Singh v. Mahadev Asram*. (Building of wall on defendants' land is not continuing wrong.)]

2. ('49) 36 A I R 1949 Orissa 1 (9) : 14 Cut L Tim 73 (DB), *Radhakrishna Das v. Radharamana Swami*.

- (145) 32 A I R 1945 Nag 78 (81, 82) : I L R (1944) Nag 753 (DB), *Ambadas Rukhabji v. Dattatraya Parashram*. (Person projecting eaves of his roof on tenant's occupancy holding — Suit by tenant for removal of encroachment — Limitation is governed by Sch. 2 Art. 1 of C. P. Tenancy Act — S. 23 not applicable—A by putting on his wall a roof which projects on B's land commits trespass and B can sue for possession.)
- (145) 32 A I R 1945 Sind 57 (70) : I L R (1945) Kar 40 (DB), *Shamdas v. Gurmukhsingh*. (Suit for declaration that certain properties were public, religious and charitable trust properties— Defendant found to have entered into possession as trespasser —S. 23 held not applicable.)
- (21) 8 A I R 1921 Lah 242 (243) : 60 Ind Cas 20, *Lal Singh v. Hira Singh*, (S. 23 would not apply to a case where the defendant has erected a *chhappar* on plaintiff's land and taken possession of the land adversely to the plaintiff as the cause of action is complete as soon as the *chhappar* is erected.)
- (41) 28 AIR 1941 Pat 181 (183) : 19 Pat 852 : 194 Ind Cas 243 (DB), *Akhauri Haliwant v. Deo Narain*. (Dispossession can be of the public as well as that of a private individual.)
- (40) 27 A I R 1940 Lah 359 (363) : I L R (1941) Lah 22 : 191 Ind Cas 42 (FB), *Khair Muhammad Khan v. Mt. Jannat*. (Encroachment by joint owner by building chabutra on common land claiming it as his own is not continuing wrong.)
- (39) 26 AIR 1939 Nag 145 (146) : 182 Ind Cas 613, *Superintendent Leprosy Asylum v. Ramsahaigir*. (The decision proceeds on the ground that to hold otherwise would defeat the provisions of Arts. 142 and 144 — There are two flaws in this : (1) Under S. 3, the provisions of the schedule are controlled by Section 23 : (2) It is not a correct assumption that if dispossession were held to be a continuing wrong, a suit for possession would never become time-barred.)
- (14) 1 A I R 1914 All 531 (532) : 25 Ind Cas 185, *Sheo Prasad Sonar v. Mangar Manhar*. (Door opened in wall for passage to defendant's house through plaintiff's land — Each act of trespass gives new cause of action — But it will not be so if the defendant's act amounted to dispossession of the plaintiff from any portion of the land.)
- (03) 27 Bom 515 (539, 540) : 5 Bom L R 274 (DB), *Fatesingji v. Bamanji*.
- (75) 24 Suth W R 97 (98), *Ramphul Sahoo v. Misree Lall*.
- (32) 19 A I R 1932 Lah 220 (221) : 135 Ind Cas 681, *Wadhawa v. Allah Ditta*. (The exclusive occupation of a building meant for common purposes.)
- (96) 19 Mad 154 (156, 157) (DB), *Municipal Commissioners, Madras v. Sarangapani Mudaliar*. (Completed trespass by adverse possession.)
- (12) 15 Ind Cas 285 (286, 287) : 1912 Pun Re No. 124, *Achar Singh v. Badhawa Singh*. ((199) 1899 Pun Re No. 8, *Narain Singh v. Ishar Singh*, followed.)
- (19) 6 AIR 1919 Cal 807 (807, 808) : 49 Ind Cas 93 (DB), *Ashutosh Sadukhan v. Corporation of Calcutta*. (In this case however the right of the Corporation had been *extinguished* under S. 28—So there was no need to refer to S. 23.)
- (29) 16 A I R 1929 Pat 624 (625, 626) : 117 Ind Cas 536 (DB), *Ram Lakhan Singh v. Chathusahi*. ((19) AIR 1919 P C 44 (P C), *Varada Pillai v. Jeevarathnammal* relied on.)
- [See also (42) 29 AIR 1942 Cal 151 (153) : 200 Ind Cas 386 (DB), *Dhajadhari Ghosh v. Union Board of Kendragoria*. (Suit for possession by Union Board constituted under Bengal Village Self-Government Act 1919 in respect of strip of land which it claimed as part of public road — Defendant found in possession from before date of establishment of Board—Art. 144, held applied and not Art. 146-A—Suit, held barred—Section 23 held did not apply.)
- (17) 4 AIR 1917 Mad 465 (471) : 40 Mad 910 : 35 Ind Cas 254 (DB), *Secretary of State v. Venkayya Garu*. (Per Srinivasa Ayengar J. — Dispossession of lessee by landlord or person claiming paramount title is not a continuing breach of contract by the lessor — His Lordship distinguishes between mere disturbances of the possession of the tenant and eviction of the tenant.)]

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reason is this. Both trespass and dispossession are wrongs committed in respect of the plaintiff's *possession*. The wrong consists in the violation of the defendant's duty not to interfere with the plaintiff's *possession*. In the case of a trespass not amounting to dispossession, the property continues to be in the possession of the plaintiff and at every moment during which the trespass continues it can be conceived of as a fresh wrong committed in respect of the plaintiff's possession. But where there has been complete dispossession, the defendant's action cannot, thereafter, amount to a fresh wrong committed in regard to the plaintiff's possession, for the simple reason that such possession does not exist. In some decisions, however, it has been held that a complete dispossession will be a continuing wrong.³ It is submitted that this view is not correct and is against the weight of authority.

The principle that dispossession is not a continuing wrong applies whether the dispossession is from land in the exclusive possession of the plaintiff or from land which is in the joint possession of both the plaintiff and the defendant.⁴ Similarly, the principle applies whether the dispossession is of an individual or a community or the public⁵ or a Municipality.⁶

3. ('40) 27 A I R 1940 Pat 449 (455) : 19 Pat 208 : 190 Ind Cas 46 (DB), *Bibhuti Narayan Singh v. Mahadeo Asram*. (Where the trespasser goes on asserting acts of possession over the land by cultivation or the obstructionist continues inhabiting the house built, the wrong *continues*. But the right of suit gets barred by the plaintiff's right to the property becoming extinguished by lapse of time under Part IV.)
- ('14) 1 A I R 1914 Cal 29 (31, 32) : 20 Ind Cas 910 (DB), *Barhamdat Missir v. Krishna Sahay*. (Occupation of land coupled with denial of title of owner may be regarded as a continuing wrong.)
- ('83) 6 Mad 176 (178) (DB), *Narasimhacharya v. Raghupathyacharya*. (Trespass and occupation of a well to the exclusion of plaintiffs held to be a continuing wrong.)
- ('26) 13 A I R 1926 Nag 260 (261, 262) : 92 Ind Cas 75, *Yado v. Ambashankar*. (Dispossession of tenant — Suit for damages — Wrong is a continuing one and damages can be claimed only up to date of suit and not prospective damages.)
4. ('40) 27 AIR 1940 Lah 359 (361) : I L R (1941) Lah 22 : 191 Ind Cas 42 (FB), *Khair Muhammad Khan v. M^l. Jannat*. (Defendant constructing chabutra on common land of both the parties and appropriating it to his exclusive use.)
[See also ('50) 37 A I R 1950 East Punj 21 (Pr. 10), *Thaman Singh v. Sohna*. (Common well belonging to plaintiff and defendant — Defendant fixing Persian wheel over well — Only trespass — No ouster.)]
5. ('42) 29 A I R 1942 Pat 188 (189) : 197 Ind Cas 818 (DB), *Kuseshwar Jha v. Uma Kant*. (Whether the wrong is a continuing one or not must depend upon the nature of the wrong and not upon the nature of the land over which it is committed.)
- ('41) 28 A I R 1941 Pat 181 (183) : 19 Pat 852 : 194 Ind Cas 243 (DB), *Akhauri Haliwant v. Deo Narain*. (Dispossession of the public is also not a continuing wrong.)
- ('39) 26 A I R 1939 Nag 145 (146) : 182 Ind Cas 613, *Superintendent Leprosy Asylum v. Ramsahagir*. (Whether the land belongs to a community or not, if one person takes sole and exclusive possession of it, or some portion of it, and excludes all others who have a right to occupation from possession, then the trespass is not a continuing trespass.)
6. ('96) 19 Mad 154 (156) (DB), *Municipal Commissioners v. Sharangapani Mudaliar*.

Even assuming that dispossession is a continuing wrong, this does not mean that the plaintiff will have a perpetual right to sue in respect of it. Because, under s. 28, at the end of the period of limitation for a suit for possession calculated from the date of dispossession, the plaintiff's right to the property will be extinguished and the defendant will acquire a right to the property, with the result that the defendant's act will cease to be a wrong from that moment.⁷ The reason is that s. 23 is based on the principle that there arises a fresh cause of action at every moment of the time during which the wrong continues and on the expiry of the period of limitation in respect of the cause of action which arises immediately on the dispossession, the plaintiff's right to the property will be extinguished and the defendant will acquire a right to it.

The occupation for private residence of a *balakhana* over a mosque was held in the undermentioned case,⁸ to be a desecration of a place of worship and a continuing wrong. The decision can be supported on the view that the occupation was only a trespass and not a complete ouster.

17. Procuring wrongful attachment under Section 146 of the Criminal Procedure Code. — Where, by reason of the defendant's act in attempting to interfere with the plaintiff's possession, the Magistrate is compelled to intervene and attach the property, the act of the defendant must, according to the High Court of Calcutta be taken to have created a state of affairs, every moment's continuance of which is a new wrong against the plaintiff for which the defendant is responsible. The wrong is therefore a *continuing* one and limitation for a suit for a declaration of title begins to run at every moment

7. ('49) 36 AIR 1949 Orissa 1 (9) : 14 Cut L Tim 73 (DB), *Radhakrishna Das v. Radharamana Swami*.

('42) 29 A I R 1942 Pat 188 (189) : 197 Ind Cas 818 (DB), *Kuseshwar Jha v. Uma Kant*.

('40) 27 A I R 1940 Pat 449 (455) : 13 Pat 208 : 190 Ind Cas 46 (DB), *Bibhuti Narayan Singh v. Mahadeo Asram*.

[See also ('41) 28 AIR 1941 Pat 181 (183) : 19 Pat 852 : 194 Ind Cas 243 (DB), *Akhauri Hailwant v. Deo Narain*. (In this case it is held that in case of dispossession, a suit for possession will not lie under S. 28 after 12 years from the dispossession — But it is not clear whether this will be so even on the assumption that dispossession is a continuing wrong — The trend of the judgment seems to be to the effect that as the plaintiff's right to the property will be extinguished under S. 28 after 12 years from the dispossession the dispossession is not a continuing wrong — It is difficult to follow the reasoning.)]

[But see ('40) 27 A I R 1940 Lah 359 (362) : I L R (1941) Lah 22 : 191 Ind Cas 42 (FB), *Khair Muhammad Khan v. Mt. Jannat*. (Submitted not correct.)]

('39) 26 A I R 1939 Nag 145 (146) : 182 Ind Cas 613, *Superintendent, Leprosy Asylum v. Ramsahaigir*. (The assumption that if dispossession is held to be a continuing wrong, a suit for possession would never become barred and Arts. 142 and 144 would be reduced to a dead letter, if not correct.)]

8. ('17) 4 A I R 1917 Lah 160 (161, 162) : 39 Ind Cas 116 : 1917 Pun Re No. 31 (DB), *Muhammad Ahamad v. Muhammad Fazal*. (('09) 1909 Pun Re No. 53 (DB), *Yad Ali v. Mubarak Ali*, distinguished.)

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of the time during which the wrong continues.¹ The right to the declaration is based on the infringement of the *negative* duty of not interfering with the plaintiff's right to actual possession. The case must be distinguished from a case where the defendant has *ousted* the plaintiff from possession and the plaintiff sues for possession as the effect of an attachment under S. 146 is not the *dispossession* of the rightful owner, the legal possession still continuing in him notwithstanding the attachment;^{1a} so that the defendant's act may be treated as amounting to a fresh interference with the plaintiff's possession at every moment of the time during which the attachment continues. (See Note 16.)

The High Court of Patna has also taken the same view as that of the Calcutta High Court.^{1b}

The High Court of Madras has, however, held that the defendant's act resulting in an order of attachment under S. 146, Criminal Procedure Code, is not a continuing wrong and that a suit for a declaration must be brought within six years of the date of attachment.² The decision does not say why it is not a continuing wrong, and does not advert to the principles and tests applicable for finding out whether a wrong is a continuing one or not. As has also been observed in the undermentioned case,³ the decision of the Madras High Court leads to an obvious anomaly, namely, that if the suit is not brought within six years of the attachment, neither of the claimants can obtain a declaration of title, and yet the title continues unaffected in the true owner, the Magistrate thus continuing as a stakeholder for an indefinite period.

In the undermentioned case⁴ where the facts did not show that the attachment of the property by the Magistrate was caused by the wrongful denial of the plaintiff's title by the defendants, it was held that the defendant was not guilty of any wrong and consequently no fresh period of limitation began to run under this section, and that

Section 23 — Note 17

1. ('22) 9 AIR 1922 Cal 419 (421) : 49 Cal 544 : 65 Ind Cas 200 (DB), *Panna Lal Biswas v. Panchu Ruidas*. (Plaintiff dispossessed by defendant — Subsequent attachment by Magistrate under S. 146 constructively restores possession to plaintiff—Case can be treated as one of continuing wrong.)
- ('16) 3 A I R 1916 Cal 751 (754) : 31 Ind Cas 242 (DB), *Brojendra Kishore Roy v. Bharat Chandra Roy*.
- 1a. ('22) 9 AIR 1922 Cal 419 (421) : 49 Cal 544 : 65 Ind Cas 200 (DB), *Panna Lal Biswas v. Panchu Ruidas*.
- ('16) 3 A I R 1916 Cal 751 (752) : 31 Ind Cas 242 (DB), *Brojendra Kishore v. Bharat Chandra*.
- ('03) 26 Mad 410 (415) (DB), *Rajah of Venkatagiri v. Isakapalli Subbiah*.
- 1b. ('38) 25 A I R 1938 Pat 212 (215) : 175 Ind Cas 256, *Ghamandi Misser v. Jagarnath Misser*. (('33) A I R 1933 Pat (224) (DB), *Jurawan v. Ramsarakh*, followed.)
2. ('03) 26 Mad 410 (416) (DB), *Rajah of Venkatagiri v. Isakapalli Subbiah*. ('93) 20 Cal 906 (DB), *Chukkun Lal v. Lolit Mohan*, dissented from.)
3. ('16) 3 AIR 1916 Cal 751 (753) : 31 Ind Cas 242 (DB), *Brojendra Kishore Roy v. Bharat Chandra Roy*.
4. ('25) 12 AIR 1925 Nag 236 (236) : 20 Nag L R 195 : 85 Ind Cas 631, *Yeknath v. Bahia*.

the right to a declaration accrued on the date of the attachment by the Magistrate which gave rise to the cause of action for declaration.

Section 23
Notes 17-18

18. Other cases of continuing wrongs independent of contract. — A wrongful seizure of moveable property under a legal process is not a continuing wrong.¹ So also, the withholding of the property seized is not a continuing wrong.² The contrary view taken in the cases cited below³ is not correct.

Where Swetambari Jains placed *charans* or impressions of footprints of saints on a sacred hill, and such placing constituted the infringement of a right of the Digambari Jains, it was held by the Privy Council that the wrong committed was a continuing one within the meaning of S. 23.⁴ The duty in the above case was to refrain from placing any such thing on the hill. The placing of it effected a change in the condition of things which was a continuing source of injury for which the Swetambaris were responsible.

A wrong entry in the village papers against the rights of the plaintiff is not a continuing wrong. The wrong, if at all, is committed once and for all when the entry is made.⁵

Section 23 — Note 18

1. ('40) 27 AIR 1940 Rang 276 (277) : 1941 Rang L R 1 : 192 Ind Cas 625 (FB), *Eng Gim Moh Firm v. Chinese Merited Banking Co. Ltd.* (In execution of decree decree-holder wrongfully attaching property of stranger—Suit by stranger for compensation for wrongful seizure is governed by Art. 29 — Such wrongful seizure is not continuing wrong within S. 23.)
- ('37) 24 AIR 1937 Mad 117 (117) : I L R (1937) Mad 491 : 167 Ind Cas 495, *Commissioner, Salem Municipality v. Bakthavatsalu.* ((1905) 1 Ch 205 *Harrington (Earl) v. Derby Corporation* relied on.)
- ('30) 17 AIR 1930 Mad 635 (637) : 53 Mad 621 : 126 Ind Cas 721 (DB), *Fannaji Devi Chand & Co. v. Sanaji Kapurchand.*
- ('14) 1 AIR 1914 Mad 135 (136, 137) : 38 Mad 655 : 24 Ind Cas 754 (DB), *N. Venkataramier v. Vythilinga Thambiran.* (('02) 25 Mad 540 (DB), *Pamu Sanyasi v. Zamindar of Jayapur* followed.)
- ('07) 29 All 615 (618) : 4 All L Jour 548, *Ram Narain v. Umrao Singh.* (Semble.)
- ('75) 24 Suth W R 298 (299) (DB), *Ram Singh Mohapattur v. Bhotro Manjee.*
See also Note 8 to Article 29.
2. ('02) 25 Mad 540 (542) (DB), *Pamu Sanyasi v. Zamindar of Jayapur.* (('01) 24 Mad 339 (DB), *Yamuna Bai v. Solayya* distinguished — But the distinction does not seem to be one which makes any difference in principle.)
- ('73) 19 Suth W R 339 (341) (DB), *Hughes v. Municipal Commrs. Howrah.*
3. ('25) 12 AIR 1925 All 131 (132) : 81 Ind Cas 1038, *Manga v. Changa Mal.* (The detention of property is a continuing wrong.)
- ('23) 10 AIR 1923 All 146 (148) : 45 All 208 : 73 Ind Cas 299 (DB), *Jhabbu v. Mt. Batul.* (Suit for damages for wrongful distraint— Limitation — U. P. Tenancy Act, S. 146—Unlawful distraint continues and is renewed every day that the distraint lasts—Limitation must be calculated from the date when the distraint ends.)
- ('01) 24 Mad 339 (341) (DB), *Yamuna Bai v. Solayya Kavundan.* (Detention is a continuing wrong.)
4. ('33) 20 AIR 1933 P C 193 (197) : 60 Ind App 313 : 12 Pat 681 : 144 Ind Cas 346 (P C), *Hukum Chand v. Maharajah Bahadur Singh.* (('80) 6 Cal 394 (PC), *Rajrupkoer v. Abdul Hossein* relied on.)
5. ('97) 20 All 35 (37) : 1897 All W N 193 (DB), *Francis Legge v. Rambaran.* ('06) 4 Cal L Jour 568 (572, 573) : 11 Cal W N 186 (DB), *Shyamanand Das v. Raj Narain Das.* (It is not a wrong at all.)

Section 23
Notes 18-19

Where an order of injunction is issued against A restraining him from building a certain wall, and A in breach of the order builds up the wall, there is a continuing wrong, and an application under O. 21, R. 32, Civil Procedure Code, is not barred as long as the wall remains.⁶ The infringement of a trade mark is a continuing wrong so long as the infringement continues.⁷

Where A is entitled under the law to a water-connection to his house from the municipal main pipes and the municipality cuts off the connection, there is clearly a continuing wrong so long as the connection is withheld.⁸

The causing of a nuisance by throwing latrine-water through a hole in the wall is a continuing wrong.⁹

The refusal of the public authority to follow the prescribed procedure under the Land Acquisition (Mines) Act of 1885 and to pay compensation is not a continuing wrong.¹⁰

Where Sikhs had acquired title by adverse possession over a mosque, it was held that all rights of the Muhammadans in the mosque, including the right to pray, were extinguished and hence the refusal of the Sikhs to allow the Muhammadans to pray could not constitute a continuing wrong.¹¹

The defendant, a co-owner fixed a persian wheel over a well which was in enjoyment of the plaintiff. It was held that the fixing of the wheel amounted to a continuing wrong.¹² Where the trustees under a trust continued to pay a certain monthly amount to the male heirs of the settlor for a long period to the exclusion of the female heirs it was held that the cause of action for a suit for declaration of title by the female heirs arose when effective denial of their right first took place and not upon the making of each payment and that this section did not apply.¹³

19. Successive breaches of contract. — This section does not apply to *successive* as opposed to continuing breaches of contract. Section 23 of the Act of 1871 did not provide for continuing breaches of contract, but for *successive* breaches of contract and continuing

(10) 5 Ind Cas 115 (116) (DB) (Cal), *Mohamed Mehdi Hasan Khan v. Phul Kuar*.
(37) 24 AIR 1937 Oudh 291 (293) : 13 Luck 143 : 166 Ind Cas 774 (DB), *Bank of Upper India v. Mt. Hira Kuer*.

6. (36) 23 AIR 1936 Lah 334 (334, 335) : 162 Ind Cas 303 (DB), *Moti Ram v. Hans Raj*. (Reversing (35) AIR 1935 Lah 702, *Moti Ram v. Hans Raj*.)

7. (12) 15 Ind Cas 116 (117) : 1913 Pun Re No. 97 (DB), *Abdul Salam v. Hamid Ullah*.

8. (29) 16 AIR 1929 All 870 (871) : 118 Ind Cas 713 (DB), *Municipal Board, Allahabad v. Sardar Bahadur Johari*.

9. (21) 60 Ind Cas 529 (529) (Lah), *Rukn-ud-Din v. Altaf Ahmad*.

10. (36) 23 AIR 1936 Pat 513 (518) : 15 Pat 510 : 164 Ind Cas 860 (DB), *Secy. of State v. Lodna Colliery Co., Ltd.*

11. (38) 25 AIR 1938 Lah 369 (385, 386) : 175 Ind Cas 945 (FB), *Masjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar*.

12. (50) 37 AIR 1950 East Punj 21 (23), *Thaman Singh v. Sohna*.

13. (44) 31 AIR 1944 Oudh 139 (147) : 19 Luck 515 : 216 Ind Cas 276 (DB), *Md. Ata Husain v. Husain Ali*.

wrongs and nuisances. As to successive breaches of contract, it was provided that a fresh right arose and a fresh period of limitation began to run upon every fresh breach,¹ but it was also provided that this did not apply to suits for the breach of contracts for the payment of money by instalments, where, on default made in payment of one instalment, the whole became due.²

The provision as to successive breaches has not been re-enacted in the corresponding section in the succeeding Acts. This, however, cannot be taken to mean that successive breaches of contract do not give rise to successive causes of action. Article 115 of the Act makes it clear that in the case of successive breaches of contract, time begins to run upon every breach. Where, therefore, a party has recurring or successive causes of action under the terms of a contract, each cause of action will give a fresh start to the period of limitation and the mere fact that a party has not availed himself of the earlier cause of action will not prevent him from availing himself of a later one.³

A contrary view was, however held in the undermentioned case.⁴ In that case A, who purchased land from B, agreed to pay certain fees annually to B in respect of such land, and further stipulated that in default of payment as agreed to, B should be entitled to the possession of a portion of the land. A never made any payment and twelve years after the first default, B sued for possession of the said portion. It was held that time ran only from the date of the first default and that the suit was barred under Art. 143 of the Act. A similar view was held in the undermentioned case.⁵ The decisions, it is submitted, do not seem to be supported on principle. See also the undermentioned case.⁶ At the same time, it should be remembered that if a breach of contract gives the plaintiff a cause of action to sue for possession his right to the property will, under s. 28, be extinguished notwithstanding that subsequent breaches may give him fresh causes of action. (See Note 16.)

Where A stands surety for B, a judgment-debtor who has been arrested in execution of a decree, and according to the terms of the surety bond, A undertakes but fails to produce B on each date of hearing of the case, the case is one of *successive* breaches and is not one of a continuing breach.⁷ Similarly, where A executes an instalment bond in

Section 23 — Note 19

1. ('75) 7 N W P H C R 53 (54, 55) (DB), *Sadha v. Mt. Bhagwani*. (Mortgagee undertaking to pay annuity—Condition of forfeiture on default—Each default gives a fresh cause of action.)
2. ('75) 24 Suth W R 20 (20) (DB), *Raghoo Nath Doss v. Ranee Shiromonee Pat Mahadebee*.
3. ('31) 18 AIR 1931 Pat 285 (290, 291) : 134 Ind Cas 609 : 11 Pat 112 (DB), *Mukhdeo Singh v. Harakh Narayan Singh*.
4. ('82) 4 All 493 (496) : 1882 All W N 125 (DB), *Bhojraj v. Gulshan Ali*.
5. ('97) 1897 Pun Re No. 28, *Achhar Mal v. Hukman*. (Plaintiff's cause of action arose on the date of the first default in paying interest.)
6. ('16) 3 AIR 1916 Lah 403 (404) : 35 Ind Cas 235 (236), *Locha Ram v. Jindwadda Khan*. (Denial of landlord's title—Landlord can condone forfeiture of right—He is entitled to sue on subsequent act occasioning forfeiture.)
7. ('35) 22 AIR 1935 Lah 174 (175) : 153 Ind Cas 459, *Jalaldin v. Mehanga Ram*.

Section 23
Notes 19-20

favour of B, his judgment-creditor, stipulating that he will pay monthly a certain sum of money, and that if five consecutive instalments are not paid, B might call for payment of the whole amount and execute the decree, the case is one of successive breaches. The non-payment of instalments is a constantly recurring cause of action and the decree-holder B can treat as his cause of action *any* of the defaults.⁸ Where under a compromise the defendant undertook to deliver a certain quantity of grain to the plaintiff yearly, it was held that the failure to pay each year gave rise to a fresh cause of action and that the plaintiff could enforce his right to the grain for as many years back as were the period of limitation.⁹

20. Successive wrongs independent of contract. — The section does not apply to *successive* wrongs. Where there are successive infringements of an existing or continuing right, each infringement is a wrong thus giving rise to successive wrongs, affording successive causes of action. As in the case of successive breaches of contract, the mere fact that a party has not availed himself of an earlier cause of action will not prevent him from availing himself of a later one. Thus, each act of trespass gives a new cause of action for a proceeding to restrain the trespass.¹ Similarly, where plaintiff sued for a perpetual injunction restraining the defendant from discharging rain-water on the roof of the plaintiff's shop through a *parnala*, it was held that on each occasion when the defendant discharged water through the *parnala* on the plaintiff's roof, the plaintiff got a fresh cause of action and that the last occasion when this was done may be availed of as the cause of action for a suit.² In *Jalandhar Thakur v. Jharula Das*,³ where X was appropriating for himself without any right the daily surplus income from the offerings made to a Hindu temple, and ten years after X had begun to do so the *shebait* of the temple sued X for a declaration that he was entitled to the said income, it was held by their Lordships of the Privy Council that the suit was not barred by limitation. Their Lordships observed: "On each occasion upon which Jharula Das received and wrongfully appropriated to his own use a share of the income to which the shebait was entitled, Jharula Das committed a fresh actionable wrong in respect of which a suit could be brought against him by the shebait."

See also the undermentioned cases.⁴

8. ('69) 12 Suth W R 71 (72) : 3 Beng L R App 112 (DB), *Mt. Khedu v. Kalu*.

9. ('04) 1904 Pun L R No, 106, p. 393, *Rattan Das v. Gopal Das*. (Words 'continuing breach' were however used. This is not correct.)

Section 23 — Note 20

1. ('14) 1 AIR 1914 All 531 (532) : 25 Ind Cas 185, *Sheo Prasad Sonar v. Mangar Manhar*. (Door opened in wall for passage to defendant's house through plaintiff's land.)

2. ('20) 7 AIR 1920 Lah 195 (196) : 56 Ind Cas 1003, *Nur Muhammad v. Gauri Shankar*. ('14) AIR 1914 All 531, *Sheo Prasad v. Mangar*, followed.)

See also Note 10 to Article 120.

3. ('14) 1 AIR 1914 P C 72 (74) : 42 Cal 244 : 41 Ind App 267 : 24 I. C. 501 (PC).

4. ('45) 32 AIR 1945 Nag 106 (109) : ILR (1945) Nag 273, *Mahomedans of Lonar v. Hindus of Lonar*. (Suit by Hindus against Muslims for declaration that

24.* In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results.

Illustration.

A owns the surface of a field. B owns the sub-soil. B digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation in the case of a suit by A against B runs from the time of the subsidence.

* Act of 1877 : S. 24.

Same as above except Illustration (b) (now repealed) which was as follows :

(b) A speaks and publishes of B slanderous words not actionable in themselves without special damage caused thereby. C in consequence refuses to employ B as his clerk. The period of limitation in the case of a suit by B against A for compensation for the slander does not commence till the refusal.

Act of 1871 : S. 25.

25. In the case of a suit for compensation for an act lawful in itself, which becomes unlawful in case it causes damage, the period of limitation shall be computed from the time when damages accrues.

Illustration.

A owns the surface of a field. B owns the sub-soil. B digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation runs from the time of the subsidence.

Act of 1859.

No corresponding provision.

suit property was Hindu Devasthan in which Hindus had right to worship in their own way—Every time defendants dispute plaintiffs' right there is recurring cause of action.)

('41) 28 AIR 1941 Mad 498 (500) : ILR (1941) Mad 544 : 198 Ind Cas 793 (DB), *Srinivasa Ayyangar v. Ramanujachariar*. (Plaintiff having right to perform festival in temple—Order under S. 144, Criminal P. C. obtained by defendant in 1914—Festival not performed by plaintiff upto 1927—Festival held again in 1930 and defendant obtained order under S. 144—Suit by plaintiff for declaration in 1930 held not barred.)

('99) 23 Bom 659 (665) : 1 Bom L R 118 (DB), *Jugal Kishore v. Lakshmandas*. (Every breach of constructive trust gives a fresh cause of action.)

('20) 7 AIR 1920 Cal 558 (560) : 57 Ind Cas 805 (DB), *Dhanpat Singh v. Mahesh Nath*. (Every denial of the right to an account from a trustee will give rise to a fresh cause of action.)

('09) 1 Ind Cas 289 (302) (DB) (Cal), *Baroda Prosad Banerjee v. Gajendra Nath Banerjee*. (Do.)

('18) 5 AIR 1918 All 102 (104, 105) : 44 Ind Cas 980 : 40 All 461 (DB), *Debi Prasad v. Badri Prasad*. (Each invasion of right to take fallen wood gives rise to a fresh cause of action and suit for declaration can be brought within six years of each invasion.)

('83) 7 Bom 323 (327) : 7 Ind Jur 613 (DB), *Anandrao Bhikaji v. Shankar Daji*. (Infringement of right of exclusive worship.)

('75) 24 Suth W R 97 (98), *Ramphul Sahoo v. Misree Lall*. (A suit to have a drain closed on the ground that it passed through plaintiff's land — Held that the claim was not barred by limitation.)

Section 24
Note 1

Synopsis

1. Scope of the section.
2. Breach of contract.
3. "Specific injury."
4. "Act."
5. Starting point of limitation.

1. Scope of the section. — This section applies only where the act of the defendant does not, *of itself*, constitute a legal injury, but an injury subsequently results therefrom.¹ In such cases, time will run only from the time when the injury results. The illustration to the section makes this clear. B's act in digging coal does not constitute a legal injury inasmuch as he owns the sub-soil and is entitled to dig coal. But the subsidence resulting from this act is itself an interference with A's enjoyment of his property and is an injury.² Where the act of the defendant *itself constitutes a legal injury*, this section has no application and the mere fact that the plaintiff suffers damage subsequently will not enable him to compute the period of limitation for a suit for compensation in respect of such act, from the date of the damage. Thus, where A threw sulphuric acid on the face of B, as a consequence of which B, after some time, lost his eyes, and sued A for damages, it was held that the act of A in throwing sulphuric acid was an assault, in itself constituting a legal injury; that S. 24 did not therefore apply, and that time would run, not from the date when the plaintiff B lost his eyes, but from the date when the act was committed.³ Similarly, where owing to the wrongful omission of the defendant District Board, the plaintiff's trap dashed against a heap of road gravel and the plaintiff injured himself, as a result of which his leg had subsequently to be amputated, and he sued the District Board for damages, it was held that this section did not apply to the case, that the illustration made it clear as to the class of cases to which the section applied, and that time ran not from the date of the amputation of the leg, but from the date of the accident.⁴ Where a

Section 24 — Note 1

1. ('24) 11 AIR 1924 Bom 290 (292, 294) : 84 Ind Cas 796 (DB), *Abdulla Mahomed Jabli v. Abdulla Mahomed Zulaikhi*. (It is only where it is necessary to consider the act plus the consequences as cause of action that the time runs from the consequences where those consequences are injurious.)
[See also ('27) 14 AIR 1927 Nag 85 (86) : 98 Ind Cas 679, *Hardeo v. Ramchandra*.
(74) 1 N W P H C R 292 (293) (DB), *Furookh Hosein v. Fuzul Hosein*. (Malicious act — Time will run from the time when the act was committed, or at least from the time when damage resulting from the injury was actually suffered.)]
2. ('91) 18 Cal 91 (96) (DB), *Dwarka Nath Gupto v. Corporation of Calcutta*.
3. ('24) 11 AIR 1924 Bom 290 (292) : 84 Ind Cas 796 (DB), *Abdulla Muhammad Jabli v. Abdulla Mahomed Zulaikhi*.
4. ('20) 7 AIR 1920 Pat 324 (329) : 58 Ind Cas 749 : 5 Pat L Jour 359 (DB), *Allan Mathewson v. District Board, Manbhum*. (In cases of personal injury, fresh cause of action does not arise by reason of the mere aggravation of the original injury.)
See also S. 23 Note 3.

person delivered certain goods to a railway company for carriage and the company allowed the goods to deteriorate due to rain water, etc., it was held that this section applied and no suit for damages could be brought unless and until specific injury occurred to him.^{4a} Where a person was wrongfully restrained it was held that the wrongful restraint was actionable *per se* and it itself gave rise to a cause of action. The limitation started when the wrongful restraint took place and not when injury i. e. illness to such person, resulted from it.^{4b}

The corresponding section of the Act of 1877 contained another illustration as follows :

“(b) A speaks and publishes of B slanderous words not actionable in themselves without special damage caused thereby. C, in consequence, refuses to employ B as his clerk. The period of limitation in the case of a suit by B against A for compensation for the slander does not commence till the refusal.”

A slander, in India, is clearly an act in itself constituting a legal injury, being an infringement of the legal right of reputation. (See Art. 25 and commentary thereunder.) In view of the discussion above, S. 24 will not apply to such cases and the illustration was therefore wrong; hence, apparently, it has been omitted from the present section. Before the amendment of S. 235 of the Companies Act by Act XXII of 1936, it was held in the undermentioned case⁵ that this section would apply to an application under section 235 of the Companies Act, 1913, which was to be regarded as a *suit* for compensation for misfeasance of the directors (being wilful neglect and breach of trust). It is submitted that this view was not correct. The misfeasance in the case was clearly itself a wrongful act and S. 24 could not apply to such cases. The undermentioned cases⁶ were also cases of similar applications, the limitation applicable to which had to be decided. In none of these cases, however, was the applicability of S. 24 considered or adverted to. Under the Companies Act, as amended above, limitation is provided for such applications in the Act itself and under S. 29, this section will not apply to them.

The section does not extend or restrict any period of limitation but *alters the date* or time from which limitation has to be computed according to the third column of the articles of the first schedule. Thus, if the suit is for compensation for any malfeasance or mis-

4a. ('47) 34 AIR 1947 Nag 224 (227, 228) : I L R (1947) Nag 726, *Firm Sitaram Bindrabai v. G. I. P. Rly.*

4b. ('42) 29 AIR 1942 Mad 539 (548) : I L R (1942) Mad 696 : 203 Ind Cas 45 (DB), *Gurucharan Kaur v. Madras Province.*

5. ('30) 17 AIR 1930 Bom 572 (585, 591) : 54 Bom 226 : 127 Ind Cas 305 (DB), *Govind Narayana v. Rangnath Gopal.*

6. ('27) 14 AIR 1927 Lah 433 (434, 435) : 8 Lah 167 : 100 Ind Cas 907 (DB), *Bhim Singh v. Basheshwar Nath.*

('23) 10 AIR 1923 Lah 58 (59, 60) : 71 Ind Cas 899 (DB), *Bank of Multan v. Hukum Chand.*

('25) 12 AIR 1925 All 519 (528) : 88 Ind Cas 785 : 47 All 669, *In re Union Bank of Allahabad.*

Section 24
Notes 1-2

feasance, independent of contract, which is not actionable without specific injury, the period of two years prescribed by Art. 36 will run, not from the date of malfeasance or misfeasance, but from the time when the injury results.⁷ The effect of this section on Article 36 is, thus to *postpone* the starting point of limitation to the date when the injury results. Similarly, where an act, not actionable without proof of specific injury resulting therefrom, is done by a local authority in pursuance of their powers under a statute, the commencement of the period of limitation under Article 2 will, by virtue of this section, be postponed to the time when the injury results.⁸

2. Breach of contract. — It has been held by the High Court of Allahabad that the section applies not only to suits based on torts but also to suits based on contracts.¹ Thus, where A entrusted a certain sum of money to B to be paid by the latter to A's mortgagee and B failed to pay the amount within a reasonable time, it was held by Ashworth, J., that the mere failure to pay did not give rise to a cause of action for compensation but that a cause of action arose when A suffered damages by being forced to pay an additional sum as interest to his mortgagee, and the suit was therefore governed by this section read with Article 116 of the Act.² A contrary view, namely, that the section applies only to suits based on torts and not to suits based on contracts, has been held by the High Court of Rangoon.³ The High Court of Patna has held that though in proper cases S. 24 can be applied to actions on contracts, in a suit for compensation for a breach of contract, the breach of contract *per se* gives rise to a cause of action and time runs from the date of the breach and to such a case S. 24 has no application.⁴

7. ('29) 16 AIR 1929 Pat 245 (246) : 8 Pat 776 : 120 Ind Cas 626 (DB), *Jagan-nath Marwari v. Kali Das Raha*.

See also Article 36 Note 4.

8. ('09) 2 Ind Cas 819 (824) : 1909 Pun Re No. 72 (DB), *Richard Watson v. Municipal Corporation, Simla*.

('91) 18 Cal 91 (96, 97) (DB), *Dwarka Nath Gupto v. Corporation of Calcutta*. (Construction of reservoir by Corporation of Calcutta — Subsidence of plaintiff's house caused — Subsidence gives a cause of action.)

See also Article 2 Note 8.

Section 24 — Note 2

1. ('26) 13 AIR 1926 All 605 (609) : 95 Ind Cas 913 (DB), *Kedar Nath v. Har Govind*.

2. ('26) 13 AIR 1926 All 605 (607, 608) : 95 Ind Cas 913 (DB), *Kedar Nath v. Har Govind*. (Kanhaiya Lal J., dealt with the case as falling under Article 83 and did not advert to S. 24.)

3. ('38) 25 AIR 1938 Rang 258 (259, 260) : 1938 Rang L R 457 : 176 Ind Cas 608 (FB), *Anamalai Chettyar v. N. M. Cowasjee*. (Limitation applicable to a suit brought against an advocate for neglect or misconduct in his professional duties is that prescribed by Art. 90 and not by S. 24, as such suit arises on negligence arising out of contract between principal and agent and not out of tort — A I R 1936 Rang 510, relied on.)

('36) 23 AIR 1936 Rang 510 (514) : 166 Ind Cas 48, *V. M. Gany v. Leong Chye*. (('26) AIR 1926 All 605 (DB), *Kedar Nath v. Har Govind*, Dissented from.)

4. ('51) 38 AIR 1951 Pat 348 (Para 8) : 28 Pat 974 (DB), *Jagat Kishore v. Parmeshwar Singh*. (Judgment-debtor paying out of Court — Decree-holder not

3. "Specific injury." — The word "injury" in this section includes *legal injury*.¹ The word "specific" means "that can be specified."²

Section 24
Notes 3-5

4. "Act." — Under s. 3 cl. (2) of the General Clauses Act, 1897, "act" includes "illegal omissions."¹

5. **Starting point of limitation.** — The computation of time in cases coming under this section is to be made from the date on which the *injury results* and not from the date on which the plaintiff becomes *aware* of the injury or loss.¹

Computation of
time mentioned in
instruments.

25.* All instruments shall, for the purposes of this Act, be deemed to be made with reference to the Gregorian calendar.

Section 25

Illustrations.

(a) A Hindu makes a promissory note bearing a Native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiration of four months after date computed according to the Gregorian calendar.

(b) A Hindu makes a bond, bearing a Native date only, for the repayment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiration of one year after date computed according to the Gregorian calendar.

Synopsis

1. Scope of the section.
2. "Shall, for the purposes of this Act, be deemed."
3. Instrument fixing thirtieth of a Native month for payment—Month containing only twenty-nine days.

1. Scope of the section. — The ordinary meaning of the word "month" in the English language is a *lunar* month and not the artificial month in the Gregorian calendar.¹ Until the year 1850 the

* Act of 1877 : S. 25 ; Act of 1871 : S. 26.

Same as above.

Act of 1859.

No corresponding provision.

certifying payment but realising money over again by execution — Breach of contract occurs when decree-holder applies for execution contrary to implied contract and time begins to run from then and not from the time when the money is actually paid over again.)

Section 24 — Note 3

1. ('30) 17 AIR 1930 Bom 572 (585) : 54 Bom 226; 127 Ind Cas 305 (DB), *Govind Narayan v. Rangnath Gopal*.
2. ('26) 13 AIR 1926 All 605 (608) : 95 Ind Cas 913 (DB), *Kedar Nath v. Har Govind*.

Section 24 — Note 4

1. ('26) 13 AIR 1926 All 605 (609) : 95 Ind Cas 913 (DB), *Kedar Nath v. Har Govind*.
[See ('91) 18 Cal 91 (96, 97) (DB), *Dwarka Nath v. Corporation of Calcutta*.]

Section 24 — Note 5

1. ('36) 23 AIR 1936 Rang 310 (313) : 164 Ind Cas 410, *Tavoy Municipality v. U Khoo Zun Nee*.

Section 25 — Note 1

1. ('09) 2 Ind Cas 573 (583): 36 Cal 516 (DB), *South British Insurance Company v. Brajonath Shaha*.

Section 25
Note 1

word "month" in an Act of Parliament meant only "lunar month," but since that date it is used in Acts of Parliament as meaning calendar month.² The rule as to "month" meaning a lunar month in contracts still remains the law in England.³ It has been held that the same interpretation must be given in this country also to the word "month" used in a contract in English.⁴ Thus, where an insurance contract provided that the lapse of six months after loss, without any suit or action being taken, should be regarded as conclusive evidence against the validity of any claim in respect of the loss, it was held that the word "month" must be taken to be "lunar month" of twenty eight days.⁵

A year in English language means the period in which the revolution of the earth round the sun is completed.

The Legislature in this country has, for certain purposes, modified the ordinary meaning of the words 'year' and 'month'. Thus, in s. 3 cl. (33) of the General Clauses Act, 1897, a 'month' is defined as meaning a month reckoned according to the British calendar; and in cl. (59) of the same Act, a 'year' is defined as meaning a year reckoned according to the British calendar. These definitions, however, apply only where such expressions *have been used in any Act of the Legislature*.⁶ The present section enacts that all *instruments* shall for the purposes of *this Act* be deemed to be made with reference to the Gregorian calendar.

As has been seen already, in cases not falling within the scope of these enactments a "month" and a "year" would still bear their ordinary meanings as explained above.

2. ('09) 2 Ind Cas 573 (583) : 36 Cal 516 (DB), *South British Insurance Company v. Brajonath Shaha*.

Wharton's "Law Lexicon."

3. ('09) 2 Ind Cas 573 (583) : 36 Cal 516 (DB), *South British Insurance Company v. Brajonath Shaha*.

4. ('09) 2 Ind Cas 573 (584) : 36 Cal 516 (DB), *South British Insurance Company v. Brajonath Shaha*.

5. ('09) 2 Ind Cas 573 (584) : 36 Cal 516 (DB), *South British Insurance Company v. Brajonath Shaha*.

6. ('09) 2 Ind Cas 573 (584) : 36 Cal 516 (DB), *South British Insurance Company v. Brajonath Shaha*.

('84) 10 Cal 913 (914) (DB), *Saroda Prashad Ganguli v. Pahali Mahanti*. (The word "months" in S. 32 of Act X of 1859 should be computed, in calculating the period of limitation, according to the English calendar.)

('79) 4 Cal 497 (497) : 3 Cal L R 398 (DB), *Mahomed Elahee Bukhsh v. Brojokishore Sen*. (The judgment in this case simply follows the decisions in 4 Beng L R App 53 and 9 Beng L R App 41.)

('70) 13 Suth W R 183 (183) : 4 Beng L R App 53 (DB), *Maharaj Jay Mangal Singh Bahadur v. Lal Rang Pal Singh*. (Year and month in the Limitation Act must be computed according to the English calendar.)

('72) 18 Suth W R 403 (403) : 9 Beng L R App 41 (DB), *Khasro Mandar v. Premlal*.

[But see ('24) 11 AIR 1924 Nag 216 (216) : 76 Ind Cas 44, *Motiram v. Lakmichand*. (A year calculated according to the Sambat calendar amongst Hindi speaking parties should not be considered to mean a year according to the British calendar.)]

2. "Shall, for the purposes of this Act, be deemed." — There was no provision corresponding to this section in the Act of 1859 and it was held that when a Native date was borne by an instrument, and a debt made payable within a certain number of months, those months must be taken to be the *Native* months, and the period of limitation reckoned by the English year *from the English date which may correspond with the Native date on which the stipulated period of payment calculated according to the Native months, may expire*, the reason of the decision being that the parties having used Native dates must be presumed to have contracted with reference to Native and not to English calendar.¹

After the introduction of the present provision in 1871, there has been a conflict of opinions as to whether the words "month" and "year" used in any instrument must, for purposes of the Act, be reckoned according to the Gregorian calendar even in cases where the intention of the parties to use a different calendar is clearly apparent. In *Nilkanth v. Dattatraya*,² the High Court of Bombay held that the section means that the parties shall be deemed to have used the terms 'month' and 'year' in the sense they bear in the Gregorian calendar. In *Rungo Bujaji v. Babaji*,³ the instrument contained a stipulation as follows: "In the month of *Kartik Shake 1799*,—that is to say in four months—we shall pay in full the principal and interest." Westropp, C. J., observed as follows:

"The Court thinks that the true construction of the note is that the maker was to pay within four (lunar) months from the date, which would expire in the month of *Kartik*. Four months according to the Gregorian calendar, would extend beyond that month, and expire in *Margasheers*. But the legislation in S. 25 of Act XV of 1877 is *absolute*. There is no saving of cases in which it appears on the face of the contract that lunar months were intended by the parties. This Court, must, therefore, be guided by S. 25, and hold the period of four months to be, for the purpose of ascertaining whether or not the suit is barred by lapse of time, four months according to the Gregorian calendar."

The view taken in *Rungo Bujaji's case*³ has been followed in the undermentioned cases.⁴ In *Latifunnissa v. Dhan Kun-*

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1. ('68 69) 5 Bom H C R A C 150 (151), *Ganpatrav Ramji v. Mannu Mohanji*. ('69) 6 Bom H C R A C 136 (136, 137), *Lalji Vaijinath v. Ravji Abaji*. ('70) 7 Bom H C R A C 77 (78), *Babaji Lakshman v. Maroti Raghaji*. (Where parties are Hindus, the presumption is that they intended to calculate the time of payment according to Hindu era notwithstanding the fact that the document (promissory note) bore also English date.)
2. ('79-80) 4 Bom 103 (104) : 4 Ind Jur 580 (DB). (Bond in this case bore Native date only and was made payable after a certain time.)
3. ('83) 6 Bom 83 (85) (DB).
4. ('24) 11 AIR 1924 Nag 208 (208) : 70 Ind Cas 338, *Harbhagat v. Narayna Rao*. (Even when lunar months are mentioned in a vernacular contract the time is to be decided by reference to calendar months—('09) 2 Ind Cas 573 (DB),

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war,⁵ the question was regarded as one of *intention* of the parties, although *Rungo Bujaji's case*³ was cited with approval by Beverley, J. It was also observed that a liberal construction should be given in cases of doubt. In that case the reckoning, according to the Gregorian calendar, gave a larger period to the debtor within which to repay the money and was accordingly adopted. The High Court of Allahabad has also held that the question is one of intention of the parties and if the intention of the parties is clear that the months should be reckoned in a particular manner, S. 25 will have no application.⁶ The Judicial Commissioner's Court of Nagpur also seems inclined to this view.⁷

Where a promissory note bore two dates, one according to the Native calendar and the other according to the British calendar and the two dates did not tally with each other, it was held that this section does not raise any presumption as to the date of the document but merely provides that the period of limitation should be worked out according to the Gregorian calendar and that the correct date should be ascertained on taking evidence.⁸

3. Instrument fixing thirtieth of a Native month for payment — Month containing only twenty-nine days. — Where money advanced under an instrument is stipulated to be repaid on the thirtieth of a particular Hindu month and it happens that that month in that year contains only twenty-nine days, the cause of action has been held to arise only on the first of the next month. Thus, where money was repayable on the 30th Pous 1283 B. S.,

South British Insurance Co. v. Brajonath distinguished on the ground that it referred to contract in the English language.)

('27) 14 AIR 1927 Mad 917 (918, 919) : 105 Ind Cas 241 (DB), *Venkatasubramania v. Bhiravaswami*. (The intention of the parties is immaterial where Section 25 applies.)

('98) 11 C P L R 91 (93), *Bhaiyalal Wani v. Jamnadas Potdar*. (Money to be paid in twelve months, i. e., up to Baisakh 1302 Fasli — Months must be calculated according to Gregorian calendar.)

('36) 23 AIR 1936 Oudh 270 (274) : 12 Luck 109 : 161 Ind Cas 605 (DB), *Raja Ram v. Rameshwar Bakhsh Singh*. (Their Lordships however rely upon Section 3, cl. (59) of the General Clauses Act which cannot apply to the case.)

('31) 18 AIR 1931 Oudh 357 (358) : 134 Ind Cas 601, *Pulai Ram Dubey v. Sanchit Misir*.

5. ('97) 24 Cal 382 (384, 385) (DB).

See also Article 132 Note 23.

6. ('15) 2 AIR 1915 All 272 (273) : 29 Ind Cas 980 (DB), *Dwarka Prasad v. Raja Ram*.

('25) 12 AIR 1925 All 138 (139) : 82 Ind Cas 330 : 47 All 66 (DB), *Roshan Lal v. Bashir Ahmed*. (Parties intending to give six months according to Hindu calendar for payment — Gregorian calendar not to be applied.)

See also Article 132 Note 23.

7. ('27) 14 AIR 1927 Nag 259 (261) : 102 Ind Cas 588, *Madhorao Narayan Rao v. Deepchand*.

8. ('41) 28 AIR 1941 Mad 587 (588), *Achuthan Nayar v. Achuthan Nayar*. (Promissory note bearing both English date and Malayalam date — Inconsistency between the two — Computation of time for limitation — Evidence as to date of note is admissible under Evidence Act, S. 96.)

and *Pous* in that year consisted only of twenty-nine days, the 29th *Pous* answering to the 12th January 1877, it was held that a suit brought on the 13th January 1880 was in time.¹ This decision has been followed by the High Court of Madras in the undermentioned case² arising under similar circumstances. These decisions, however, rest on general principles of law and have nothing to do with s. 25 of the Limitation Act.

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1. ('81) 6 Cal 239 (240) : 6 Cal L R 553 (DB), *Almas Banez v. Mahomed Buya*.
2. ('94) 17 Mad 61 (62) (DB), *Gnanasammunda Pandaram v. Palaniyandi Pillai*.

PART IV.

ACQUISITION OF OWNERSHIP BY POSSESSION.

Section 26

26.* (1) Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption, and for twenty years,

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption, and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

(2) Where the property over which a right is claimed under sub-section (1) belongs to ^a[the Crown], that sub-section shall be read as if for the words "twenty years" the words "sixty years" were substituted.

* Act of 1877 : S. 26.

Same as Section 27 of the Act of 1871 below.

Act of 1871 : S. 27.

27. Where the access and use of light or air to and for any building has been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years, and where any way or water-course or the use of any water, or any other easement, whether affirmative or negative, has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way, water-course, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation. — Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorising the same to be made.

Illustrations.

(a) A suit is brought in 1871 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him claiming title thereto as an

Explanation. — Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorising the same to be made.

Illustrations.

(a) A suit is brought in 1911 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption from 1st January 1890 to 1st January 1910. The plaintiff is entitled to judgment.

(b) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff, on one occasion during the twenty years, had asked his leave to enjoy the right. The suit shall be dismissed.

a. *Substituted* for the word "Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

Synopsis

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| 2. Extent of applicability of the Easements Act and the Limitation Act. | 11. Enjoyment should be open. |
| 3. Acquisition of easements by prescription. | 12. As an easement. |
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| 6. Easements of light and air. | 16. Sixty years' user necessary against Government. |
| 7. Right of way. | 17. Plea of easement. |
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| 9. "Any other easement." | 19. Suit in respect of easements—Parties. |
| 9a. "Enjoyed." | 20. "Shall be absolute and indefeasible." |
| | 21. Custom, if can override the Limitation Act. |
| | 22. Unity of title or possession of dominant and servient estates in the same person—Effect. |

easement and as of right, without interruption, from 1st January 1850 to 1st January 1870. The plaintiff is entitled to judgment.

(b) In a like suit also brought in 1871, the plaintiff merely proves that he enjoyed the right in manner aforesaid from 1848 to 1868. The suit shall be dismissed, as no exercise of the right by *actual user* has been proved to have taken place within two years next before the institution of the suit.

(c) In a like suit, the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.

Act of 1859.

See Note 1 to this Section.

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Abandonment and discontinuance. See Note 14.

Artificial watercourse. See Note 8.

"Belongs" in sub-section (2) refers to ownership and not to possession. See Note 16.

Enjoyment for twenty years by same person not necessary. See Note 15.

Mere non-user for some time—Not interruption. See Note 14.

Permissive user — Not user as of right. See Note 13.

User 'as of right'—Presumption. See Notes 13 and 18.

1. History of the law of acquisition of easements in India. — The origin of servitudes seems to have been as ancient as that of property. They seem to have been well known both to the Hindu and Mahomedan law as well as to the English law. After the advent of the British rule in India, the development of the law of easements in this country prior to the passing of the special Acts relating to easements was marked by the application of the principles of English law. In districts outside the Presidency Towns where the law was to be administered according to the principles of justice, equity and good conscience, the principles of English law were applied as being the measure of justice, equity and good conscience but subject to such modifications as were suited to the usages and habits of the people. In the Presidency Towns, the English law was administered by virtue of the provisions contained in the charters constituting the High Courts. By Regulation v of 1827 the acquisition of easements by prescription was provided for so far as the mofussil in Bombay Presidency was concerned, the period necessary for such acquisition being *thirty* years.¹ In other Presidencies, sometimes, a user for a period of twenty years, and sometimes for a period of twelve years was held necessary to acquire an easement² and in some cases the question was regarded as one to be decided on the facts of each case whether the enjoyment was of sufficient length as to enable the Court to hold in favour of acquisition.³

Section 26 — Note 1

1. (1865) 2 Bom H C R 333 (333), *Rambhau Bapushet v. Bhai Babushet*.

('73) 10 Bom H C R 399 (400), *Savalgiapa Virbasapa v. Basvanapa Basapa*.

(1865) 2 Bom H C R 334 (337), *Anaji Dattushet v. Morushet Bapushet*.

2. ('69) 12 Suth W R 76 (77) : 3 Beng L R 211 (DB), *Kristo Chunder Chuckerbutty v. Kristo Chunder Burnick*. (A user for the period of twelve years gave a person a legally prescriptive right.)

('69) 11 Suth W R 522 (523, 524, 525) : 3 Beng L R A C 166 (D B), *Kartick Chunder Sircar v. Kartick Chunder Dey*. (Twelve years sufficient.)

('69) 5 Mad H C R 6 (21), *Ponnusami Tevar v. Collector of Madura*. (Period of user should be for at least the period of adverse possession which is prescribed by S. 1, cl. 12 of the Limitation Act of 1859.)

3. ('69) 5 Mad H C R 6 (25, 26, 28) (DB), *Ponnusami Tevar v. Collector of Madura*. (Per Innes, J.)

('69) 12 Suth W R 274 (274, 275): 3 Beng L R A C 325 (DB), *Roop Chunder Ghose v. Roop Moonjuree Dossee*. (Long user is enough but no specific number of years necessary.)

('70) 14 Suth W R 199 (200) (DB), *Imambundee v. Sheo Dayal*. (Proof of well-established and fixed user is sufficient.)

In the year 1859 an attempt was made to insert in the Limitation Bill of that year, the following provisions relating to the acquisition, by prescription, of easements :

“(iv) Subject to the exceptions and to the qualifications hereinafter mentioned, whoever has enjoyed, mediately or immediately, any benefit, liberty or privilege derived out of immovable property or any right of ownership over the same for the space of twelve years without interruption, shall acquire by prescription both at law and in equity, a right to the enjoyment of such benefit, liberty or privilege as against the owner of such immovable property, unless such benefit or privilege shall have been enjoyed by some consent or agreement expressly given or made for that purpose by some deed or writing.

“(v) If the perpetual right to any such benefit, liberty or privilege as in the last preceding section mentioned, whether acquired by prescription or otherwise, shall have been disused for twelve years when it was capable of being used, the same shall be extinguished.”

These sections were, however, omitted when the bill was passed into law and the old system of administering the law of easements in the Presidency Towns and in the mofussil continued.

The Limitation Act of 1871 introduced for the first time provisions relating to easements in sections 27 and 28 thereof corresponding to the present ss. 26 and 27. The provisions were confined to the acquisition of easements by *prescription*. The acquisition of easements in *other ways* than by prescription, the extent, incidents and extinction of easements were all matters to which the principles of English law continued to be applied. The Act repealed the Bombay Regulation v of 1827.

The Limitation Act of 1877 simply reproduced the sections relating to easements in the Act of 1871.

In 1882 the Indian Easements Act⁴ was passed codifying the law of easements and licenses in India. It however extended only to the Provinces of Madras, Central Provinces and Coorg, and so far as such Provinces were concerned the provisions of the Limitation Act as to easements were repealed.

By Act VIII of 1891 the Easements Act 1882 was extended to what now is the United Provinces, and the Province of Bombay. It applies to Sind also.⁵

(70) 13 Suth W R 440 (441) : 5 Beng L R 174 (DB), *Mullick Kurim Baksh v. Harrihur Mandar*. (Long user is enough.)

(67) 7 Suth W R 271 (272) (DB), *Bhugwan Chunder Chowdhry v. Shaikh Khosal*. (Do.)

[See also (68) 10 Suth W R 452 (453) (DB), *Mohim Chunder Chuckerbutty v. Chundee Churn Goocho*.]

4. See pages 19 to 35.

5. (39) 26 AIR 1939 Sind 39 (42) : 179 Ind Cas 884, *Abdulla Haroon v. Municipal Corporation, Karachi*. (NOTE. — By Act VIII of 1891 the Easements Act was extended to the territories administered by the Governor of Bombay—Sind

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The present Act has reproduced the provisions as to easements in the Act of 1877 with the following changes :

- (1) Sub-section (2) of S. 26 is new and enlarges the period of prescription to sixty years where the servient tenement belongs to the Government.
- (2) The words "the Crown" were substituted for the word "Government" in sub-s. (2) by the Government of India (Adaptation of Indian Laws) Order, 1937.
- (3) Illustration (b) to the section was omitted apparently on the ground that it was not correct, no *actual* user being necessary to be shown within two years of the suit. See Note 15.

As to the applicability of the Limitation Act to Himachal Pradesh see the undermentioned case.⁶

2. Extent of applicability of the Easements Act and the Limitation Act.—As has been seen in Note 1 the Easements Act now applies to the Provinces of Madras and Bombay, the United Provinces, the Central Provinces, Sind and Coorg. Sub-section (4) of S. 29 of this Act provides that nothing in Ss. 26 and 27 and the definition of easement in S. 2, cl. (5) shall apply to cases arising in territories to which the Easements Act may, for the time being, extend. Thus, it is clear that in the said Provinces, the law of easements in all the aspects is solely governed by the Easements Act.¹

In all the other Provinces in India, the law, so far as the *acquisition* of easements by *prescription* is concerned, is that prescribed by the Limitation Act. The *extent*, *incidents*, *extinction* and *disturbance* of easements as well as *other modes* of acquisition of easements, are not affected by this Act and are governed by the principles of English law as it stood before the Prescription Act in England where the application of such principles is suited to the usages and habits of the people.²

was one of such territories—Sind was made a separate Province under the Government of India Act, 1935 but the laws in force there previously continued to be in force after the separation.)

6. ('49) 36 AIR 1949 Him Pra 4 (4, 5), *Haroo v. Man Das*. (Easements Act and Limitation Act were made applicable in Jubbal State (Himachal Pradesh) from 17th September 1946. But they were not made applicable to pending actions. Hence, in suits instituted prior to this date, easements such as right of way could be claimed only on basis of grant and not on the ground of prescription.)

Section 26 — Note 2

1. ('39) 26 AIR 1939 Sind 39 (42) : 179 Ind Cas 884, *Abdulla Haroon v. Municipal Corporation, Karachi*.
2. ('12) 12 Ind Cas 60 (61) : 39 Cal 59 (DB), *Paul v. William Robson*. ('95) 19 Bom 797 (801), *Municipality of Poona v. Waman Rajaram*. (Easement of necessity — Acquisition.) ('94) 18 Bom 616 (623, 628, 629) (DB), *Chuni Lal Mancharam v. Manishankar Atmaram*. ('87) 14 Cal 839 (855), *Delhi and London Bank Ltd. v. Hem Lall Dutt*. ('27) 14 AIR 1927 Lah 492 (493) : 102 Ind Cas 447, *Karam Ilahi v. Ghulam Mustafa*. (Alteration of easement not increasing burden furnishes no cause of action.)

The Easements Act has generally adopted the principles of English law in such matters except in certain particulars, and consequently decisions in cases arising under the Easements Act may usefully be referred to in dealing with similar cases arising in the Provinces to which the Easements Act does not apply.³

3. Acquisition of easements by prescription. — Under the early English law, prescription was not regarded as a mode of *acquiring* an easement. Where long user of a particular right was proved, it was regarded as evidence that the servient owner *acquiesced* in or *consented* to such user being made, from which acquiescence or consent, a grant or covenant on the part of the servient owner could be *presumed*,¹ provided the nature of the user was what it would have been if the person claiming the right had been a *grantee* or a person in whose favour a covenant had been entered into by the servient owner. A grantee or a covenantee would exercise the right obtained by him openly and peaceably and without fear of interruption. It was therefore a user of this nature for a long time that gave rise to the presumption of grant or covenant in his favour.² In the course of the development of the law, *immemorial* user, which at first was regarded as necessary to raise the presumption of grant, was changed to user for the period of *legal* memory which reached back to 1189 A. D. and no farther. This was the result of the Statute of Westminster, 3 Edw. I, c. 39. Later still, user for the period of *living* memory came to be regarded as sufficient to raise the presumption of grant. Lastly, user for a period of twenty years was regarded as sufficient to raise the said presumption. This was based on the analogy of the provisions in the Statute of James I, c. 16, which limited the period for possessory actions to a period of twenty years. But whatever the length of the user was, it did not by itself *create* a right of easement, but was merely regarded as raising a *presumption* of a grant having been made or a covenant having been entered into. It was under the English Prescription Act, 2 & 3 Will. IV, ch. 71,^{2a} that a user for a particular period, *created* by its own force, a right which was non-existent.³ But notwithstanding that prescription was thus made a mode of *acquisition* of easements, the principle that prescription *lies in grant* which in its turn is based upon the acquiescence or consent of the servient owner has never

3. See ('39) 26 AIR 1939 Rang 421 (422) : 1940 Rang L R 93 : 185 Ind Cas 605, *Tan Sit Shan v. U Po Nyun*. (Although Easements Act does not apply to Burma, Court must have regard to that Act in considering the question of the acquisition of a right of way under S. 26, Limitation Act — ('36) AIR 1936 Rang 58 (DB), *Daw Gyan v. U Maung*, followed.)

Section 26 — Note 3

1. See Peacock on "Easements," 3rd Edition, pages 414, 421, 422, 425.
[See also ('16) 3 A I R 1916 Sind 29 (31) : 33 Ind Cas 615 : 9 Sind L R 101, *Premji Ladha v. Visram Amul*.]
2. Peacock on "Easements" 3rd Edition, page 425.
- 2a. See pages 17 to 19.
3. ('76-78) 1 Mad 335 (337, 338) : 1 Ind Jur 802 (DB), *Subramania Ayyar v. Ramchandra Rao*. (English law surveyed.)
('69) 5 Mad H C R 6 (20, 21), *Ponnasami Tevar v. Collector of Madura*. (Do.)

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been lost sight of⁴ and is found in the requirement that the user must be *nec vi, nec clam, nec precario*, i. e., peaceable, open and without interruption.^{4a}

This section has followed the general principles of English law as to the acquisition of easements by prescription in that it prescribes that there must be user for twenty years and that such user must be open, peaceful, as of right and without interruption.⁵ Although, thus, this section contains the elements which have come down from the times when long user was treated as raising a presumption of a grant or covenant, the acquisition of an easement under this section is independent of the capacity or incapacity of the servient owner to make a grant of the easement. Thus, where a person claimed a prescriptive right to the flow of rain water from his compound to a municipal drain it was held that whether the municipality could grant such an easement was immaterial for deciding the question of acquisition of the easement under this section.⁶

4. Other modes of acquisition not barred. — The leading case on the point is *Rajrup Koer v. Abdul Hossein*,¹ where the plaintiff had enjoyed a right to an artificial watercourse for more than twenty years prior to the obstruction complained of, which was, however, more than two years before suit. It was held by the High Court of Calcutta that the claim to establish his right was barred under section 27 of the Act of 1871 (now S. 26). It was held by their Lordships of the Privy Council that the Act did not exclude other modes of acquisition, that, independent of the Act, a grant could be presumed from long user and that on the facts of that case a presumption should be made. Their Lordships observed as follows :

“But the statute is remedial and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements.”

4. See (1864) 1 Suth W R 230 (230), *Moonshee Zumer Ali v. Mt. Durgabun*. (Grant is implied in prescription.)

(1865) 4 Suth W R 49 (50), *Goluck Chunder Chowdhury v. Tarinee Churn Chukerbutty*. (An easement by prescription presupposes a grant.)

(’26) 13 A I R 1926 Cal 647 (647) : 91 Ind Cas 348 (DB), *Mamin Khan v. Moiz uddin Khan*.

4a. (’17) 4 AIR 1917 Lah 382 (383): 37 Ind Cas 788: 1917 Pun Re No. 4, *Sundar v. Nag*. (Enjoyment should be *nec vi, nec clam, nec precario*.)

(’31) 18 AIR 1931 Lah 395 (398) : 12 Lah 741 : 135 Ind Cas 51 (DB), *Ram Sarup v. Abdul Haq*.

5. See (’25) 12 AIR 1925 Cal 788 (789): 87 Ind Cas 19 (DB), *Behari Lal Mukerjee v. Asutosh Banerjee*.

6. (’38) 25 AIR 1938 Pat 423 (424) : 177 Ind Cas 315, *Dwarka Prasad v. Patna City Municipality*.

Section 26 — Note 4

1. (’81) 6 Cal 394 (403, 404) : 7 Ind App 240 : 4 Sar 199 : 7 Cal L R 529 : 4 Ind Jur 530 : 3 Suther 816 : 4 Shome L R 7 (PC). (Long enjoyment—Legal origin, grant or agreement to create the right of easement must be presumed.)

It has consequently been held in numerous cases² that a grant or other legal origin could be presumed from long user and relief granted

2. ('48) 35 A I R 1948 Mad 222 (225) : (1947) 2 Mad L Jour 492 (DB), *Venkataratanam v. Maharaja of Pithapuram*. (Right to water.)
- ('46) 33 A I R 1946 Cal 444 (447, 448) : 223 Ind Cas 470, *Bholanath Ghose v. Momena Khatun*. (No particular period has been prescribed and can, therefore, be said to be essential for the establishment of such right but where it is based on a claim of continuous or uninterrupted user alone, proof of enjoyment for any period not exceeding 20 years will ordinarily be considered insufficient to establish immemorial user so as to justify any presumption of easement by lost grant.)
- ('41) 45 Cal W N 486 (488), *Abdul Hamid v. Ahmed Ali*. (In such case enjoyment within two years of suit need not be proved.)
- ('24) 11 AIR 1924 Cal 369 (370) : 69 Ind Cas 183, *Amritnath Biswas v. Jogendra Chandra Bhattacharjee*. (Immemorial user—Grant may be presumed.)
- ('23) 10 AIR 1923 Cal 291 (291) : 67 Ind Cas 244, *Guru Prasanna Roy v. Fulchand Mondal*. (The provisions of S. 26 are not applicable where plaintiff sues for a declaration of a right of easement on the basis of lost grant.)
- ('23) 10 AIR 1923 Cal 200 (201) : 70 Ind Cas 263 (DB), *Ali Mohamed v. Sheikh Katu*. (The right claimed in this case was customary right of way—Held it was not necessary to rely on S. 26, if the existence of such a right could be otherwise established.)
- ('75) 15 Beng L R 361 (366, 367), *Modhoosooden Dey v. Bissonath Dey*. (Partition of common property of joint Hindu family many years back—Grant of easement may be presumed.)
- ('83) 8 Cal 956 (958) : 10 Cal L R 577 : 7 Ind Jur 86 (DB), *Charu Surnokar v. Dakouri Chunder Thakur*. (Relief was given on the basis of implied grant though the case did not fall under S. 26.)
- ('18) 5 AIR 1918 Cal 212 (213) : 46 Ind Cas 970 (DB), *Nagendra Nath Mazumdar v. Banwari Lal Das*. (Section 26 of the Limitation Act has nothing to do with an ancient village pathway used by the inhabitants of a particular village from time immemorial.)
- ('08) 35 Cal 851 (857) (DB), *Eshan Chandra Samanta v. Nil Moni Singh*. (Customary right and right by vicinity can be acquired apart from S. 26.)
- ('20) 7 AIR 1920 Cal 940 (941) : 62 Ind Cas 633 (DB), *Surendra Nath v. Girdhari Singh*. (Acquisition of right by immemorial user.)
- ('11) 9 Ind Cas 846 (847) (Cal), *Abdul Khoyrat v. Hem Chandra Roy*. (Ferry right is a right in the nature of an easement and can, therefore, be acquired independently of S. 26, Limitation Act.)
- ('09) 2 Ind Cas 410 (411) (DB) (Cal), *Nerode Kanta Chakravarthy v. Bharat Chandra Chakrabarthy*. (Path set apart on partition of joint lands for use by both branches of the family—Section 26, Limitation Act, held inapplicable as there was no question of easement there being no dominant or servient tenement.)
- ('25) 12 AIR 1925 Pat 748 (749, 750) : 90 Ind Cas 356 (DB), *Abdul Ghani v. Harnam Singh*. (Long user may be attributed to implied grant.)
- ('26) 13 A I R 1926 Cal 507 (507) : 53 Cal 1016 : 91 Ind Cas 712 (DB), *Bhabadee Chatterjee v. Bhusan Chandra Mukerjee*. (Customary right can be acquired by long user.)
- ('81) 7 Cal 132 (136) : 8 Cal L R 281 : 5 Ind Jur 642 : 4 Shome L R 144 (DB), *Koylash Chunder Ghose v. Sonatun Chung Barooie*. (Right of passage for boats over another's land when it becomes covered with water during the rainy season can be acquired by immemorial user.)
- ('19) 6 AIR 1919 P C 52 (54) : 43 Mad 529 : 46 Ind App 302 : 54 Ind Cas 154 (PO), *Secretary of State v. Maharajah of Bobbili*. (Easement enjoyed over a long course of years—Grant may be presumed.)
- ('82) 1882 All W N 76 (76), *Sheikh Bhusai v. Mata Prasad*.
- ('81) 1881 Bom P J 322 (DB), *Ramchandra v. Narayan*. (No obstruction by owner of unoccupied ground to falling of plaintiff's eaves—No grant can be presumed.)

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on that basis though the plaintiff is unable to establish his right to an easement under S. 26 of the Limitation Act.

An easement such as a right of way may be acquired, as regards a portion of the way, by grant and as regards another portion by prescription.³

4a. Acquisition of rights other than easements. — This section only deals with the acquisition of *easements*. For the meaning of "easement", see Notes under section 2, clause (5).

A right to a way claimed by the public or a right to a village pathway claimed by the residents of a village is not an *easement*. (See Note 7.) Similarly, the right claimed by the Mahomedans of a certain locality to bury their dead in a particular piece of land is not

('89) 1889 All W N 133 (134), *Shankar Lal v. Motar Mul.* (A well and chabutra standing neither on the land of plaintiff or of defendant used by inhabitants of mohulla for bathing purposes for upwards of fortyone years — Interference with plaintiff's right though two years prior to the institution of the suit for disturbance of the right — Plaintiff's suit was decreed.)

('21) 8 AIR 1921 Bom 430 (432) : 45 Bom 1027 : 62 Ind Cas 65 (DB), *Rambhai v. Vallabha Jhaverbhai.* (Limit of time from which immemorial user may be inferred depends upon the circumstances of each case — But in any case such user must be in excess of twenty years.)

('81) 6 Bom 20 (23) (DB), *Punja Kuvarji v. Bai Kuvar.* (Immemorial user must be referred to legal origin.)

('89) 4 O P L R 16 (19, 20), *Amritnath v. Moti Lall.* (Thirty years user before the Easements Act came into force — Plaintiff's claim for easement was decreed.)

('16) 3 AIR 1916 Mad 1001 (1005) : 31 Ind Cas 528 (DB), *Muthu Goundan v. Anantha Goundan.* (Where open enjoyment has taken place for a long series of years, title by prescription can be acquired independently of the statute and a suit to establish that right can be brought within twelve years after the obstruction.)

('36) 23 AIR 1936 Mad 682 (687) : 164 Ind Cas 764 : 59 Mad 979, *Nagarethna Mudaliar v. Sami Pillai.* (Prescription at Common law as such is not applicable to India — Three methods of acquiring easements by prescription under the Indian law pointed out.)

('29) 16 AIR 1929 Mad 819 (820, 821) : 122 Ind Cas 497 (DB), *Ramakrishna Iyer v. Ramanatha Pattar.*

('22) 9 AIR 1922 Mad 5 (6) : 66 Ind Cas 11 : 45 Mad 633 (DB), *Kunjammal v. Rathanam Pillai.* (In the case of long enjoyment of a right, legal origin should be presumed.)

('82) 5 Mad 226 (228, 229) (DB), *Srinivasa Rau v. Secretary of State.*

('82) 5 Mad 253 (255) : 6 Ind Jur 465 (DB), *Zamindar of Kurupam v. Zamindar of Merangi.*

[See ('81) 6 Cal 812 (814) (DB), *Achul Mahta v. Rajun Mahta.* (The case was remanded for finding on the issue whether there was evidence of enjoyment of the right of such character and duration as to justify the presumption of grant independent of S. 26, Limitation Act.)]

[See also ('49) 36 AIR 1949 Him Pra 4 (4, 5), *Haroo v. Man Das.* (Case before Limitation Act was made applicable to Jubbal State — Easement such as right of way could be claimed only on basis of grant and not on ground of presentation.)]

('39) 26 AIR 1939 Nag 193 (195) : 183 Ind Cas 341 (DB), *Ganpat Rao v. Badar Farid.* (Right of Mahomedans to bury their dead — Grant was presumed from long user — ('81) 6 Cal 394 (PC), *Rajrup v. Abdul*, relied on.)]

3. ('20) 7 AIR 1920 Cal 600 (601) : 57 Ind Cas 852 (DB), *Kala Chand Mukhapadhy v. Jotindra Nath Chakerbutty.*

an easement. (See Notes 4 and 5 under section 2 (5).) Such rights can be based on custom raising a presumption of grant.¹ Immemorial user is not necessary, as in English law, to prove such custom.² See the case cited below for the essentials of a valid customary right to a village pathway.³ A right to pasturage cannot be claimed by an indefinite body of persons on the basis of a *lost grant*.⁴ But such a right can be based on custom.⁵

5. Who can acquire easements. — An easement may be acquired in respect of a tenement either by the owner of such tenement or on his behalf by any person in possession thereof.¹ Thus, a tenant of the owner can acquire an easement for the benefit of the dominant tenement in his possession and the owner may thus gain a prescriptive right.² One of two or more co-owners of immovable property may, as such, with or without consent of the other or others, acquire an easement for the beneficial enjoyment of such property.³

At the same time, as seen in S. 2 (5) Note 4, an easement implies that the servient tenement does not belong to the person claiming the easement.⁴ (See also section 4 of the Easements Act.) Hence, a tenant cannot acquire either for himself or for his landlord an easement on land which belongs to himself.⁵ So also, one co-owner cannot acquire

Section 26 — Note 4a

1. ('45) 32 AIR 1945 Pat 118 (119) : 220 Ind Cas 511 (DB), *Baisnath Barik v. Sh. Nasiruddin*. (Customary right—Right of way over village pathway — Inference of dedication from long user.)
- ('39) 26 AIR 1939 Nag 193 (195) : 183 Ind Cas 341 (DB), *Ganpat Rao v. Badar Farid*. (Right to bury dead in a particular piece of land.)
2. ('39) 26 AIR 1939 Nag 193 (195) : 183 Ind Cas 341 (DB), *Ganpat Rao v. Badar Farid*.
- ('38) 25 AIR 1938 Cal 202 (204) : 175 Ind Cas 252, *Harisadhan De v. Radhika*.
3. ('38) 25 AIR 1938 Cal 202 (204) : 175 Ind Cas 252, *Harisadhan De v. Radhika*.
4. ('33) 42 Cal W N 1102 (1104), *Abdul Hosain v. Sadai Gobinda*. (Essentials of custom to establish such right indicated.)
5. ('38) 42 Cal W N 1102 (1104), *Abdul v. Sadai Gobinda*.

Section 26 — Note 5

1. See Peacock on "Easements," 3rd Edition, p. 317.
Compare also Section 4 of the Easements Act.
See also the cases cited in foot-note 2.
2. ('15) 2 AIR 1915 Cal 403 (404) : 31 Ind Cas 549, *Madan Mohan v. Sashi Bhusan*. (Note that even though this case is from Bengal where Easements Act does not apply yet the principle of S. 12 of Easements Act has been applied.)
- ('34) 21 AIR 1934 Mad 575 (578) : 152 Ind Cas 216, *Chinnasamy Goundar v. Balasundra*. (Possession as occupier can be tacked to enjoyment as owner.)
- ('18) 5 AIR 1918 Oudh 296 (299) : 45 Ind Cas 585 : 21 Oudh Cas 78, *Ganesh Prasad v. Khuda Baksh*. (The enjoyment of the right may be by successive tenants of the dominant heritage.)
3. See Section 12 of the Easements Act, 1882.
4. ('39) 26 AIR 1939 Lah 28 (29) : 182 Ind Cas 498, *Onkarnath v. Munilal*. (Section 26 assumes that the dominant and servient tenements belong to different persons.)
5. ('39) 26 AIR 1939 Rang 421 (422) : 1940 Rang L R 93 : 185 Ind Cas 605, *Tan Sit Shan v. U Po Nyun*. (Case relating to right of way—('75) 15 Beng L R 361, *Madhoosoodun v. Bissonauth* and ('26) A I R 1926 Mad 728 (FB), *Subba Rao v. Lakshmana Rao*, followed.)

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an easement over the joint property.⁶ See also Note 12.

As to whether a tenant may acquire an easement against his own landlord (or against another tenant under the landlord) in respect of the tenement demised, see Note 13.

See also Note 9a and section 12 of the Easement Act.

6. Easements of light and air. — Every owner of land has a *natural right* to so much light and air as pass vertically thereto: (See Easements Act, s. 7.) But he may have acquired an *additional* right the enjoyment of which is a restriction of the enjoyment by the neighbour of his natural rights. The additional right to light and air is an easement, and if acquired will be a legal right that the servient owner shall not by any act on the servient tenement diminish the quantity of light and air to which the dominant owner is so entitled. (See Note 2 to S. 2, sub-s. (5).) It is thus a *negative* easement.

Where a right to light and air is enjoyed through an *aperture* in a wall, it is not necessary that the aperture should belong to the dominant owner. The aperture may belong even to the servient owner. The ownership of the aperture is not an essential matter.¹

As to the *extent* of the right to the access of light and air that can, under law, be recognized as an easement, see Note 9a to S. 2, sub-s. (5).

7. Right of way. — In *Chuni Lall v. Ram Kishen Sahu*,¹ Wilson, J., observed as follows :

“It may be useful to premise that by the Common Law of England there are three distinct classes of rights of way and

6. ('39) 26 AIR 1939 Lah 28 (29) : 182 Ind Cas 498, *Onkar Nath v. Muni Lal*. (Wall erected by one co-owner on top of joint wall is joint property — He cannot acquire an easement in respect of ventilators in the top wall — NOTE. — The facts of this case are not clear but if the co-owners of the wall are owners of the properties on either side of the wall there does not seem to be any difficulty in holding that one of them can acquire an easement of light and air through the ventilators in the common wall, as in such a case the owners of the dominant and servient tenements will be different persons notwithstanding the common ownership of the party wall—For such a case, see ('23) A I R 1923 Lah 249, *Nandu Shah v. Sant Ram*, where one of the co-owners of a common wall was held entitled to an easement against the other co-owner in respect of the ventilators in the common wall.)

Section 26 — Note 6

1. ('32) 19 AIR 1932 Cal 249 (252) : 59 Cal 260 : 131 Ind Cas 193 (DB), *Jotindra Mohan v. Probodh Kumar*.

('23) 10 AIR 1923 Lah 249 (250), *Nandu Shah v. Sant Ram*. (Where the dominant owner had an easement right in respect of ventilators in a wall of his house, the fact that the adjoining servient owner acquires by agreement a joint ownership in the wall will not operate to extinguish the easement — It would have been otherwise if the former had acquired the joint ownership of the whole house of the servient owner.)

[But see ('39) 26 AIR 1939 Lah 28 (29) : 182 Ind Cas 498, *Onkar Nath v. Muni Lal*. (One co-owner of a wall cannot acquire as against another co owner an easement in respect of ventilators in the wall.)]

Section 26 — Note 7

1. ('88) 15 Cal 460 (464, 465) : 12 Ind Jur 425 (FB).

other similar rights. First, there are private rights in the strict sense of the term vested in particular individuals or the owners of particular tenements, and such rights commonly have their origin in grant or prescription. Secondly there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of a city, the tenants of a manor or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exist for the benefit of all the Queen's subjects; and the source of these is ordinarily dedication. It is unnecessary to enquire whether the mode of acquiring each of these classes of rights is necessarily the same in all cases in England and in India. But it is, I think, important to remember that these three classes of rights exist in the one country as well as in the other."

This has been followed in the undermentioned cases.²

A right for passage of boats through another man's channel is analogous to a right of way.³

As to the *extent* of a right of way that can be acquired, see Note 9a to section 2 sub-section (5).

An easement as to a right of way necessarily implies that the right is vested in a determinate individual or individuals. (See Note 8 under S. 2 (5).) Hence, a right of way belonging to the public in general or a particular section of the public cannot be claimed as an *easement*. Thus, a customary right to a village pathway is not an easement.⁴

See also the undermentioned case.⁵

8. Right to watercourse or to the use of any water. — As has been seen already in the Notes to S. 2, sub-s. (5), where water flows in a *natural* defined channel, each successive riparian owner is *prima facie* entitled to the unimpeded flow of the water in its natural course and to its reasonable enjoyment as it passes through his land as a natural incident to his ownership of it. It has also been pointed out that a right, which is an interference with the natural

2. ('38) 25 AIR 1938 Cal 202 (203): 175 Ind Cas 252, *Harisadhan De v. Radhika*. ('30) 17 AIR 1930 Cal 286 (287): 57 Cal 526: 125 Ind Cas 600, *Pran Nath Kundu v. Emperor*. (A public right of way in the full sense of the term is unconnected with any dominant tenement.)

3. ('81) 7 Cal 145 (147): 8 Cal L R 375 (DB), *Doorga Churn Dhur v. Kally Kumar Sen*. (A right of way is ordinarily a right of passing in a particular line, or direction and not a right to vary it at pleasure.)

4. ('45) 32 AIR 1945 Pat 118 (119): 220 Ind Cas 511 (DB), *Baisnath Barik v. Sk. Nasiruddin*.

('38) 25 AIR 1938 Cal 202 (203, 204): 175 Ind Cas 252, *Harisadhan De v. Radhika Prosad*.

5. ('49) 36 AIR 1949 Him Pra 4 (4, 5), *Haroo v. Man Das*. (Case before Limitation Act was made applicable to Jubbal State — Easement such as right of way could be claimed only on basis of grant and not on ground of prescription.)

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rights of riparian owners to use the river water for ordinary purposes, can be acquired by prescription.¹

But the said principles do not apply to *artificial* watercourses. In the case of artificial watercourses any right to the flow or the use of water must rest on some grant or arrangement proved or presumed.^{1a} Where the artificial watercourse is found to have been for a *temporary* purpose and liable to variations (e. g., where it is created for running a mill), no grant of right to an easement in the water (which must be of permanent character), can be presumed from long enjoyment. In such a case, therefore, there can be no prescriptive right also to the use of the water.² Where, on the other hand, the watercourse though artificial is intended to be a *permanent* one, e. g., channels constructed as part of a permanent system of irrigation, a long enjoyment of the water can certainly give rise to a presumption of a grant. A prescriptive right to the use of the water in such a channel can be acquired by prescription.³

An easement may be established of the right to cause river water to flow across the servient tenement on to the dominant tenement for the purpose of irrigation by means of an embankment erected on the dominant tenement.⁴

Section 26 — Note 8

1. ('08) 35 Cal 851 (857) (DB), *Eshan Chandra Samanta v. Nil Moni Singh*.
[See also ('48) 35 AIR 1948 P C 23 (25) : I L R (1947) Kar (PC) 388 (PC), *Ramaswami Ayyar v. Hariram*. (Water from pond naturally flowing southward into A's land—B erecting bund and making it flow eastward and fill his irrigation tank — B enjoying right for more than twenty years without interruption gets right to the water by prescription.)]
- 1a. ('79) 4 Cal 633 (637) : 6 Ind App 33 : 3 Sar 856 : 3 Ind Jur 179 : 2 Shome L R 194 (PC), *Ramessur Persad v. Koonj Behary*.
('23) 10 AIR 1923 Lah 257 (258) : 73 Ind Cas 489, *Bela Singh v. Bali Ram*.
2. (1839) 8 L J Ex 201 (215) : 52 R R 671, *Arkwright v. Gell*.
(1848-49) 18 L J Ex 305 (313) : L R 3 Ex 748 : 13 Jur 472 : 77 R R 809, *Wood v. Waud*.
3. ('79) 4 Cal 633 (638, 639) : 6 Ind App 33 : 3 Sar 856 : 3 Ind Jur 179 : 2 Shome L R 194 (PC), *Ramessur Persad v. Koonj Behary*.
('84) 7 Mad 530 (534), *Rayappan v. Virabhadra*. (The right to artificial watercourses as against the party creating them depends upon the character of the watercourse and upon the circumstances under which it was created.)
('01) 14 C P L R 145 (146, 149) (DB), *Chakradhar Singh v. Tikaram Saw*.
(Following (1839) 8 L J Ch 201, *Arkwright v. Gell*.)
('03) 30 Cal 281 (284), *Madhub Dass Bairagi v. Jogesh Chunder Sarkar*.
[See also ('48) 35 AIR 1948 Mad 222 (225) : (1947) 2 Mad L Jour 492 (DB), *Venkataratanam v. Maharaja of Pithapuram*. (Inam land registered as wet — Zamindar's registers showing land as single crop wet — Second crop raised for 40 years without demand for extra charge for water — Presumption that Inamdar was given right to all water conveyed by channel free of any charge — Acquisition of right of easement by prescription to water for second crop free of charge held established.)]
4. ('03) 30 Cal 1077 (1082) (DB), *Budhu Mandal v. Maliat Mandal*.
[See also ('27) 14 A I R 1927 Lah 216 (217) : 100 Ind Cas 498, *Tunnan v. Tota*. (Right to take water through another person's property is an easement within the meaning of S. 26, Limitation Act.)]

9. "Any other easement." — The expression "any other easement" includes a variety of rights which can be acquired as easements but not falling within the classes of easements specified in the section.¹ For instances of such easements, see Note 9 to S. 2, cl. (5).

9a. "Enjoyed." — For the acquisition of an easement under this section it must have been enjoyed by the *claimant* or some person on his behalf. Where a scavenger, who is a *municipal* servant, passes over A's land for conserving B's latrines it has been held by the Rangoon High Court that it cannot be said that B enjoys the right of way as contemplated by this section.¹ A different view has, however, been held by the Bombay High Court.^{1a} See also the case cited below.²

A right may be "enjoyed" during a certain period although there may be no *actual user* of the subject-matter of the right at that time. See Notes 14 and 15.

10. "Peaceably." — It is only where the user is *nec vi, nec clam* and *nec precario* that a prescriptive right to an easement can be acquired. The qualification "peaceably" lies in the word *nec vi*, that is, without violence.¹ The word "peaceably" therefore means that the dominant owner has neither been obliged to resort to *physical force* himself at any time during the period of enjoyment, nor had he

Section 26 — Note 9

1. ('47) 34 AIR 1947 Lah 79 (80) : 224 Ind Cas 286, *Ladha v. Mahi*. (The words 'or other easement' in S. 26 imply that the section is not exhaustive and other easements not specifically mentioned in the section can as well be acquired by prescription. The right of storing manure on the land of another is a right which is beneficial to enjoyment of the property of the persons enjoying that right over the land of another. Such a right would not destroy completely the subject-matter of the easement and can, therefore, be acquired by way of easement if the user has continued for the prescribed period : A I R 1927 All 115, *Dhaneshwar Tewari v. Antu Tewari*; A I R 1930 All 410, *Ramphal Singh v. Bachchu Ram*, Rel. on ; A I R 1931 Sind 1 : 25 Sind L R 257, *Jamaitrai v. Goumal*, Disting.)

Section 26 — Note 9a

1. ('39) 26 AIR 1939 Rang 34 (41) : 180 Ind Cas 477 (DB), *Murugappa Chettyar v. K. S. A. K. Chettyar Firm*. (('86) 13 Cal 136 (PC), *Jadulal v. Gopalchandra* and ('26) AIR 1926 Bom 282 (DB), *Ramchandra v. Anant* distinguished. Per Braund, J. — "Enjoy" in S. 26 means "exercise" — In this case the claimant of the easement never had any right to say when or how or over what land or by what method the municipal scavenger should carry out his work.)
- 1a. ('22) 9 AIR 1922 Bom 79 (79) : 76 Ind Cas 754, *Yosef David Varulker v. Moses Solomon Talker*. (Right of passage for scavenger can be acquired by twenty years' user.)
- ('26) 13 AIR 1926 Bom 282 (283) : 95 Ind Cas 170, *Ram Chandra Wasudeo v. Annant Laxman*. (Passage for sweeper can be acquired by prescription though sweeper is a municipal servant.)
2. ('38) 42 Cal W N 1102 (1104), *Abdul Hosain v. Sadai Gobinda*. (Right to pasturage claimed by villagers — As *all* the villagers could not have enjoyed the right during the statutory period, the right could not be acquired under this section — The decision does not refer to the point that an indefinite body of persons cannot acquire an easement — See Section 2 (5) Note 8.)

Section 26 — Note 10

1. ('10) 8 Ind Cas 1196 (1196) (Low Bur), *Kyinan v. Set Lan*.

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Notes 10-11

been prevented by the use of *physical force* by the defendant in his enjoyment of such right.² In the undermentioned case³ it was held that the words "peaceable enjoyment" within the meaning of S. 15 of the Easements Act, corresponding to this section, mean enjoyment without "interruption" by the servient owner sufficient to defeat the enjoyment. A mere protest, it is conceived, would not render the enjoyment otherwise than peaceable. See Note 14.

11. Enjoyment should be open.—The qualification "openly" lies in the words "*nec clam*"¹ which is found in the expression *nec vis, nec clam, nec precario*. The words "*nec clam*" mean "without stealth" and the reason of the requirement that the user must be open lies in the fact that *acquiescence* lies at the root of all prescription, and where the enjoyment is not open it cannot be said that the owner of the servient tenement, actually or constructively acquiesced in or consented to the easement. In *Angus v. Dalton*,² Thesiger, L. J., observed that a user which is secret raises no presumption of acquiescence on the part of the servient owner, and as a consequence, no presumption of right on the part of the dominant. In *Sturges v. Bridgman*,³ the same learned Lord Justice observed as follows :

"A man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests or endeavours to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold that an enjoyment which a man cannot prevent can raise no presumption of consent or acquiescence. Upon this principle, it was decided in *Webb v. Bird*,⁴ that currents of air blowing from a particular quarter of the compass and in *Chasemore v. Richards*⁵ that subterranean water percolating the strata in no known channels could not be acquired as an easement by user; and in *Angus v. Dalton*,⁶ a

2. ('16) 3 AIR 1916 Mad 1001 (1004) : 31 Ind Cas 528 (DB), *Muthu Goundan v. Anantha Goundan*. (Thus oral opposition or oral expressions of dissent cannot prevent the enjoyment being peaceful.)

('31) 18 AIR 1931 Lah 395 (398) : 12 Lah 741 : 135 Ind Cas 51 (DB), *Ram Sarup v. Abdul Haq*. (Mere denial by the defendant of plaintiff's right and an unsuccessful attempt to have it negatived in Courts of law does not prevent the plaintiff acquiring the right.)

3. ('19) 6 AIR 1919 Bom 94 (95) : 49 Ind Cas 963 (DB), *Kurvarbai v. Jamsedji*. (Protests in this case were made by giving written notices.)

Section 26 — Note 11

1. ('10) 8 Ind Cas 1196 (1196) (Low Bur), *Kyinan v. Set Lan*.

2. (1878) 27 W R (Eng) 623 (628) : 4 Q B D 162 : 48 L J Q B 225 : 40 L T 605.

3. (1880) 28 W R (Eng) 200 (200, 203) : 48 L J Ch 785:11 Ch D 852 : 41 L T 219.

4. (1861) 4 L T 445 (447) : 10 C B (NS) 268 : 30 L J C P 384 : 9 W R (Eng.) 899.

5. (1859) 7 H L C 349 : 29 L J Ex 81 : 5 Jur (NS) 873 : 7 W R (Eng.) 685.

6. (1878) 4 Q B D 162 (181, 187) : 48 L J Q B 225 : 27 W R (Eng.) 623 : 40 L T 605.

case of lateral support of buildings by adjacent soil, which came on appeal to this Court, the principle was in no way impugned. It is a principle which must be equally appropriate to the case of affirmative as of negative easements; in other words, it is equally unreasonable to imply consent to your neighbour enjoying something which passes from your tenement to his, or subjecting your tenement to something which comes from his when in both cases you have no power of prevention.

"But the affirmative easement differs from the negative easement in this—that the latter can in no circumstances be interrupted except by acts done upon the servient tenement; the former constituting as it does a direct interference with the enjoyment by the servient owner of his tenement, may be subject of legal proceedings as well as of physical interruption. To put concrete cases the passage of light and air to your neighbour's windows may be physically interrupted by you but gives you no legal ground of complaint against him. The passage of water from his land on to yours may be physically interrupted, or may be treated as a trespass and made the ground of action for damages or for an injunction, or both."

Actual knowledge is, however, not necessary on the part of the servient owner of the right enjoyed by the dominant owner.⁷ The requirement that the user should be open shows, however, that it must be of a nature from which a presumption that the owner of lands had knowledge and had acquiesced in the right, might be drawn.⁸

12. As an easement. — The right claimed must have been enjoyed *as an easement*. If the acts done by the person claiming the easement are only referable to a purported character of owner, they cannot sustain a subsequent claim for an easement in respect of the property.¹ The mere fact, however, that in litigation the claimant

7. ('39) 26 AIR 1939 Rang 34 (39) : 180 Ind Cas 477 (DB), *Murugappa Chettyar v. K. S. A. K. Chettyar Firm*. (Per Mackney, J., in the judgment appealed from — 10 Cal 214 referred.)

('84) 10 Cal 214 (218) (DB), *Arzan v. Rakhal Chunder Roy Chodhury*.

('89) 1889 Bom P J 196, *Ganpat Rao v. Baji Shamraj*. (The section only requires that the right should be exercised openly—10 Cal 214 followed.)

('16) 3 AIR 1916 Mad 1001 (1004) : 31 Ind Cas 528 (DB), *Muthu Goundan v. Anantha Goundan*. (Lunacy or imprisonment of the servient owner cannot prevent acquisition of easement under the Easements Act.)

8. ('39) 26 AIR 1939 Rang 34 (39) : 180 Ind Cas 477 (DB), *Murugappa Chettyar v. K. S. A. K. Chettyar Firm*. (Per Mackney, J., in the judgment appealed from—('84) 10 Cal 214 (DB), *Arzan v. Rakhal Chunder* referred.)

('29) 16 AIR 1929 Bom 144 (146) : 116 Ind Cas 231 (DB), *Ramchandra Trimbak v. Hari Martand*. (Case under Easements Act.)

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1. ('26) 13 AIR 1926 Mad 728 (732) : 49 Mad 820 : 96 Ind Cas 968 (FB), *Subba Rao v. Lakshmana Rao*. (The question to what purported character are the acts of user to be ascribed is one which the Court *must* answer—('16) AIR 1916 Mad 718 (DB), *Konda Reddi v. Ramasawami* overruled; ('06) 34 Cal 51 (FB), *Narendra Nath v. Abhoy Charan* and (1911) 1 M W N 95 (DB), *Venkata v.*

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puts forward a claim of ownership, which is found to be not true, is not conclusive on the question whether the right was enjoyed as an easement or not and will not necessarily entail the dismissal of the suit.²

It has been seen in Note 4 to S. 2, sub-s. (5) that the essence of an easement is that there should be two tenements belonging to *different* persons, the maxim being "None can have land and also an easement over it." Where therefore there is unity of possession or ownership in the same person of both the tenements, there cannot be any enjoyment *as an easement* during the period of unity.³

- Subbaroya* dissented from; ('15) A I R 1915 P C 131 (PC), *A. G. of S. Nigeria v. J. H. & Co.* and (1914) L R 3 K B 911, *Lyell v. Lord Hothfield* followed.)
- ('39) 26 AIR 1939 Rang 34 (35, 36) : 180 Ind Cas 477 (DB), *Murugappa Chettyar v. K. S. A. K. Chettyar Firm.* (Per Mackney, J., in the judgment in S. A. No. 275 of 1937—The words "as an easement" qualify the words "claiming title thereto" and not the word "enjoy.")
- ('39) 26 AIR 1939 Sind 110 (110, 111) : ILR (1939) Kar 307 : 181 Ind Cas 961 (DB), *Khanchand Jethamal v. Naraindas Pahlajrai.*
- ('32) 19 AIR 1932 Bom 513 (514, 515) : 56 Bom 427 : 139 Ind Cas 571, *Marghabhai Vallabh v. Motibhai Mithabhai.* (A person cannot acquire an easement unless he acts with the knowledge that it is a case of dominant and servient tenement and that he is exercising right over property which does not belong to him : NOTE—This view is criticised in AIR 1939 Bom 149.)
- ('92) 16 Bom 592 (595) (DB), *Chunilal Fulchand v. Mangaldas Govardhandas.*
- ('27) 14 AIR 1927 Nag 386 (386) : 104 Ind Cas 503, *Tulsiram v. Ganpat.* (User as owner cannot be made basis of easement.)
- ('30) 17 AIR 1930 Pat 7 (9, 10) : 124 Ind Cas 385 (DB), *Kartic Manjhi v. Banmali Mukerji.* (AIR 1926 Mad 728 (FB) followed.)
- [See ('10) 8 Ind Cas 502 (503) (DB) (Mad), *Venkata Varahia Dikshitar v. Subbaroya Pillai.* (A false plea of ownership would not necessarily preclude the acquisition of right of easement.)]
- [See also ('39) 26 AIR 1939 Bom 149 (150) : ILR (1939) Bom 140 : 183 Ind Cas 139 (DB), *Rau Rama v. Tukaram.* (In this case it is held that while acts done under a definite claim of ownership cannot establish an easement a conscious assertion of an easement is not necessary.)]
- [But see ('33) 20 AIR 1933 Bom 122 (123) : 144 Ind Cas 998 (DB), *Tamanbhat Shankarbhat v. Krishtacharya Tamanacharya.* (Obiter.)]
- ('22) 9 AIR 1922 Bom 199 (200) : 46 Bom 200 : 64 Ind Cas 517 (DB), *Dharamdas Kaushalyadas v. Ranchhodji Dayabhai.* (Per Macleod, C. J.)]

2. See the cases cited in foot-note 1 above.

- ('20) 7 AIR 1920 Cal 940 (940) : 62 Ind Cas 633 (DB), *Surendra Nath Singh v. Girdhari Singh.* (('91) 16 Bom 592 (DB), *Chunilal v. Govardhandas* not followed; ('16) AIR 1916 Mad 718 (DB), *Konda Reddi v. Ramasawami* and ('06) 34 Cal 51 (FB), *Narendra v. Abhoy Charan* followed.)
- ('39) 26 AIR 1939 Sind 110 (112) : ILR (1939) Kar 307 : 181 Ind Cas 961 (DB), *Khanchand Jethamal v. Naraindas Pahlaj Rai.* (But if plaintiff in witness box leads evidence to show that he has been the owner of the land over the statutory period he clearly destroys his case as to easement.)
- [See also ('39) 26 AIR 1939 Bom 149 (150) : ILR (1939) Bom 140 : 183 Ind Cas 139 (DB), *Rau Rama v. Tukaram.* (Ownership and easement can be claimed in the alternative—34 Cal 51 (FB) followed.)]

3. ('75) 15 Beng L R 361 (365, 366), *Modhoosoodhun v. Bissonath Dey.*
- ('93) 15 All 270 (282) : 1893 All W N 151 (DB), *Wutzler v. Sharpe.*
- ('89) 1893 All W N 66 (67), *Jalaluddin v. Asad Ali.*
- [See ('37) 24 AIR 1937 Nag 38 (39) : 168 Ind Cas 921, *Nago v. Mt. Lahani.* (A right of easement and a right of ownership are mutually exclusive.)]

Where the ownership of a property vests *jointly* in several persons, they are all owners having a right to use the property in whole or in part (*per my et per tout*) and the mere fact that each is exclusively enjoying some portion which is undivided from the rest cannot enable the one to acquire a right of easement over another plot held exclusively by other cosharers.⁴ See also Note 5.

An easement can be claimed only by a determinate person or persons. A right claimed by the public in general or a section of the public, such as a public right of way is not an *easement*. (See Note 7.) See also S. 2 (5) Note 8.

Where an exclusive right of user is claimed by a member of the public who commenced to exercise that right originally as a member of the public, it must be shown that the right has been exercised by that person so as to exclude from its enjoyment all persons claiming to be entitled to it in the same capacity. If this is not shown a mere right of user cannot crystallise into an easement by prescription.^{4a}

An act done in the exercise of a statutory duty or right cannot be relied on to create an easement.⁵

13. "As of right." — The qualification "as of right" lies in the words "*nec precario*" which are found in the expression "*nec vi, nec clam, nec precario*" and mean "without permission or favour."¹ A user as of right does not therefore mean a *rightful* user or a user without

[See also (1863) 2 Bom H C R 176 (178), *Lalji Ratanji v. Ganga Ram Tulja Ram*. (In a suit brought to establish a right of ownership over certain land it is not competent to the Court to enter into and decide upon the plaintiff's right to an easement over the same.)]

4. ('25) 12 AIR 1925 Pat 492 (493) : 87 Ind Cas 736 (DB), *Kameshwar Narain Singh v. Janardhan Prasad Narain Singh*. (A person cannot claim right of easement over any portion of the village of which he is a co-owner.)

('30) 17 AIR 1930 Sind 34 (35) : 120 Ind Cas 497 : 24 Sind L R 208 (DB), *Gir-dharidas Radhakishandas v. Thirthadas Gokaldas*. (('05) 32 Cal 837, *Mahesh v. Nowbat* followed.)

[See also ('26) 13 AIR 1926 Bom 545 (545) : 97 Ind Cas 691 (DB), *Rajubhai Mohanbhai v. Lalbhai Mulchand*. (Joint property—Right of easement does not arise.)]

4a. ('46) 33 AIR 1946 Cal 12 (14) : ILR (1945) 2 Cal 581 : 224 Ind Cas 175 (DB), *Province of Bengal v. Indra Kumar*. (To acquire an exclusive prescriptive right of fishery in a public navigable river as an easement the user must be in assertion of a right higher than the general right of the public to fish in such rivers.)

5. ('39) 26 AIR 1939 Rang 34 (40, 41) : 180 Ind Cas 477 (DB), *Murugappa Chettyar v. K. S. A. K. Chettyar Firm*. (The passage of scavenger across another's land to plaintiff's latrine was an act done in the exercise of the statutory right under the Burma Municipal Act and could not give rise to an easement.)

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1. ('10) 8 Ind Cas 1196 (1196) (Low Bur), *Kyinan v. Set Lan*.

('18) 5 AIR 1918 Oudh 296 (299) : 21 Oudh Cas 78 : 45 Ind Cas 585, *Ganesh Prasad v. Khuda Baksh*. (Non-permissive user is as of right.)

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trespass² but simply means a user in the assertion of right,³ as if the claimant was the true owner of the right.⁴ In other words, it means an *adverse* exercise of a growing right against the servient tenement.⁵ In the undermentioned case⁶ it was held that an enjoyment in such a manner as not to involve the admission of any obstructive right in the owner of the servient tenement was an enjoyment as of right. As will be observed in Arts. 142 and 144 Note 18 it is a fundamental principle that where a possession can be referred to a lawful title it will not be considered to be adverse, under similar principles an act which is traceable to a statutory right will not be deemed to be adverse so as to create a prescriptive right under this section.^{6a} A *permissive* user is not a user as of right and cannot be the basis of any prescriptive right.⁷ Whether a user was as of right or not must be decided on a

2. ('39) 26 AIR 1939 Rang 34(41) : 180 Ind Cas 477 (DB), *Murugappa Chettyar v. K. S. A. K. Chettyar Firm*.

('38) 25 AIR 1938 Pat 423 (425) : 177 Ind Cas 315, *Dwarka Prasad v. Patna City Municipality*. (23 Suth W R 52 and ('31) A I R 1931 Lah 395 (DB), *Ram Sarup v. Abdul Haq* relied on.)

('75) 23 Suth W R 52 (53), *Alimooddeen v. Wuzeer Ali*.

3. ('39) 26 AIR 1939 Rang 34 (41) : 180 Ind Cas 477 (DB), *Murugappa Chettyar v. K. S. A. K. Chettyar Firm*.

('38) 25 AIR 1938 Pat 423 (425) : 177 Ind Cas 315, *Dwarka Prasad v. Patna City Municipality*. (There should be the assertion of a right to act against the will of the servient owner—23 Suth W R 52 and AIR 1931 Lah 395, relied on.)

('75) 23 Suth W R 52 (53), *Alimooddeen v. Wuzeer Ali*.

('31) 18 AIR 1931 Lah 395 (397) : 12 Lah 741 : 135 Ind Cas 51 (DB), *Ram Sarup v. Abdul Haq*. ('As of right' is not synonymous with 'rightfully' — ('75) 15 Beng L R 361, *Madhoosoodhun v. Bissonath Day* followed.)

4. ('17) 4 AIR 1917 Lah 382 (383) : 1917 Pun Re No. 4: 37 Ind Cas 788, *Sundar v. Nag*.

5. ('70) 13 Suth W R 344 (344) : 5 Beng L R App 12 (DB), *Askar v. Ram Manik Roy*.

('75) 15 Beng L R 361 (365, 366), *Modhoosoodhun Dey v. Bissonath Dey*.

[See also ('09) 3 Ind Cas 271 (273) (DB) (Lah), *Sahib Ditta v. Daya Singh*.]

6. ('83) 7 Bom 522 (524) (DB), *Mathuradas v. Bai Amthi*. (Enjoyment of light and air through apertures in wall.)

6a. ('39) 26 AIR 1939 Rang 34 (40) : 180 Ind Cas 477 (DB), *Murugappa Chettyar v. K. S. A. K. Chettyar Firm*. (Right of municipal scavengers to enter on any land for the purpose of conserving latrines is a statutory right under the Burma Municipal Act and no question of easement can arise in regard to such right.)

7. ('38) 25 AIR 1938 Pat 423 (425) : 177 Ind Cas 315, *Dwarka Prasad v. Patna City Municipality*. (Right to use of municipal drain—Municipality being entitled under the Municipal Statute to enlarge, lessen, close up or remove drain—Plaintiff's use of drain held only permissive.)

('70) 13 Suth W R 449 (449) (DB), *Aukhoy Coomar v. Mollah Nobee Nowaz*. (Servient owner resuming the exclusive user of his land occasionally—Dominant owner's user is permissive.)

('17) 4 AIR 1917 Lah 382 (383) : 1917 Pun Re No. 4 : 37 Ind Cas 788, *Sunder v. Nag*. (Annual payment for user—User was not as of right.)

('93) 16 Mad 304 (304, 305) (DB), *Nagappa v. Subba*. (Kumki right of landholders in South Canara is a right exercised over Government waste by the permission of the Government and is not an easement right.)

('70) 13 Suth W R 344 (344) : 5 Beng L R App 12 (DB), *Askar v. Ram Manik Roy*. (Possession in case of easements must be exercised adversely to the owner of land over which the easement is claimed.)

consideration of the character of the ground (in the case of a right of way), the space for which the right is claimed, the relations between the parties and the circumstances in which the user took place.⁸ It can, generally, only be established indirectly as a matter of inference from circumstances.⁹ Where long open user is proved, the *presumption*^{9a} however is, in the absence of other circumstances, that it has been as of right.¹⁰ This is the general trend of opinion though it has

(24) 11 AIR 1924 All 50 (50) : 74 Ind Cas 481 (DB), *Panna Lal v. Bohra Panna Lal*.

(89) 1889 Bom P J 196 (DB), *Ganpatrav v. Baji Shamraj*.

(72) 17 Suth W R 11 (11) (DB), *Futteh Ali v. Asgur Ali*. (To constitute a right of way, the right must not be exercised at the will and favour of the other party.)

(37) 24 AIR 1937 Lah 320 (321) : 171 Ind Cas 40, *Asmat Ulla v. Rahmat Ullah*. [See also (34) 21 AIR 1934 Pesh 96 (98) : 152 Ind Cas 141 (DB), *Galun Shah v. Nawab Ali*. (Where the grant is in the nature of a license and not of an easement, right of user cannot be acquired by prescription.)

(1900) 24 Bom 156 (165) : 26 Ind App 184 : 2 Bom L R 518 : 7 Sar 609 (PC), *Sultan Nawaz Jung v. Rustumji Nanabhoy Byramji Jijibhoy*. (Case under the Easements Act—Right enjoyed in pursuance of an agreement.)

(33) 20 AIR 1933 Cal 539 (541) : 145 Ind Cas 427 (DB), *Brajendra Kishore v. Iswar Kaibarta*. (Every act of fishing by license—There is no enjoyment as of right so as to give rise to the customary right of fishing.)]

8. (29) 16 AIR 1929 Bom 144 (147) : 116 Ind Cas 231 (DB), *Ramachandra Trimbak v. Hari Martand*.

(39) 26 AIR 1939 Sind 39 (42) : 179 Ind Cas 884, *Abdulla Haroon v. Municipal Corporation, Karachi*. (The mere fact that plaintiff must have erected buildings on the property with the permission of the defendants does not make the enjoyment of light and air through the windows of that building permissive.)

(38) 25 AIR 1938 Pat 423 (425) : 177 Ind Cas 315, *Dwarka Prasad v. Patna City Municipality*. (Municipality empowered to enlarge, lessen or close up a drain under S. 223 (1) of the Bihar and Orissa Municipal Act—Rain water from plaintiff's compound flowing into the drain for more than twenty years—Held plaintiff was not acting in assertion of a private right against statutory rights of the Municipality, hence the enjoyment was not "as of right" and the drain could be closed by the Municipality—(11) 16 Ind Cas 893 (DB), *Bhagavatula v. Bhagavatula*, referred.)

(22) 65 Ind Cas 509 (510) (DB) (Cal), *Mahomed Nural Huq v. Baksu Mandal*. (Fact that land is waste land does not necessarily show that no easement can be acquired over it—(03) 8 Cal W N 359, *Khoda Buksh v. Tajuddin*, followed.)

(11) 9 Ind Cas 965 (965) (DB) (Cal), *Meser Mullick v. Hefizuddin Mullick*. (Because the exercise of the right of way is not proved to be permissive, it cannot be presumed to be exercised 'as of right'.)

9. (06) 1906 Pun L R No. 26, p. 95, *Mir Mansab Ali v. Muhammad Akbar*.

9a. (26) 13 AIR 1926 Oudh 237 (238, 239) : 91 Ind Cas 987, *Majid Hussain v. Faiyaz Hussain*. (Rebuttable presumption is used.)

10. (26) 13 A I R 1926 Lah 522 (522) : 95 Ind Cas 269 (DB), *Piare Lal v. Ishaq Lal*. (An open user continued without interruption for a long time and not shown to be attributable to any permission on the owner's part is *prima facie* evidence of enjoyment as of right—The presumption is that the user is as of right.)

(75) 24 Suth W R 228 (229), *Poorno Chunder Chatterjee v. Shurut Chunder Bhattacharjee*. (User for upwards of twenty years proved.)

(17) 4 AIR 1917 Mad 386 (388, 389) : 35 Ind Cas 749 (DB), *Swaminatha Mudaly v. Velu Mudaly*. (Case of right to water—(03) 8 Cal W N 359, *Khoda Buksh v. Tajuddin*, distinguished on the ground that that case referred to right of way.)

(26) 13 AIR 1926 Pat 460 (460, 461) : 96 Ind Cas 1010 (D B), *Nazir Hussain v. Aulad Haider*. (The rule that presumption from user should be that it is as of

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been held in some cases¹¹ that such a presumption, though applicable under the English law, is not applicable in this country where the conditions are different.

The words "as of right" clearly indicate that there must be two tenements belonging to different persons. Hence a co-owner cannot

right must depend not only upon the circumstances of each case but also of each particular country — 8 Cal W N 359, followed.)

('21) 8 A I R 1921 Nag 127 (128) : 61 Ind Cas 569, *Hari v. Mahadeo*, (('70) 14 Suth W R 124 (DB), *Mahomed Ali v. Joogul Ram*, followed.)

('20) 7 AIR 1920 Lah 354 (355) : 1 Lah 206 : 56 Ind Cas 728, *Diwan v. Jagta*.

('23) 10 AIR 1923 Lah 594 (594) : 83 Ind Cas 538, *Bali Ram v. Bela Singh*. (Thirty years user without permission or not in pursuance of any arrangement — Enjoyment of easement is as of right.)

('25) 12 AIR 1925 Lah 344 (345) : 86 Ind Cas 595, *Ishaq Lall v. Piyari Lal*. (AIR 1922 Mad 5 followed.)

('22) 9 A I R 1922 Mad 5 (6) : 66 Ind Cas 11 : 45 Mad 633 (DB), *Kunjammal v. Rathnam Pillai*. (User proved — Presumption is as of right — The distinction made between case of right of way and right to water in A I R 1917 Mad 386 not approved.)

('34) 21 AIR 1934 Pat 11 (13) : 148 Ind Cas 215 (DB), *Radha Kishun v. Sunder Mal*. (Long enjoyment in a particular way proved — It is the duty of Court to clothe such enjoyment with right.)

('22) 9 A I R 1922 Upp Bur 23 (23) : 4 Upp Bur Rul 90 : 70 Ind Cas 915, *Maung Po Hla v. Maung Po Sein*.

('25) 12 AIR 1925 Nag 270 (271) : 85 Ind Cas 81, *Narain v. Ikram*. (('20) A I R 1920 Nag 26, *Ramchandra v. Venkat Rao*, followed.)

('28) 111 Ind Cas 196 (197) (Lah), *Laba Singh v. Sunder Singh*. (When a right of way has been used peaceably and openly without interruption for 20 years its user as of right may be legally inferred.)

('35) 22 AIR 1935 Lah 937 (938, 939) : 157 I. C. 871, *Bishan Das v. Behari Lal*.

('32) 19 A I R 1932 Cal 249 (251) : 59 Cal 260 : 138 Ind Cas 193 (D B), *Jotindra Mohan Mitter v. Probodh Kumar Dutt*.

('37) 24 AIR 1937 Pat 589 (591) : 172 Ind Cas 516, *Balakrishna Das v. Shyam Sunder*.

[See however ('38) 25 A I R 1938 Cal 202 (204) : 175 Ind Cas 252, *Harisadhan De v. Radhika Prosad*. (Customary right to village pathway — Evidence of user of pathway as of right is necessary — Mere evidence of user openly and without obstruction is not enough — Such user is consistent with its being permissive.)]

11. ('29) 16 AIR 1929 Pat 124 (125) : 115 Ind Cas 884 (DB), *Nasiruddin v. Deokali*. (Mere period of long user does not give rise to a presumption that the user was 'as of right' — Hence one who claims a right by reason of long user must plead and prove that the user was under a claim of right.)

('23) 10 A I R 1923 Nag 192 (192) : 71 Ind Cas 831, *Sonba v. Dattatraya*. (Long user may not always raise a presumption of grant.)

('13) 18 Ind Cas 211 (211) (DB) (Cal), *Baroda Kant Karmakar v. Sreenath Sil*. (('03) 8 Cal W N 359, *Khoda Buksh v. Tajuddin*, followed.)

('29) 16 AIR 1929 Cal 542 (543) : 56 Cal 927 : 119 Ind Cas 293 (DB), *Siti Kanta Pal v. Radha Gobinda Sen*.

('23) 10 A I R 1923 Lah 257 (258) : 73 Ind Cas 489, *Bela Singh v. Bali Ram*. (Long user — No proof of user as of right — Held easement not established.)

[See also ('89) 2 O P L R 34 (35), *Hira v. Khushalgir*. (The fact that the plaintiff's cattle passed over defendant's *banjar*, does not show that the way was as of right.)

('13) 19 Ind Cas 66 (67) (DB) (Cal), *Rameshur Mitra v. Nut Behari Guin*. (Presumption to be drawn from user must always be a question of fact depending on circumstances of each case.)]

acquire an easement in respect of the joint property.^{11a} See Note 5.

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This section differs from the corresponding provisions of the English Prescription Act and of the Indian Easements Act in that, it requires the user as of right in the case of *all* easements. Under the English Act, the words "as of right" are omitted in respect of easements of light and under the Easements Act the words are omitted in respect of easement of light and air and of support.¹² The result is that under the said Acts a *tenant* can under certain circumstances, acquire for his own benefit as against the landlord, certain easements.¹³

Under this Act a *tenant* cannot acquire by prescription *any* easement against his landlord, because he cannot be said to use it *as of right*.¹⁴ Similarly, where two tenements are owned by the same person and are in the occupation of different persons as lessees, one of them cannot prescribe against the other. This is based on the principle that the possession of the tenant is in law the possession of the landlord and to allow a right to be acquired by prescription under such circumstances would be to allow the landlord to acquire an easement

11a. ('44) 31 AIR 1944 Pat 261 (268, 269): 23 Pat 115 (DB), *Traders and Miners Ltd. v. Dhirendra Nath*.

('39) 26 AIR 1939 Lah 28 (29): 182 Ind Cas 498, *Onkar Nath v. Muni Lal*. (No easement can be acquired in respect of ventilators in wall which was jointly owned. NOTE.—But see ('23) AIR 1923 Lah 249, *Nandu Shah v. Sant Ram*.)

12. ('19) 6 AIR 1919 Bom 94 (95): 49 Ind Cas 963 (D B), *Bai Kuvarbai v. Jamsedji Rustomji*.

13. See Peacock on "Easements," 3rd Edition, page 457.

14. ('47) 34 A I R 1917 Nag 175 (176): ILR (1947) Nag 254, *Doma Matadin v. Ragho Rama*.

('92) 14 All 185 (188): 1892 All W N 38 (FB), *Udit Singh v. Kashi Ram*.

('02) 29 Cal 363 (366, 367) (DB), *Mani Chandra v. Baikanta Nath*. (Tenant derives his right from the lessor, and as the latter cannot have an easement as of right against himself so also the tenant cannot have it.)

('30) 17 AIR 1930 Lah 119 (119, 120): 119 Ind Cas 418, *Puran v. Ghungar*. (The presumption always is that possession or user is permissive.)

('17) 4 AIR 1917 Cal 681 (685): 34 Ind Cas 450 (D B), *Sital Chandra v. Allen Delanny*. (But he can acquire it by grant.)

('23) 10 AIR 1923 Cal 8 (9): 70 Ind Cas 663: 50 Cal 356 (DB), *Tinkori Pathak v. Ram Gopal*. (But he can acquire such an easement by other modes such as by immemorial user — ('13) 20 Ind Cas 359 (DB) (Cal), *Bhupendra Nath v. Annada Prosad*, followed.)

('17) 4 AIR 1917 Pat 530 (531): 41 Ind Cas 577 (DB), *Krishna Chandra Mandal v. Ram Sahai Katari*.

('34) 21 AIR 1934 Pat 11 (12): 148 Ind Cas 215 (DB), *Radha Kishen v. Sunder Mal*. (There cannot be prescription as between tenants of same landlord.)

('07) 6 Cal L Jour 218 (222) (DB), *Sitab Rai v. Dubal Nagesia*.

('30) 17 AIR 1930 Pat 7 (10): 124 Ind Cas 385 (DB), *Kartic Manjhi v. Banamali Mukherji*. (But he can claim a right of easement based on immemorial user.)

('96) 1 Cal W N 151 (152) (DB), *Jeenab Ali v. Allabuddin*. (But he can acquire a way of necessity by implied grant.)

('13) 22 Ind Cas 379 (380) (All), *Bahadur v. Khushi Ram*.

('36) 23 A I R 1936 Sind 61 (62, 63): 30 Sind L R 32: 163 Ind Cas 137 (D B), *Mowloo Nanji v. Rochiram*. (Tenant holding temporary lease cannot acquire right of way by user over land in possession of other tenant under same landlord — Enjoyment of easement is not as of right.)

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right in his own soil.¹⁵ But where A is a tenant of a certain land under B and *owns* a building on such land A can acquire an easement of light and air in regard to such building as against C who is a tenant of another piece of land under the same landlord. The reason is that A is not a tenant in regard to the building.¹⁶ As to whether a permanent tenure-holder can acquire an easement against the owner or another permanent tenure-holder, see the undermentioned cases.¹⁷

Where an enjoyment has begun as of right, a mere interruption for less than a year cannot affect it though constant interruptions, even if not acquiesced in for a year, may show that the enjoyment was not as of right.¹⁸

14. "Without interruption." — The enjoyment necessary to qualify for a right of easement is something very different from *actual user*. A discontinuous easement such as a right of way, or a right to use a piece of land at particular intervals or a right to go by boats in times of flood or in the rainy season, cannot be actually used every moment of the period of prescription but only at intervals. There may be days and weeks and months during which the right may not be exercised at all and yet during all these days and weeks and months the person claiming the right may have been in full enjoyment of it when necessary.¹ But no easement can be acquired where there has

15. ('39) 43 Cal W N 636 (638) (DB), *Nagendra Nandini v. Priya Nath*.

16. ('39) 43 Cal W N 636 (639) (DB), *Nagendra Nandini v. Priya Nath*.

[See also ('39) 26 AIR 1939 Sind 39 (44) : 179 Ind Cas 884, *Abdulla Haroon v. Municipal Corporation, Karachi*. (Easement of light and air for building owned by tenant but standing on leased land can be acquired against the landlord — ('38) AIR 1938 All 293 (FB), *Abdul Rashid v. Braham Saran* followed — Case under Easements Act.)]

17. ('24) 11 AIR 1924 Cal 363 (364) : 70 Ind Cas 173 (DB), *Kali Pada Bose v. Fani Bhusan Roy*. (In this case the user of thirty years was traced to a lost grant.)

('29) 16 AIR 1929 Pat 124 (126) : 115 Ind Cas 884 (DB), *Nasiruddin v. Deokali*. (Obiter — He may acquire.)

('20) 7 AIR 1920 Mad 125 (125) : 54 Ind Cas 948 (DB), *Narayan v. Lingappa*. (A permanent tenant cannot acquire an easement against his landlord — ('02) 29 Cal 363, *Mani Chander v. Baikanta Nath* followed.)

('15) 2 AIR 1915 Cal 403 (404, 405) : 31 Ind Cas 549, *Madan Mohan v. Sashi Bhusan*. (The point was left undecided in the case but it was doubted whether easement could be acquired by prescription in such a case.)

18. (1851) 20 L J Q B 482 (485) : 17 Q B D 267 : 85 R R 455 : 15 Jour 675, *Eaton v. Swansea Waterworks Co.*

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1. ('46) 33 AIR 1946 Cal 444 (448) : 223 Ind Cas 470, *Bholanath Ghosh v. Momena Khatun*. (In case of claim of easement for use of water for irrigation or rights of analogous nature proof of absolute continuous user is not necessary. The right can be established by proof of periodical user.)

('24) 11 AIR 1924 All 97 (98) : 74 Ind Cas 922, *Sri Ram v. Mani Ram*. (Right to irrigate from certain wells — There may have been no irrigation because of excessive rainfall or because land was allowed to lie fallow — Hence in the absence of proof of interruption by defendants, plaintiff's right was decreed.)

('15) 2 AIR 1915 Cal 594 (595) : 26 Ind Cas 485 (DB), *Ram Gopal Sen v. Abhoya Charan Ghose*. (Where a plaintiff sues for obstructing the right of way for boats

been no user *at all*.^{1a}

The section requires that the enjoyment should be 'without interruption' and the explanation thereto enacts that nothing is to be considered as an interruption unless —

1. *firstly* : there is an actual discontinuance of the possession or enjoyment ;
2. *secondly* : such discontinuance is by reason of the act of some person other than the claimant himself, and
3. *thirdly* : such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

It follows that the exercise of the right need not be continuous² and that a mere *non-user* of an easement for a time is not an interruption of the enjoyment.³ Thus, where the owner of a house

in the rainy season, the non-user of the way within two years previous to the institution of the suit is no bar under Section 26 of the Limitation Act.)

('81) 7 Cal 132 (135) : 8 Cal L R 281 : 5 Ind Jur 642 : 4 Shome L R 144 (DB), *Koylash Chunder Ghose v. Sonantun Chung Barooie*. (Do.)

('36) 40 Cal W N 222 (224), *Mangulal Agarwalla v. Chandi Charan Mukherji*.

('19) 23 Cal W N lxxxii. ((1919) 1 Ch 24, *Levet v. Gas Light and Coke Company* criticised.)

('19) 6 AIR 1919 Cal 357 (358) : 51 Ind Cas 372 (DB), *Gopal Chandar Sen v. Bankim Behary Roy*. (Cessation of user is not always inconsistent with continuance of enjoyment of a right.)

('29) 16 AIR 1929 All 497 (497) : 118 Ind Cas 521, *Partap Singh v. Hemraj*. (The mere failure to exercise the right for a period of two years does not extinguish the right of easement.)

1a. ('90) 1890 Bom P J 184, *Patel Valabhbhai v. Valabhai*. (Mere proof of existence of gutter for the statutory period is not sufficient to establish easement to discharge the water of a sink through it on to another's land — Actual passage of water must be proved.)

2. ('03) 30 Cal 1077 (1083) (DB), *Budhu Mandal v. Malat Mandal*. (An easement, to cause the water of a river to flow, by means of bunds erected on the claimant's land, across the servient tenement, on to the dominant tenement may be established by twenty years' user during the periods of draught, when it could be taken advantage of, although the exercise of the right may not be continuous.)

('11) 9 Ind Cas 69 (70) (DB) (Cal), *Ghasiram v. Asirbad*. (Proof of substantial enjoyment of the right for the requisite period is enough.)

('35) 22 AIR 1935 Cal 282 (283) : 155 Ind Cas 833, *Jogesh Chandra Roy v. Sm. Sachchandra*. (A person may be said to be in enjoyment of a right of way during a period of time, though he does not use the way every moment.)

[See also ('29) 16 AIR 1929 Cal 286 (287) : 56 Cal 161 : 110 Ind Cas 422, *Bepin Behary v. Ramnath Ghatak*. (Where a person is taking water during monsoon through an artificial channel for nearly 32 or 35 years into his own field for irrigation purposes by cutting an *ail* of another's field at a particular place during the monsoon, such user cannot be said to be of a temporary nature and the right to take such water can be acquired by prescription.)]

3. ('41) 45 Cal W N 486 (487), *Abdul Hamid v. Ahmed Ali*. (But user of a pathway only once in the period of twenty years is not enough to establish the easement under this section.)

('29) 16 AIR 1929 All 497 (497) : 118 Ind Cas 521, *Partab Singh v. Hemraj*. (Mere failure to exercise right within two years before suit does not extinguish easement.)

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ceases to use the way to it because the house is for a time unoccupied, or where a farmer desists for a time from exercising a right to pasture because he happens to have no pasturable cattle or because by reason of draught or some other cause the herbage is scanty or unwholesome, it cannot be said that the enjoyment has been "interrupted" within the meaning of the section.⁴

A non-user of the right may be an interruption if it is caused by reason of an *obstruction* of a person other than the claimant himself.⁵ In other words, the non-user must be the effect of a prevention of the user by some person acting *adversely* to the claimant.⁶ In the case of affirmative easements, such adverse act must consist in doing some act on the servient tenement or in taking legal proceedings for the direct interference with the servient owner's rights of ownership. In the case of negative easements, it must consist in doing some act on the servient tenement. Proof of circumstances which merely *negative assent* on the part of the servient owner to the enjoyment of the easement claimed, or evidence of dissent such as a *protest* unaccompanied by actual obstruction, is not sufficient to support a plea of interruption.⁷ Where in the process of acquisition of an easement of light and air through certain windows the dominant tenement was burnt down and was rebuilt with windows corresponding to the old windows, it was held that the temporary discontinuance of the enjoyment was not an "interruption" as it was not by reason of any obstruction by the servient owner or other person.⁸ In the undermen-

(35) 22 AIR 1935 Cal 282 (283) : 155 Ind Cas 833, *Jogesh Chandra Roy v. Sm. Sachchhandra*.

(74) 22 Suth W R 340 (341), *Sheikh Muhammad Ansure v. Sheikh Sefatoollah*. (Temporary non-user during rainy season.)

(18) 5 AIR 1918 Oudh 296 (298) : 45 Ind Cas 585 : 21 Oudh Cas 78, *Ganesh Prasad v. Khuda Baksh*. (To establish right of way it is not necessary to show that the right was exercised at every moment of time during the statutory period.)

4. (75) 1 Cal 422 (430) : 25 Suth W R 228 (DB), *Sham Churn Auddy v. Tariney Churn Banerjee*. (The term 'interruption' in the section is altogether inapplicable to any voluntary discontinuance of the user by the claimant himself.)

(19) 6 AIR 1919 Cal 357 (358) : 51 Ind Cas 372 (DB), *Gopal Chandra v. Bankim Bihari*.

5 (75) 1 Cal 422 (429) : 25 Suth W R 228 (DB), *Sham Churn Auddy v. Tariney Churn Banerjee*.

6. (75) 1 Cal 422 (429) : 25 Suth W R 228 (DB), *Sham Churn Auddy v. Tariney Churn Banerjee*.

(35) 22 AIR 1935 Cal 282 (283) : 155 Ind Cas 833, *Jogesh Chandra Roy v. Sm. Sachchhandra*. (The term 'interruption' refers to an adverse obstruction and not to a mere discontinuance of user.)

7. (19) 6 AIR 1919 Bom 94 (95, 96) : 49 Ind Cas 963 (DB), *Kuvarbai v. Jam-sedji Rustamji*. (Legal notices by servient owner.)

(31) 18 AIR 1931 Lah 395 (398) : 12 Lah 741 : 135 Ind Cas 51 (DB), *Ram Sarup v. Abdul Haq*.

(16) 3 AIR 1916 Mad 1001 (1004) : 31 Ind Cas 528 (DB), *Muthu Goundan v. Ananta Goundan*.

8. (22) 9 AIR 1922 Bom 3 (4) : 46 Bom 448 : 67 Ind Cas 250 (DB), *Ratan Lal Bhola Ram v. Gulam Husen Abdul Ali*.

tioned case^{8a} it was held that the mere filling up of a channel would not necessarily constitute obstruction if no water for purposes of irrigation was required at that time and there was no refusal by the defendants to re-open the channel when wanted.

A discontinuance of enjoyment, even though it may be by reason of an obstruction by a person other than the claimant, is nevertheless not an interruption unless such obstruction is *submitted to or acquiesced in for one year* after the claimant has notice thereof and of the person making or authorising the same to be made.⁹ In order to negative acquiescence in, or submission to, obstruction, it is not necessary for the party obstructed to have brought a suit or taken any active steps to remove the obstruction; it is enough if he has communicated to the party obstructing that he does not submit to or acquiesce in it.¹⁰

The word "interruption," (not acquiesced in), is not confined to the case of *intermediate* obstructions in the course of the period of enjoyment of twenty years mentioned in the statute, but is capable of being applied to the case of an obstruction or hindrance at the latter part of the period of twenty years so as to prevent the actual enjoyment for the full period of twenty years without interruption from taking place. Thus, if the enjoyment has lasted nineteen years seven months and then there is an obstruction, and eight months thereafter a suit is filed, the enjoyment must be deemed to have continued up to date of suit.¹¹ In *Flight v. Thomas*,¹² Tindal, C. J., referring to the word 'interruption' used in the English Prescription Act, observed as follows:

"There is nothing in the word itself which necessarily confines its meaning to an obstruction in the middle or course of the enjoyment; and no authority has been cited to show that an interruption for the last three months of the period of twenty years is to be considered as different in itself, or in its legal

8a. ('14) 1 AIR 1914 Cal 907 (907) : 25 Ind Cas 386, *Kanai Lal Mandal v. Jadab Lal Gangopadhyaya*.

9. ('67) 7 Suth W R 367 (367) (DB), *Roy Luchmee Pershad v. Mt. Fuzeelutonnissa Bibee*. (A wrongful interruption of right of user of a channel to permit the egress of water collecting on plaintiff's land would not necessarily destroy the right of user, unless such interruption has been *acquiesced in* by the plaintiff.)

('29) 16 AIR 1929 All 382 (384) : 116 Ind Cas 806, *Municipal Board, Pilibhit v. Khalil-ul-Rahiman*. (Acquiescence not proved — Explanation 2 to S. 15, Easements Act, which corresponds with explanation to this section, does not apply.)

10. ('77) 1 Mad 335 (339) : 1 Ind Jur 802 (DB), *Subramania Iyer v. Ramachandra Rao v. Venkat Rao*. (The question whether there has been submission to or acquiescence in an obstruction is one of fact.)

(1864) 31 L T 684 (687) : 23 W R (Eng) 163 (164) : 44 L J C P 66 : L R 10 C P 108, *Glover v. Coleman*.

11. ('18) 5 AIR 1918 Lah 23 (25) : 1918 Pun Re No. 48 : 46 Ind Cas 17, *Sawan Singh v. Chattar Singh*. (Where the period of obstruction is less than one year the obstruction may, for the purposes of calculating the period of twenty years be ignored.)

12. (1839) 52 R R 468 (478) : 11 A & E 688 : 3 P & D 442.

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consequences, from an interruption of the same duration in the middle of the twenty years."

A contrary view, namely that the explanation does not apply to an interruption at the end of the period of twenty years has been held in the undermentioned cases.¹³ It is submitted that this view is not correct.

The explanation does not, however, apply, where there has been no interruption *before* suit. Thus, where the servient owner files a suit nineteen years and some months after the dominant owner has begun to enjoy the easement, the latter cannot say that under the explanation he can add the period subsequent to suit as interruption not acquiesced in for more than a year.¹⁴

Although a mere non-user of an easement is not, as has already been seen, an interruption of the enjoyment, it may, under particular circumstances, show that the right has been *abandoned*, and the easement thus destroyed.¹⁵ No hard and fast rule could, however, be laid down as to what would or would not constitute a discontinuance of the enjoyment or abandonment where there has been no user of it for a particular period. Obviously, the question must depend upon the circumstances of the particular case and the nature of the right claimed.¹⁶ A mere non-user for a time, if the circumstances are not such as to indicate an intentional abandonment of the right would not, even if such non-user extends to two or three years, be sufficient to destroy the right.¹⁷ In the undermentioned case¹⁸ the non-user of

13. ('27) 14 AIR 1927 Mad 238 (239) : 98 Ind Cas 886, *Rama Krishnayya v. Rattaya*.

('05) 1905 Pun L R No. 203, p. 680 : 1905 Pun Re No. 73, *Amir Haidar Shah v. Fajja*. (The word 'interruption' applies only to cessation of enjoyment followed by a further period of enjoyment.)

14. ('24) 11 AIR 1924 Lah 628 (628) : 75 Ind Cas 608, *Chiragh Din v. Ghulam Muhammad*.

15. ('25) 12 AIR 1925 Rang 137 (139) : 2 Rang 534 : 84 Ind Cas 1003 (DB), *S. A. Christopher v. J. A. Cohen*.

('86) 1886 Pun Re No. 38, *Ghulam Muhammad v. Gulsher Mohamed Khan*.

16. ('99) 26 Cal 593 (597) : 3 Cal W N 610 (DB), *Janhavi Chowdhurani v. Bindu Bhashini Choudhurani*.

('10) 7 Ind Cas 813 (813, 814) (Cal), *Poran Ghosh v. Netai Sundar Roy*.

('19) 6 AIR 1919 Pat 185 (187, 188) : 49 Ind Cas 752, *Mewa Sao v. Nasiruddin*. (Non-user during the time the old building was pulled down and a new one constructed in its place — *Held* there was no abandonment.)

('73) 20 Suth W R 188 (188) (S B), *Raj Behari Roy v. Tara Pershad Roy*.

('69) 12 Suth W R 519 (520) (DB), *Jugutbundhoo Chuckerbutty v. Jagut Chunder Chowdhury*.

('04) 6 Bom L R 287 (288) (DB), *Vinayak v. Martand*.

17. ('80) 1880 Pun Re No. 68, *Churrut Singh v. Simboo*.

('86) 1886 Pun Re No. 38, *Ghulam Muhammad v. Gulsher Muhammad Khan*. (Non user may amount to abandonment when considered with other circumstances.)

('10) 7 Ind Cas 813 (814) (Cal), *Poran Gosh v. Netai Sundar Roy*.

('19) 6 AIR 1919 Pat 185 (187, 188) : 49 Ind Cas 752, *Mewa Sao v. Nasiruddin*. (Mere non-user does not amount to abandonment.)

[But see ('05) 1905 Pun L R No. 203, p. 680 : 1905 Pun Re No. 73, *Amir Haidar Shah v. Fajja*. (Submitted not correct.)]

18. ('70) 14 Suth W R 79 (80) : 5 Beng L R App 66 (DB), *Haridas Nandi v. Jadunath Dutt*.

a right of way for six years was held to show that the right was abandoned. Where the dominant owner himself created an obstruction of a permanent character thus incapacitating himself from using the right, and this happened at a time when the dominant owner had not yet acquired by prescription the easement, it was held that his act did not amount to an abandonment of an easement inasmuch as abandonment implied that the easement had already been acquired. At the same time, it was held that the act amounted to a discontinuance of the enjoyment of the right so that during the period that the obstruction existed it could not be said that the person was in the enjoyment of the right within the meaning of this section.¹⁹ Where there is a right of way between fixed termini and the servient owner points out a different pathway, there is no interruption of the easement, the right being one to pass from one point to the other, not necessarily by the shortest route or by a particular route.²⁰ See also Note 9a to section 2 sub-section (5).

In April 1892, B, the servient owner, dispossessed A, the dominant owner from the dominant tenement. A thereupon sued B for possession of the dominant tenement under section 9 of the Specific Relief Act and obtained possession in June 1895. Between 1892 and June 1895, A could not, and was not, enjoying the easement (which was a right of way over B's land) though there was no obstruction by B by any act done on the servient tenement. After A obtained possession, B obstructed A in the exercise of the right of way and A thereupon filed a suit for a declaration of the right in November 1895. It was held that the cessation of the user from 1892 to 1895 was not consistent with the idea of continuance of the enjoyment and that consequently he did not acquire any right of way.²¹

15. "For twenty years." — A right to an easement is not indefeasibly established by an enjoyment for less than twenty years.¹

19. ('76) 1 Cal 422 (429, 430) : 25 Suth W R 228 (DB), *Sham Churn Auddy v. Tariney Churn Banerjee*. (As the discontinuance of the enjoyment was voluntary, it was not an *interruption* within the meaning of the section.)

20. ('29) 16 AIR 1929 Pat 124 (125) : 115 Ind Cas 884 (DB), *Nasiruddin v. Deokali*. (A case of discontinuous, non-apparent positive easement.)

21. ('99) 26 Cal 593 (597) : 3 Cal W N 610 (DB), *Janhavi Chowdhurani v. Bindu Bashini Choudhurani*. (At whatever time the suit is brought the enjoyment must be found to have continued till within two years of that time.)

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1. ('75) 7 N W P H C R 293 (295) (DB), *Jogal Kishore v. Mulchand*.

('99) 1899 Pun Re No. 68 : 1900 Pun L R No. 5, *Sharaf Husain v. Ram Kishen Das*.

('18) 5 AIR 1918 Lah 23 (25) : 1918 Pun Re No. 48 : 46 Ind Cas 17, *Sawan Singh v. Chattar Singh*.

('78) 2 Bom 660 (662) : 3 Ind Jur 278 (DB), *Sarubai Jitmal v. Bapu Narhar Sohoni*. (Where there has been no appropriation of light and air through an aperture for the statutory period of 20 years, no right of easement is created thereby.)

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At any time within that period the owner of the servient tenement may sue for redress and the claimant to the easement cannot rely on a plea of prescription in answer.² But though an enjoyment by the dominant owner for less than twenty years does not give him any right against the servient owner, he has sufficient interest as against *trespassers* to maintain a suit against them for relief.³

The period of twenty years or more of enjoyment must end within two years before the institution of the suit.⁴ Otherwise, the claimant to the easement cannot succeed.⁵ If the period of twenty

- (71) 16 Suth W R 198 (199) (DB), *Rajah Bijou Keshub Roy v. Obhoy Churn Ghose*. (The finding that the right claimed has been enjoyed 'for a good many years' is quite insufficient.)
- (73) 20 Suth W R 283 (283), *Juggessur Singh v. Nund Lall Singh*. (This is so as regards both rights of way and rights of water.)
- (75) 25 Suth W R 15 (16), *Sheikh Hubeebul Hossein v. Sheikh Shahamut Ali*. [See also (21) 8 AIR 1921 Mad 627 (629) : 70 Ind Cas 367 (DB), *Sivananjiah v. Sithay Goundar*. (A mere user which has not ripened by prescription (in this case by 60 years' enjoyment against Government would not give any right upon which an action could be founded.)]
2. (75) 7 N W P H C R 293 (295) (DB), *Jogal Kishore v. Mulchand*.
(24) 11 AIR 1924 Lah 628 (628) : 75 Ind Cas 608, *Chiragh Din v. Ghulam Muhammad*.
(22) 9 AIR 1922 Bom 83 (84) : 67 Ind Cas 356 : 46 Bom 827 (DB), *Kashi Bai Kalidas v. Vallabai*. (Redress by way of injunction.)
(28) 15 AIR 1928 Bom 312 (315) : 113 Ind Cas 525 (DB), *Lallubhai v. Bhimbhai*. (Case under Easements Act.)
(72) 19 Suth W R 194 (195) : I A Sup Vol 175 : 12 Beng L R 406 : 3 Sar 236 (PC), *Elliott v. Bhoobun Mohun Bonnerjee*. (Building commenced before expiry of 20 years.)
[See (28) 15 AIR 1928 Nag 91 (91) : 109 Ind Cas 281, *Abdul Raheman v. Mulchand*. (Removal of support of wall before accrual of right of easement by prescription by neighbour is not actionable.)]
3. (16) 3 AIR 1916 Mad 442 (443) : 30 Ind Cas 989 (DB), *Anantha Desikachariar v. Viswanatha Mudaly*. (Injunction can be claimed against the trespasser.)
(95) 5 Mad L Jour 24 (25) (DB), *Acchanna v. Venkamma*. (He can, in the process of acquisition, claim as against a person not the servient owner that he shall not be obstructed in his enjoyment.)
(10) 6 Ind Cas 266 (266) : 34 Mad 173 (DB), *Kondappa Rajan v. Dwara Konda Suryanarayana*.
(14) 1 AIR 1914 Sind 24 (25) : 8 Sind L R 218 : 27 Ind Cas 999 (DB), *Gobind Ram v. Saberhatullah*. (6 Ind Cas 266 and (93) 20 Cal 834 (PC), *Ismail v. Mahomed*, followed.)
4. (14) 1 AIR 1914 All 68 (69) : 24 Ind Cas 126 (DB), *Muhammad Maroof v. Sultan Ahmad*. (Case under Easements Act.)
(75) 24 Suth W R 295 (296) (DB), *Baboo Luchmee Pershad Narain Singh v. Tiluckdharee Singh*.
(74) 23 Suth W R 401 (411), *Gopee Chand Setia v. Bhoobun Mohun Sen*.
(15) 2 AIR 1915 Bom 284 (285) : 40 Bom 401 : 33 Ind Cas 192, *Bai Bhicaji v. Perojshaw Jiwanji*. (Case under Easements Act.)
(78) 1878 Pun Re No. 25, *Fatteh v. Himmat*.
(19) 6 AIR 1919 Cal 357 (357) : 51 Ind Cas 372 (DB), *Gopal Chandra Sen v. Bankim Behary Ray*. (Mere proof of enjoyment for 20 years is not enough.)
5. (19) 6 AIR 1919 Cal 357 (357) : 51 Ind Cas 372 (DB), *Gopal Chandra Sen v. Bankim Behary Ray*.

years has ended within two years of the suit, it does not matter if there has been a subsequent interruption for more than a year.^{5a} A title to an easement under the section is not complete by the mere effluxion of the period of twenty years. However long the period of enjoyment may have been, no absolute or indefeasible right can be acquired until the right is brought in question in some suit.⁶ In other words, it is the *filing of the suit* that enables the easement to be acquired.⁷

Since the enjoyment referred to in the section is not by *actual* user,⁸ it is not necessary that there should have been *actual* user within two years next before the institution of the suit.⁹ In this view illustration (b) to the corresponding sections of the Acts of 1871 and 1877 which indicated that *actual user* within two years next before the suit was necessary^{9a} was against the terms of the section¹⁰ and was consequently omitted in the present Act.

The *same* easement must have been enjoyed for the period of twenty years referred to in the section. Where during the course of enjoyment the easement is altered so as to impose *additional or new burden* on the servient tenement, a fresh period of twenty years' enjoyment is necessary to acquire the right.¹¹ The principle is that the owner of a dominant tenement cannot, by increasing the burden,

5a. ('38) 25 AIR 1938 Pat 423 (425) : 177 Ind Cas 315, *Dwarka Prasad v. Patna City Municipality*.

6. ('29) 16 AIR 1929 Cal 542 (543) : 56 Cal 927 : 119 Ind Cas 293, *Siti Kanta Pal v. Radha Govinda Sen*.

('20) 7 AIR 1920 Mad 541 (541, 542) : 60 Ind Cas 171 (DB), *Nachiparayan v. Narayana Goundan*.

7. ('44) 31 AIR 1944 Pat 261 (268, 269) : 23 Pat 115 (DB), *Traders and Miners Ltd. v. Dhirendra Nath*.

('16) 3 AIR 1916 Mad 1001 (1003) : 31 Ind Cas 528 (DB), *Muthu Goundan v. Anantha Goundan*. (Case under Easements Act.)

('16) 3 AIR 1916 Sind 29 (31) : 33 Ind Cas 615 : 9 Sind L R 101 (DB), *Premji Ladha v. Visram Amul*. (The period of 20 years is not a period 'in gross' but the 20 years immediately preceding the institution of the suit or ending not more than two years before suit.)

('23) 10 AIR 1923 Oudh 29 (30) : 72 Ind Cas 909, *Basdeo Singh v. Bhagwat Prasad*.

8 See Note 14.

9. ('19) 6 AIR 1919 Cal 357 (358) : 51 Ind Cas 372 (DB), *Gopal Chandra Sen v. Bankim Behary Ray*.

('10) 9 Ind Cas 69 (70) (DB) (Cal), *Ghashiram v. Asirbad*.

9a. ('73) 20 Suth W R 283 (283), *Juggessur Singh v. Nundlal Singh*.

10. ('81) 7 Cal 132 (135, 136) : 8 Cal L R 281 : 5 Ind Jur 642 : 4 Shome L R 144 (DB), *Koylash Chunder Ghose v. Sonatun Chung Barcoie*.

[See also ('99) 26 Cal 593 (596, 597) : 3 Cal W N 610 (DB), *Janhavi Chowdhurani v. Bindu Bashini Choudhurani*. (Though proof of actual user is not necessary, yet the cessation of user must be consistent with continuance of enjoyment.)]

11. ('02) 26 Bom 374 (377, 378) : 4 Bom L R 34 (DB), *Bai Hariganga v. Tricamlal Kedareshwar*.

('26) 13 AIR 1926 Nag 474 (475) : 96 Ind Cas 546, *Badri v. Jafarbai*.

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by alteration, increase his right.¹² Thus, where new windows were built which did not receive the same cones of light or a substantial part thereof as were received by the old windows, it was held that the easement claimed in respect of the new windows was different from that claimed in respect of the old windows, and can only be acquired by twenty years' enjoyment of the light through the new windows.¹³ On the same principle, no easement can be claimed to spread the branches or the roots of a tree on the neighbour's land without liability to have them cut.¹⁴ The reason is that a growing tree is always in a state of change in extent and space by the growth of twigs, etc., and cannot be enjoyed as the same easement for any length of time.¹⁵

The question whether the same easement has been enjoyed during a particular period is a question of fact. Where the light received

12. ('20) 7 AIR 1920 Cal 268 (268) : 58 Ind Cas 854 (DB), *Suresh Chandra Biswas v. Jogendra Nath Sen.* (Alteration of dominant tenement.)
(22) 65 Ind Cas 579 (579) (DB) (Cal), *Ram Kumar Majumdar v. Mohim Chandra Dutta.* (When a particular mode of user is not heavier than the mode of user proved, the plaintiff may be allowed to use it in that particular way, e. g., the user of a way for horses may include the right to lead smaller animals as well but not larger animals or loads.)
(13) 19 Ind Cas 984 (986) (All), *Jamna Prashad v. Gopinath.* (Passage used for the sweepers, maids and ladies of a household could not be used as a passage for males also as it amounted to an aggravation of the easement.)
(24) 11 AIR 1924 Lah 387 (388) : 69 Ind Cas 406, *Hans Raj v. Malawa Mal.* (Where defendant had acquired the right to use the roof over plaintiff's room as an open space, he will not be justified in building over that portion and increase the burden on the servient tenement.)
(26) 97 Ind Cas 169 (169) (DB) (All), *Gajadhar v. Kishori Lal.*
[See also ('15) 2 AIR 1915 Sind 12 (12, 13) : 28 Ind Cas 169, *Ayooob Ismail v. Nur Muhammad Sileman.* (If he increases burden, proper remedy is injunction.)
(32) 19 AIR 1932 Cal 249 (254) : 59 Cal 260 : 138 Ind Cas 193 (DB), *Jotindra Mohan Mitter v. Probodh Kumar Dutt.* (Adjoining premises—Construction of drain with consent—Right limited by particular purpose—Additional burden cannot be imposed.)]
13. ('02) 26 Bom 374 (377, 378) : 4 Bom L R 34 (DB), *Bai Hariganga v. Tricamlal Kedarshwar.*
14. ('25) 12 AIR 1925 Bom 446 (447) : 89 Ind Cas 191 (DB), *Keshav Krishna v. Shankar Mahadeo.* (19 Bom 420 followed.)
(95) 19 Bom 420 (427) (DB), *Hari Krishna v. Shankar Vithal.*
(04) 31 Cal 944 (948) : 8 Cal W N 710 (DB), *Lakshmi Narain Banerjee v. Tara Prosonna Banerjee.*
(09) 2 Ind Cas 230 (232) : 5 Nag L R 52, *Udesingh v. Ganeram.*
(02) 24 All 499 (500) : 1902 All W N 169, *Behari Lal v. Ghisa Lal.*
[See ('18) 5 AIR 1918 Bom 68 (70) : 43 Bom 164 : 47 Ind Cas 629 (DB), *Vishnu Jagannath v. Vasudeo Raghunath.*]
[See also ('29) 114 Ind Cas 512 (512) (Oudh), *Abdul Haq v. Shahamat Ali.* (Quære — Whether easement can be claimed to collect fruits falling upon neighbour's land from a growing tree.)]
[But see ('93) 17 Bom 745 (747) (DB), *Naik Parsotam Chela v. Gandrap Fatelal Gokuldas.* (Assumed to be an easement right.)]
15. ('09) 2 Ind Cas 230 (232) : 5 Nag L R 52, *Udesing v. Ganeram.* (1 Rolle 393, *Norris v. Baker*; 1895 A C 1, *Lemon v. Webb* and ('95) 19 Bom 420 (DB), *Hari v. Shankar*, followed.)

through certain new apertures is the same or a substantial part of the cone of light received through the old windows, the easement cannot be considered to have been altered so as not to constitute the *same* easement.¹⁶ Where A had enjoyed easement over B's lane for allowing A's sweepers to walk and cleanse A's privy for a certain number of times a year, and during the course of enjoyment the Municipality made a rule that municipal servants should clean the privies *daily* and such servants began thereafter to cleanse A's privy daily, it was held by the Privy Council that the easement did not become materially different so as to prevent the periods prior and subsequent to the change being tacked on.¹⁷ Similarly, where the same channel was used to take water from a tank, but the water was taken through different openings, it was held that the easement was not different.¹⁸ So also, an easement of way cannot be deemed not to be the *same* easement where the termini are fixed, though the servient owner can point out the route from time to time.¹⁹

It is not necessary that the same *person or individual* should have enjoyed the easement for the whole of the twenty years. Where A, B and C have been successively in possession of the dominant tenement and have enjoyed an easement right over the servient tenement, C can tack on the period of his own enjoyment to the periods of enjoyment of the easement by A and B in order to make up the statutory period of twenty years.²⁰ The principle that one trespasser cannot tack on his *possession* to that of another for claiming a prescriptive title to the *ownership* of the property does not apply to easements which are appurtenant to the land and are not personal rights.^{20a}

Under the Law of Jamnagar no one can acquire any right of easement against the Government. Therefore the period during which a dominant owner has been discharging water from his house on the servient tenement, when it is of State ownership, cannot be tacked on to the period during which he is in the process of acquiring the right of easement against a private person after the transfer of the servient tenement by the State to such person.^{20aa}

Where a right of pasturage was claimed by all the villagers over certain land which they alleged they had enjoyed as a pasture for over

16. ('04) 7 Bom L R 73 (75), *Framji Shapurji v. Framji Edulji*.

17. (86) 13 Cal 136 (142) : 13 Ind App 77 (PC), *Jadulal v. Gopala Chandra*.

18. ('11) 9 Ind Cas 69 (70) (DB) (Cal), *Ghashiram v. Asirbad*.

19. See Note on "Extents of easements" in Note 9a to S. 2 sub-section (5).

20. ('37) 24 AIR 1937 Nag 38 (39) : 168 Ind Cas 921, *Nago v. Mt. Lahani*. (('17) AIR 1917 Nag 7, *Ganno v. Beni* distinguished.)

('22) 9 AIR 1922 Upp Bur 23 (24) : 4 Upp Bur Rul 90 : 70 Ind Cas 915, *Maung Po Hla v. Maung Po Sein*.

('18) 5 AIR 1918 Oudh 296 (299) : 45 Ind Cas 585 : 21 Oudh Cas 78, *Ganesh Prasad v. Khuda Baksh*. (Periods of enjoyment by successive tenants of dominant heritage can be tacked.)

20a. ('37) 24 AIR 1937 Nag 38 (39) : 168 Ind Cas 921, *Nago v. Mt. Lahani*.

20aa. ('51) 38 AIR 1951 Sau 5 (Pr 4) (DB), *Chhotalal v. Babulal Sunderlal*.

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twenty years it was held that *some* of the villagers might have enjoyed it for the prescriptive period but it could not be the case with all of them. Hence such right could not be established under this section.^{20b}

The requirement of twenty years' user is not applicable to easements that may be acquired in other ways than by prescription, e. g., by contract²¹ or custom.²²

When the enjoyment is once "interrupted" within the meaning of the explanation, a fresh user for the full period of twenty years must be shown in order to establish a right of easement: the user prior to the interruption cannot be added on to the period subsequent to the interruption.²³

16. Sixty years' user necessary against Government. —

Under the Acts of 1871 and 1877 there was no provision corresponding to sub-s. (2) and there was a conflict of opinions whether the twenty years' rule applied to rights of easement claimed by prescription against Government. According to one view the Crown was not affected by S. 26 at all¹ and this was based on the general principle that "the law is *prima facie* made for subjects only: at all events the Crown is not reached except by express words or by necessary

20b. ('38) 42 Cal W N 1102 (1104), *Abdul Hosain v. Sadai Gobinda*. (There is no reference in the judgment to the question whether an *easement* can be acquired by an indefinite body of persons like the inhabitants of a village—As seen in Section 2 (5) Note 8, an easement can be vested only in a determinate person or persons.)

21. ('75) 23 Suth W R 290 (290), *Kallaram Dhur v. Jogul Kishore Surmah*. [See also ('97) 1 Cal W N 96 (98), *Sreemati Soojan Bibi v. Shamed Ali*. (Easement acquired by virtue of decree—Obstruction—Suit need not be within two years of obstruction.)]

22. (1900) 2 Bom L R 454 (459) (DB), *Nathubhai v. Choksi Chaganlal*. ('97) 20 Mad 389 (390) (DB), *Palaniandi Tevan v. Puthirangouda Nadan*. (No fixed period.)

('13) 20 Ind Cas 467 (467) (Oudh), *Jai Jai Ram v. Sanwal Singh*. (A right to graze cattle can be subject of a customary right.)

[See also ('46) 33 AIR 1946 Cal 444 (448) : 223 Ind Cas 470, *Bholanath Ghose v. Momena Khatun*. (Prescriptive right on basis of immemorial user — No particular period prescribed — Proof of user for less than 20 years would not ordinarily be sufficient.)]

23. ('38) 25 AIR 1938 Pat 423 (424, 425) : 177 Ind Cas 315, *Dwarka Prasad v. Patna City Municipality*. (But 'interruption' for a year or more will not nullify a right already acquired by twenty years' enjoyment where the period of twenty years has ended within two years of the suit.)

('14) 1 AIR 1914 All 323 (324) : 25 Ind Cas 405 (DB), *Kedar Nath v. Sohan Lal*. (Case under Easements Act.)

Section 26 — Note 16

1. ('90) 14 Bom 213 (220) (DB), *Secretary of State v. Mathurabhai*. (NOTE—The head-note to this report is misleading as observed in ('10) 5 Ind Cas 621 (626) (DB), *Government of Bombay v. Usufali*.)

('27) 14 AIR 1927 Sind 270 (271, 272) : 86 Ind Cas 757 : 21 Sind L R 195 (DB), *Ganga Ram v. Secretary of State*.

[See also ('11) 11 Ind Cas 180 (181) : 39 Cal 53 (DB), *Abhoy Charan Jelja v. Dwarka Nath Malo*.]

implication in any case where it would be ousted of an existing prerogative or interest."² According to another view the section would apply even against the Crown.³ Sub-section (2) of the present section now makes it clear that an easement can be acquired even against the Crown by an enjoyment for sixty years.

But in order that that sub-section may apply, it is necessary that the property over which a right is claimed "belongs" to Government. It has been held by the High Court of Allahabad in a case arising under the corresponding section of the Easements Act that the words "belongs to Government" mean belongs to Government *at the date the easement is claimed* in suit and not at some anterior period. Thus, if at the date of the suit the Government is not the owner but has transferred the property to X, the sub-section will not apply.⁴ The High Court of Lahore also holds the same view.^{4a} But the High Court of Madras has held that the words "belongs to the Government" refer to the period during which the easement is enjoyed and not to the time of the suit.⁵ In that case there was an enjoyment for forty years of land belonging to Government, after which the Government transferred the same to a private person. A suit was brought against the latter to establish the easement. Their Lordships observed :

"We think the words 'belongs to Government' in the last paragraph of S. 15 must refer, *not to the time of suit*, but to the time during which the easement is enjoyed. An easement can only be acquired by twenty years' enjoyment against a private person or by sixty years' enjoyment against Government. Here neither condition is satisfied."

The word "belongs" refers to *ownership* and not to *possession*. If therefore the property is in the *ownership* of the Government at the date the claim is made, sub-section (2) will apply, even though the property may be in the possession of a tenant or other person with a

2. Maxwell, 6th Edition, page 244 cited in ('27) AIR 1927 Sind 270 (271), *Ganga Ram v. Secretary of State*.

[See also ('74) 1 Bom 7 (9) (DB), *Ganpat Putaya v. Collector of Kanara*.

('10) 5 Ind Cas 621 (626) : 34 Bom 618 (DB), *The Government of Bombay v. Usufali Salabhai*.]

3. ('84) 10 Cal 214 (218) (DB), *Arzan v. Rakhal Chunder Roy*. (Assumed.)

('85) 8 Mad 467 (471) (DB), *Viresa v. Tattayya*. (Do.)

4. ('29) 16 AIR 1929 All 382 (383, 384) : 116 Ind Cas 806, *Municipal Board, Pilibhit v. Khalil-ul-Rahman*.

4a. ('42) 29 AIR 1942 Lah 124 (125) : ILR (1943) Lah 129 (DB), *Saya Ram v. Lahore Electric Supply Co., Ltd.* (The word "belongs" should be given its plain meaning and should not be interpreted by a forced construction as equivalent to "has belonged." Where, therefore, an easement is claimed over some property in the hands of a transferee from the Crown, the right would be acquired against the transferee to whom the property belongs by the expiry of a period of 20 years within two years next before the suit brought. The 60 years' rule has no application.)

5. ('18) 5 AIR 1918 Mad 120 (121) : 41 Mad 622: 45 Ind Cas 98 (DB), *Srinivasa Upadhya v. Ranganna Bhatta*.

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limited right.⁶ The reason is that the easement attaches to one piece of land or building over another piece of land and not against A or B.⁷

17. Plea of easement. — A plea of prescriptive right cannot, like a plea of limitation, be taken at any stage of the suit. The reason is that the plea relates to a branch of *substantive* law which strengthens the title of the claimant. It is not part of the adjective law. Such a plea cannot therefore be taken for the first time in second appeal.¹

A party can set up *alternative* claims to ownership of the servient tenement, and to an easement thereon.² This does not affect in any way the principle that unless the party is actually found by the Court to have enjoyed the right *as an easement*, he cannot succeed in establishing an easement right.³

A plea that the party has been using water from a particular source from time immemorial does not amount to setting up a plea of an *easement*.⁴

A claim to an easement by prescription should not be converted by the Court into one by custom, as what may suffice to prove the one may not suffice to establish the other.⁵ Similarly, where a suit

6. ('34) 21 AIR 1934 Mad 575 (578) : 152 Ind Cas 216, *Chinnasamy Goundan v. Balasundara Mudaliar*.

('24) 11 AIR 1924 All 724 (726) : 78 Ind Cas 844, *Narain Das v. Behari Kahar*.

('28) 15 AIR 1928 Oudh 17 (18) : 106 Ind Cas 305, *Jagan v. Jagadish*.

7. ('24) 11 AIR 1924 All 724 (726) : 78 Ind Cas 844, *Narain Das v. Behari Kahar*.

Section 26 — Note 17

1. ('28) 15 AIR 1928 Nag 203 (204, 205) : 106 Ind Cas 293, *Gulab Rao v. Manjoolabai*.

2. ('39) 26 AIR 1939 Bom 149 (150) : ILR (1939) Bom 140 : 183 Ind Cas 139 (DB), *Rau Rama v. Tukaram*. (34 Cal 51 (FB) followed)

('39) 26 AIR 1939 Sind 110 (111) : ILR (1939) Kar 307 : 181 Ind Cas 961 (DB), *Khanchand Jethamal v. Naraindas Pahlaj Rai*.

('07) 34 Cal 51 (56) : 4 Cal L Jour 437 : 11 Cal W N 20 : 1 Mad L Tim 364 (FB), *Narendra Nath Barari v. Abhou Charan Chattopadhyaya*. (It is not inconsistent for the plaintiff to claim *mourashi* right in a property and in the alternative a right of easement over the same.)

('06) 4 Cal L Jour 367 (368, 370) (DB), *Durgamani Debya v. Ambika Charan*. (But the plaintiff cannot set up an *inconsistent* case — See ('71) 16 Suth W R 198 (DB), *Rajah Bijoy Keshub Roy v. Obhoy Churn*.)

('08) 8 Cal L Jour 289 (291) (DB), *Purnendu Narain Roy v. Dwijendra Narain Roy*.

('24) 11 AIR 1924 Cal 369 (369) : 69 Ind Cas 183, *Amritanath Biswas v. Jogendra Chandra*.

('25) 12 AIR 1925 Cal 788 (789) : 87 Ind Cas 19 (DB), *Behari Lall Mukherjee v. Asutosh Banejee*.

('30) 17 AIR 1930 Pat 7 (9) : 124 Ind Cas 385 (DB), *Kartic Manjhi v. Banamali Mukerji*. (If however he claims right by ownership he cannot *per se* claim as an easement.)

3. See Note 12.

4. ('23) 10 AIR 1923 Lah 605 (606) : 80 Ind Cas 197, *Mansa Ram v. Kalu Ram*.

5. ('24) 11 AIR 1924 Lah 275 (276) : 69 Ind Cas 528 (DB), *Sitaram v. Ghanno*.

is merely to establish a right of *ownership* of property, it is not competent for the Court to enter into and decide the question of a right to an easement over such property.⁶

Since an easement is only a privilege, the claimant can, when obstructed, only claim that his right should not be encroached upon and not that the party in possession of the servient tenement, whether owner or trespasser, should not enjoy the tenement at all.⁷

18. Onus of proof. — The onus is on the claimant to an easement to prove all the points necessary to establish an easement under this section.¹ But where a long open user of a right is proved, there will arise a *presumption*, in the absence of circumstances negating it, that the user was as of right.²

Where an obstruction is proved to have taken place, the burden is on the person obstructed to show that he did not submit to or acquiesce in it.³

19. Suit in respect of easements — Parties. — A suit for a declaration of a right to an easement should be instituted against *all* the owners of the servient tenement where there are several of them¹

[See also ('38) 42 Cal W N 1102 (1104, 1105), *Abdul Hosain v. Sadai Gobinda*. (In this case, on the construction of the pleadings the Court held that the plea of customary right was not a new plea—('21) AIR 1921 Cal 569 (DB), *Gopal Krishna v. Abdul Samad* distinguished.)]

6. ('92) 15 Mad 489 (490) : 2 Mad L Jour 257 (DB), *Sambbayya v. Gopalakrishnamma*. (In this case neither pleadings nor the issues suggested a right of easement.)

7. ('28) 15 AIR 1928 Lah 709 (710) : 108 Ind Cas 610, *Shimbu Dayal v. Gajju Mal*. (An easement like right of way over a tenement is a right running with the land and is not a personal right.)

Section 26 — Note 18

1. ('39) 26 AIR 1939 Sind 39 (42) : 179 Ind Cas 884, *Abdulla Haroon v. Municipal Corporation, Karachi*.

('25) 12 AIR 1925 Lah 297 (298) : 91 Ind Cas 485, *Bija Ram v. Brij Lal*.

('27) 14 AIR 1927 Lah 885 (886) : 105 Ind Cas 560, *Duni Chand v. Nizam-ud-din*.

('90) 1890 Bom P J 184, *Patil Valabhbbhai v. Valabhai*.

('06) 1906 Pun L R No. 26, *Mir Mansab Ali v. Muhammad Akbar*.

('35) 22 AIR 1935 Pat 188 (190) : 155 Ind Cas 966, *Jangbahadur v. Thithar Singh*.

('04) 8 Cal W N 359 (361), *Shaikh Khoda Buksh v. Shaikh Tajuddin*. (Claimant to easement must prove that the user was "as of right.")

('71) 15 Suth W R 401 (402) (DB), *Heera Lall Kooer v. Purmessur Kocer*.

('70) 14 Suth W R 199 (199, 200) (DB), *Imambundee Begam v. Sheo Dyal Ram*.

('14) 1 AIR 1914 All 407 (408) : 25 Ind Cas 499, *Ganga Sahai v. Shib Charan*.

('74).1 Cal 422 (423) : 25 Suth W R 228 (DB), *Sham Churn Auddy v. Tariney Churn Banerjee*.

2. See Note 13.

3. ('20) 7 AIR 1920 Nag 26 (28) : 16 Nag L R 76 : 54 Ind Cas 936, *Rama Chandra Rao v. Venkat Rao*. (This is so, because, whether a person submitted or not necessitates inquiry into the state of mind of that person and is a matter within his special knowledge : See sections 103 and 106, Evidence Act.)

Section 26 — Note 19

1. ('24) 11 AIR 1924 Cal 369 (369) : 69 Ind Cas 183, *Amritanath Biswas v. Jogendra Chandra*.

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though for a suit to *remove an obstruction* created by one of such owners only, the others are not necessary parties.²

A *benamidar* for the dominant owner can sue for removal of an obstruction to access to light and air to the dominant tenement.³

Where A carries water by a drain on B's land which then goes on to C's land, A cannot sue C to allow the water to flow to C's land. The most that A can do is to sue B for a right to discharge water on B's land. If B wants in turn to discharge it upon C's land, he must sue C.⁴

A decision in a suit for the declaration of a right to an easement over certain property will not be binding on a mortgagee where mortgage was of a date prior to the suit and who was not impleaded in the suit.⁵

20. "Shall be absolute and indefeasible." — It has been seen in Note 15 that a right to an easement is established only in a suit. Where the right is so established, it becomes absolute and indefeasible.¹ The mere fact that the dominant owner is not inconvenienced by the obstruction does not affect the right so acquired. Thus, the fact that A who has established a right of way over B's land to go to plot C, has another way by which he can go to plot C, cannot affect the right of A to enjoy the easement established.² Similarly, the fact that light from other sources exists than that which is acquired by prescription, is no answer to a suit for infringement of a prescriptive right to light and air which has been established.³ Where A has

(21) 8 AIR 1921 Cal 622 (622) : 62 Ind Cas 425, *Haran Sheikh v. Ramesh Chandra*. (Suit for declaration of right of way as village road — One of the persons interested in servient tenement not made party to suit — Court will not proceed to make a decree.)

2. ('15) 2 AIR 1915 Cal 403 (403) : 31 Ind Cas 549, *Madan Mohan v. Sashi Bhushan*. (('10) 5 Ind Cas 23 (DB), *Madan Mohan v. Akshoy Kumar*, explained — All the "servient owners" means all the servient owners who had raised objections to the plaintiff's right of way and against whom there was a cause of action.)

(23) 10 AIR 1923 Pat 65 (70) : 2 Pat 110 : 69 Ind Cas 947 (DB), *Mt. Sarban v. Phudo Sahu*. (Easement claimed over lands of several proprietors one of whom obstructs — Other proprietors not necessary parties.)

3. ('21) 8 AIR 1921 Cal 560 (561) : 64 Ind Cas 581 (DB), *Panchu Gopal v. Matangini Debi*. (Benamidar though he has no beneficial interest in the property yet in fact represents the owner.)

4. ('30) 1930 Mad W N 611 (612), *Srinivasa Chettiar v. Aravamutha Iyengar*.

5. ('44) 31 AIR 1944 Pat 261 (268, 269) : 23 Pat 115 (DB), *Traders and Miners Ltd. v. Dharendra Nath*.

Section 26 — Note 20

1. ('44) 31 AIR 1944 Pat 261 (268, 269) : 23 Pat 115 (DB), *Traders and Miners Ltd. v. Dhendranath*. (But the right so established is not enforceable against a mortgagee whose mortgage is prior to the suit.)

('78) 3 Bom 174 (176) : 1878 Bom P J 257 (DB), *Mohan Lal Jechand v. Amratlal Bechardas*.

2. ('66) 6 Suth W R 222 (223), *Sham Bagdee v. Fukeer Chand Bagdee*.

('74) 22 Suth W R 302 (303), *Mokoondonath Bhadoory v. Shib Chunder Bhadoory*.

3. ('11) 12 Ind Cas 60 (63) : 39 Cal 59 (DB), *Paul v. William Robson*.

established a right of easement but makes an excessive user of it to which user he has not acquired a prescriptive right, the servient owner can obstruct and prevent the excessive user but he has no right to obstruct and prevent the rightful user.⁴

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21. Custom, if can override the Limitation Act. — It was held in the undermentioned case¹ that a custom cannot be allowed to override the positive provisions of the Limitation Act. Thus, where a prescriptive right is allowed by the Limitation Act, no custom to the effect that no such right shall be acquired is admissible.

22. Unity of title or possession of dominant and servient estates in the same person — Effect. — “The unity of the dominant and servient estates in the same person extinguishes the easement appurtenant to the dominant estate, for no person can have an easement in land which he himself owns. But unity of title of the two estates will not extinguish an easement, unless the ownership of the two estates be co-extensive, equal in validity, quality and all other circumstances of right. If one estate is held in fee and the other for a term of years there is no unity of possession that will extinguish an easement of one estate as against the other; but the unity of possession in such case, will only suspend the easement during the time of such unity of possession. Consequently, an easement may be revived, after it has been extinguished by the union of the dominant and servient tenements in one owner, by their subsequent severance, provided the easement is apparent, continuous and essential to the enjoyment of the dominant tenement.”¹

See also Notes 5 and 13.

27.* Where any land or water upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of

Section 27

* Act of 1877 : S. 27.

Same as S. 28 of the Act of 1871 below, except that the words in parenthesis “(other than the access and use of light and air)” after the word “easement” were omitted.

Act of 1871 : S. 28.

28. Provided that, when any land or water upon, over or from which any easement (other than the access and use of light and air) has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof,

(‘28) 15 AIR 1928 Pat 106 (107, 108) : 105 Ind Cas 39, *Mt. Jadooie Kaharin v. Mt. Kishun Basi*.

4. (‘29) 16 AIR 1929 Cal 350 (352) (DB), *Raman Chandra v. Bhola Nath*.

Section 26 — Note 21

1. (‘78) 3 Bom 174 (177): 1878 Bom P J 257 (DB), *Mohanlal Jechand v. Amratlal Bechardas*.

Section 26 — Note 22

1. (‘23) 10 AIR 1923 Cal 8 (10, 11 : 50 Cal 356 : 70 Ind Cas 663 (DB), *Tinkori Pathak v. Ram Gopal*.

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Note 1

years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the period of twenty years in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C, a Hindu widow, had a life interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

1. Scope.—This section must be read with S. 26. It provides for exclusion of certain periods in reckoning the twenty years or sixty years referred to in S. 26. In order that this section may apply—

- (1) the servient tenement must, during the period of user by the dominant owner, have been held under or by virtue of life interest or for any term exceeding three years, and
- (2) the person entitled to the servient tenement on the determination of such interest or term, must have resisted the enjoyment within three years of such determination.

Where a Hindu widow is in possession, and makes a transfer of the land in favour of X by virtue of her powers as representing the estate, it cannot be said that the transferee is a "person entitled on the *determination* of the interest" of the widow, within the meaning of this section.¹

The deduction referred to in the section can be claimed only when the claim is contested within three years next after the termination of

the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that, during ten of these years, C, a deceased Hindu widow, had a life-interest in the land; that, on C's death, B became entitled to the land; and that within two years after C's death, he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

Act of 1859.

No corresponding provision.

Section 27 — Note 1

1. (18) 5 AIR 1918 Cal 1028 (1034) : 41 Ind Cas 47 (DB), *Fralijool Tea Co., Ltd. v. Nagendra Nath Chowdhury*. (Obiter.)

the term or interest. The fact that the owner did not determine the tenancy at the expiry of the term and allowed the tenant to *hold over* does not affect the question. Thus, where A enjoyed the easement for twenty-two years from 1877 to 1899, but during the period from 1887 to 1899 the land was in the possession of a *kanomdar* under a *kanom* executed by the servient owner B, but B allowed the *kanomdar* to hold over till 1905, and obstructed the easement only after 1905, it was held that the fact that B obstructed after 1905 will not prevent the right becoming indefeasible in favour of A inasmuch as the obstruction was not made within three years of 1899 which was the expiry of the term of the *kanom*.²

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Note 1

28.* At the determination of the period hereby limited Extinguishment of to any person for instituting a suit for right to property. possession of any property, his right to such property shall be extinguished.

Section 28
Note 1

Synopsis

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| 1. Principle of the section. | 5. "Any property." |
| 2. "At the determination of the period." | 6. "Shall be extinguished." |
| 2a. Applicability of section to cases where there is a continuing wrong. See Section 23 Note 16. | 7. Inalienable property — Acquisition of title by adverse possession. See Notes to Articles 142 & 144. |
| 3. "Suit for possession." | 8. Plea of title. |
| 4. "Any person." | 9. Onus of proof. See Notes to Articles 142 & 144. |

TOPIC INDICATOR

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| Attachment under Section 146, Criminal Procedure Code. See Note 2. | Retrospective extinguishment of right. See Note 6. |
| Doctrine of remitter. See Note 6. | Section not applicable to defences. See Note 2. |
| Equity of redemption. See Note 2. | Suit for declaration—Not suit for possession. See Note 3. |
| Local or special laws. See Note 3. | Suit for restitution of conjugal rights. See Note 3. |
| Personal actions. See Note 1. | |
| Principal right extinguished—Accessory rights also extinguished. See Note 6. | |

1. Principle of the section. — The general principle is that limitation bars only the remedy and does not *extinguish the right*

* Act of 1877 : S. 28.

Same as above.

Act of 1871 : S. 29.

Extinguishment of right to land or hereditary office. At the determination of the period hereby limited to any person for instituting a suit for possession of any land or hereditary office, his right to such land or office shall be extinguished.

Act of 1859.

No corresponding provision.

2. ('19) 6 AIR 1919 Mad 939 (341, 342) : 42 Mad 567 : 50 Ind Cas 291 (DB), *Kuniparambil Parkum v. Kutti Ammoo*. (Case under Easements Act.)

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itself.¹ This section is an exception to this general principle so far as

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1. See Note 14 to Section 3 and Note 16 to the Preamble.

See also the following cases :

- ('50) 37 AIR 1950 All 7 (Para 7) : ILR (1950) All 564, *Baljit v. Chand Kiran*. (Right of a reversioner to challenge an alienation by a Hindu widow is not destroyed but continues to exist even after the period of limitation for a suit to challenge it has expired.)
- ('49) 36 AIR 1949 All 195 (196) : ILR (1949) All 331 (DB), *Bhagwati Prasad v. Shiromoni Sugar Mills*. (Suit by company for recovery of share money from share-holder does not fall under S. 28 — Notice of forfeiture of shares including items recovery of which is barred by limitation — Notice is not illegal on that account.)
- ('49) 36 AIR 1949 East Punj 29 (32) : ILR (1948) East Punj 365 (DB), *Ram Sarup v. Ramchandar*.
- ('47) 34 AIR 1947 Bom 375 (377) : ILR (1947) Bom 143 (DB), *Muppanna v. Shree Gajanan Urban Co.-Op. Bank*. (Remedy of party on award under S. 59 (1) (a), Bombay Co-operative Societies Act barred — Award does not become infructuous — Remedy under S. 59 (1) (b) may still be available.)
- ('38) 42 Cal W N 758 (759), *Bhupendra Nath v. Trinayani Debi*.
- ('29) 16 AIR 1929 Nag 145 (146) : 25 Nag L R 74 : 116 Ind Cas 421 (DB), *Naraindas v. Nenu*. (('05) 2 Nag L R 42, *Mohomed Shareff v. Chaitu* disapproved.)
- ('86) 9 All 23 (25, 26) : 1886 All W N 279 (DB), *Chunni Lal v. Banaspat Singh*. (Lease—Mortgage for securing payment of rent — Decree by Revenue Court for arrears of rent time-barred — Suit for sale of the mortgaged property not time-barred.)
- ('24) 11 AIR 1924 All 551 (554, 556) : 46 All 775 : 80 Ind Cas 684 (FB), *Gajadhar v. Jagannath*. (('22) AIR 1922 All 402 (DB), *Ram Kishen v. Chhedi Rai* followed.)
- ('30) 17 AIR 1930 All 416 (417) : 52 All 539 : 122 Ind Cas 411 (DB), *Jokhu Bhunja v. Sitla Baksh Singh*. (('15) AIR 1915 All 480 (DB), *Kesar Kunwar v. Kashi Ram* dissented from.)
- ('30) 17 AIR 1930 All 858 (860) : 52 All 979 : 132 Ind Cas 21 (DB), *Muhammad Raza Ahmad v. Zahoorahmad*. (It was a suit for partition.)
- ('67) 8 Suth W R 51 (54) (DB), *Mt. Janee Khanum v. Mt. Amatoool Fatima Khanum*. (A lien is a right of defence, not a right of action and consequently can be claimed in respect of a statute-barred debt.)
- ('80) 5 Cal 897 (899) : 6 Cal L R 489 : 3 Shome L R 154 (DB), *Nursing Doyal v. Hurryhur Saha*.
- ('81) 6 Cal 340 (349) : 7 Cal L R 121 (DB), *Mohesh Lal v. Busunt Kumaree*. (('77) 1 Mad 228 (DB), *Valia Tamburatti v. Vira Rayan*, followed.)
- '82) 7 Cal 91 (95) : 9 Cal L R 53 (DB), *Muhammad Hossein v. Kokil Singh*. (Decree remains whether execution can be taken out upon it or not.)
- ('18) 5 AIR 1918 Cal 933 (937, 938) : 44 Cal 425 : 37 Ind Cas 277 (DB), *Priya-sakhi Debi v. Bireswar Shamanta*. (Dispossession of mortgagor in simple mortgage does not extinguish title of mortgagee by lapse of time.)
- ('21) 8 AIR 1921 Cal 67 (68) : 66 Ind Cas 209 : 48 Cal 817, *Narendra Lal Khan v. Tarubala Dassi*. (If the creditor has any form of lien upon property, he can exercise it notwithstanding that he could not bring a suit, it being time barred.)
- ('13) 21 Ind Cas 716 (718) (DB) (Cal), *Ramdhari Singh v. Parmanund Singh*. (('05) 32 Cal 576 (DB), *Sheo Saran v. Mohabir Pershad* relied on.)
- ('21) 8 AIR 1921 Lah 170 (171) : 65 Ind Cas 642 (DB), *Nathwa v. Kanhiya*. (A I R 1915 All 480, disapproved and distinguished.)
- ('21) 8 AIR 1921 Lah 351 (352) : 57 Ind Cas 348 (DB), *Akbar Hussain v. Ragnandan Das*. (('90) 1890 Pun Re No. 147 (FB), *Kamra v. Bishambar Das*, followed.)

- ('22) 9 AIR 1922 Lah 254 (256, 257) : 3 Lah 200 : 66 Ind Cas 771 (FB), *Motan Mal v. Muhammad Baksh*. (Post diem interest can be claimed as damages for entire period if mortgagee is defendant and for six years if he is plaintiff.)
- ('26) 13 AIR 1926 Lah 633 (633, 634) : 96 Ind Cas 844 (DB), *Sultan Muhammad v. Ladha Singh*. (AIR 1915 All 480, dissented from.)
- ('31) 18 AIR 1931 Lah 668 (670) : 132 Ind Cas 661 (DB), *Dalip Singh v. Sikh Gurdwara Parbandhak Committee, Amritsar*. (A petition under S. 5, Sikh Gurdwaras Act.)
- ('70) 6 Mad H C R 32 (33) (DB), *Mooneappah v. Venkatacharyudoo*. (An unappropriated payment is to be applied to the earliest debt, although the debt is barred by the act of limitation.)
- ('77) 1 Mad 267 (275, 276) : 1 Ind Jur 367 : 1 Mad L R 343 (DB), *Administrator General of Madras v. Hawkins*. (The Administrator of Madras is authorised to pay a barred debt.)
- ('79) 2 Mad 400 (406) : 4 Ind Jur 229 (DB), *Nallatambi v. Ponnusami*. (Foreign judgment is not open to the objection that the suit was barred by the law of limitation applicable in the country where the contract was made.)
- ('83) 6 Mad 293 (294) : 7 Ind Jur 357 (DB), *Narayanasami v. Samidas*. (Hindu law—The son is liable to pay barred debt acknowledged by his father.)
- ('83) 6 Mad 351 (353, 354) (DB), *Samuel Pillai v. Ananthanatha Pillai*. (The administratrix of an estate agreed to pay S his share of the estate—S gave a promissory note for a barred debt claimed by A from her—Held that there was consideration for the promissory note.)
- ('90) 13 Mad 189 (190) (DB), *Kondappa v. Subba*. (It is competent to the widow of a deceased Hindu to bind the reversion by a mortgage executed to secure such debts though they were barred.)
- ('90) 13 Mad 490 (492) (DB), *Kanharankutty v. Uthotti*. (Malabar law—Right of pre-emption under otti—Not barred under S. 28.)
- ('10) 7 Ind Cas 898 (898, 899) : 33 Mad 308 (DB), *Subramania Aiyar v. Gopala Aiyar*. (('86) 14 Cal 50 (DB), *Anando Kishore Dass v. Anando Kishore Bose* relied on.)
- ('12) 14 Ind Cas 69 (70) (DB) (Mad), *Muthusawmi Chettyar v. Subramaniya Ayer*. (('05) 29 Mad 200 (FB), *Venkataramanaya v. Venkataramana* distinguished)
- ('16) 3 AIR 1916 Mad 720 (725, 726) : 28 Ind Cas 221 : 39 Mad 365 (DB), *Chidambara Mudaliar v. Krishnaswamy Pillai*. (Limitation cannot be pleaded to defeat an adjustment which the right to account gives.)
- ('18) 5 A I R 1918 Mad 657 (658, 659) : 40 Ind Cas 358 (DB), *Nathamuni Pillai v. Vengammal*. (A I R 1915 All 480, distinguished.)
- ('33) 20 AIR 1933 Nag 190 (191) : 144 Ind Cas 716, *Narhar Ramchandra Gude v. Gullu*, (('31) AIR 1931 P C 79 (P C), *Ariff v. Jadunath*, explained and distinguished.)
- ('33) 20 AIR 1933 Nag 241 (242, 243) : 144 Ind Cas 736 : 30 Nag L R 142, *Ramshanker v. Ghulab Shanker*. (Mortgage decree barred by limitation—Security is not extinguished.)
- ('25) 12 AIR 1925 Oudh 92 (93) : 79 Ind Cas 942 : 27 Oudh Cas 268, *Behari Lal v. Beni Madho*. (Suit to recover money secured where the debt was evidenced by a prior pro-note the claim under which was barred.)
- ('25) 12 AIR 1925 Oudh 267 (268) : 78 Ind Cas 106, *Zohra Bibi v. Ganesh Pershad* (A time-barred debt can be valid consideration for transfer of property.)
- ('28) 15 A I R 1928 Oudh 273 (276) : 3 Luck 459 : 112 Ind Cas 481 (DB), *Ram Ratan Lal v. Aditya*. ((1885) 14 Q B D 294, *In re Hepburn*, followed.)
- ('32) 19 AIR 1932 Pat 346 (348, 349) : 11 Pat 616 : 140 Ind Cas 572 (DB), *Surajman Prasad v. Sadanand Misra*. (('28) AIR 1928 Pat 24, *Ram Das v. Chhota Lal*, dissented from.)
- ('12) 14 Ind Cas 508 (509, 510) : 6 Low Bur Rul 34 (DB), *Momein Bee Bee v. Ariff Ebrahim*. ((1904) 52 W R (Eng.) 586, *In re Wheeler*, followed.)

Section 28
Note 1

suits for *possession of property* are concerned² and provides that the bar of the remedy shall operate to extinguish the right.^{2a} But the section enacts no new principle not recognized before. Before the Act of 1871, there was no provision corresponding to this in the Bengal Limitation Regulations III of 1793 and II of 1805 or the Bombay Regulation V of 1827 or the Limitation Act of 1859. The Regulations and Act, in reference to suits for the possession of land, in terms limited the remedy only and did not expressly extinguish the right or title. But it was nevertheless settled as a general principle that upon the expiry of the prescribed period of limitation for such suits the title was *extinguished* in favour of the person in possession.³ In *Gunga Gobind*

(‘37) 24 AIR 1937 Sind 273 (275, 278) : 172 Ind Cas 520 : 31 Sind L R 180 (DB), *Premomal Daomal v. Khudabux*. (‘23) AIR 1923 Sind 14 (DB), *Sakar Chand v. Yacoob*, relied on.)

[See (‘39) 26 AIR 1939 Cal 163 (166) : I L R (1938) 2 Cal 328 : 182 Ind Cas 389 (DB), *Nakul Chandra v. Kalipada Ghosal*. (Limitation does not bar defence — A I R 1916 P C 172 (PC), *Sri Kishan v. Kashmiro* followed.)]

2. (‘50) 37 A I R 1950 All 7 (Para 7) : I L R (1950) All 564, *Bal Jit v. Chand Kiran*. (Limitation bars remedy but not the right unless a case is of the description provided for by S. 28.)

(30) 17 A I R 1930 All 858 (860) : 52 All 979 : 132 Ind Cas 21 (DB), *Mahomed Raza Ahmad v. Zahoor Ahmad*. (It was a suit for partition and not for possession.)

(‘24) 11 AIR 1924 All 551 (556) : 46 All 775 : 80 Ind Cas 684 (FB), *Gajadhar v. Jagannath*. (Per Daniels J.)

(‘18) 5 A I R 1918 Mad 657 (658) : 40 Ind Cas 358 (DB), *Nathamuni Pillai v. Vengammal*. (‘18) A I R 1918 Mad 1332 (DB), *Athan v. Sutarjanam*, distinguished.)

(‘31) 18 A I R 1931 Lah 668 (670) : 132 Ind Cas 661, *Dalip Singh v. Sikh Gurdwara Parbandhak Committee, Amritsar*. (‘07) 1907 Pun Re No. 140 (DB), *Hakim Singh v. Waryaman*, referred.)

(‘30) 17 A I R 1930 All 416 (417) : 122 Ind Cas 411 : 52 All 539 (DB), *Jokhu Bhunja v. Sitla Baksh Singh*. (‘28) A I R 1928 All 99 (DB), *Ram Kishore v. Ram Nandan*, relied on.)

(‘37) 24 AIR 1937 Sind 273 (277, 278) : 172 Ind Cas 520 : 31 Sind L R 180 (DB), *Premomal Daomal v. Khudabux*. (‘24) AIR 1924 PC 198 (PC), *Lachmi Narayan v. Balmakund* explained.)

2a. (‘40) 27 AIR 1940 Nag 49 (53) : I L R (1940) Nag 348 : 186 Ind Cas 731 (FB), *Punjaram Jagoba v. Ramu Chintoo*.

3. (‘41) 28 A I R 1941 Cal 223 (227) : I L R (1940) 2 Cal 393 (DB), *Rajnandini Debi v. Manmatha Pal*. (Per Nasim Ali J. — Even before 1877, the law of limitation was regarded not simply as barring the remedy but also as conferring title on the adverse possessor.)

(‘67) 11 Moo Ind App 345 (359, 361, 363) : 7 Suth W R P C 21 : 1 Suther 676 : 2 Sar 284 (PC), *Gunga Gobind Mundal v. Collector of 24-Pergunnas*. (1828) 1 Moo Ind App 305 (PC), *Freeman v. Fairlie*, recognized and supported.)

(‘69) 12 Suth W R 192 (193, 194) : 3 Beng L R A C 343 (DB), *Baradakant Roy Bahadur v. Prankrishna Paroi*.

(‘73) 20 Suth W R 114 (115, 116) : 11 Beng L R 237 (DB), *Brindabun Chunder Roy v. Tarachand*.

(‘69) 11 Suth W R 382 (386, 388) (DB), *Booa Russoolee v. Nawab Nazim of Bengal*.

(‘69) 11 Suth W R 139 (140) (DB), *Radha Gobind Roy v. Ram Kishore Dutt*.

(‘70) 13 Suth W R 465 (466) (DB), *Mt. Bee Bee-Chummun v. Mt. Om Koolsoom*. (The rule of limitation applies to the case of a proprietor claiming malikana.)

Mandul v. The Collector of the 24-Purgunnahs,⁴ their Lordships of the Privy Council observed as follows :

"The title to sue for dispossession of the lands belongs, in such a case, to the owner whose property is encroached upon; and if he suffers his right to be barred by the law of limitation, the practical effect is the extinction of his title in favour of the party in possession; As between private owners contesting *inter se* the title to the lands, the law has established a limitation of twelve years; after that time, it declares not simply that the remedy is barred, but that the title is extinct in favour of the possessor."

The law of limitation as regards possession and dispossession of property, has thus always been a law of *prescription*.⁵

In Kutch there was no law of limitation to title by acts of adverse possession and title was not extinguished by any length of adverse possession.⁶ This Act now applies to Kutch as it applies to the whole of India except Jammu and Kashmir. (See S. 1).

2. "At the determination of the period." — The words "at the determination of the period hereby limited to any person for

('66) 1 Agra Rev 38 (40) (DB), *Bhagoutee Charun v. Shiva Pershad*. (In this case a rent free holder had encroached on the adjoining land and enjoyed it rent free and adversely to zamindari right for more than twelve years.)

('76) 1 Bom 286 (290, 291, 293) (DB), *Sita Ram v. Khanderav*. (Case under Bombay Regulation V of 1827.)

('85) 9 Bom 198 (226, 227) (FB), *Radhabai v. Anantrav Bhagwant Deshpande*. (Service vatan lands.)

('76) 1 Bom 352 (366, 367) (DB), *Collector of Thana v. Dadabhai Bommanji*. (Case under Bombay Regulation V of 1827.)

('67) 8 Suth W R 386 (387, 388) (DB), *Khajah Enaetoollah Chowdhry v. Kishen Soondur Sarma*. (('66) 5 Suth W R 261 (DB), *Gunesh Lall v. Sheikh Ahme-doolah* and ('66) 5 Suth W R (P C) 69 (P C), *Rajah Haimun v. Koomer Gun-sheam*, followed.)

('72) 17 Suth W R 119 (120) : 8 Beng L R 540 (DB), *Amæeroonissa Begum v. Amir Khan*. (Case under Act XIV of 1859.)

('73) 20 Suth W R 104 (105) (DB), *Ramlochun Chuckerbutty v. Ram Soondar*.

('71) 15 Suth W R 80 (82) (DB), *Ram Sahoy Singh v. Kooldeep Singh*.

[See also ('18) 5 A I R 1918 Mad 183 (187, 188) : 44 Ind Cas 630 (DB), *Raman Somayajipad v. Kunhikutty Kovilamma*. (('63) 1 Mad H C R 258 (DB), *Kesava v. Peddu* dissented from.)

('29) 16 A I R 1929 Cal 149 (154) : 118 Ind Cas 566 (DB), *Khantamoyee Debi v. Hridayanand Bhattacharjee*. ((1837) 1 M I A 446 (P C), *Ghulam Russool v. Mughlo* and ('77) 3 Cal 224 (DB), *Gossain Das v. Issur Chunder*, followed)]

[But see (1862) 1 Mad H C R 85 (89) (DB), *Doed Kullammal v. Kuppu Pillai*. (The Indian Law of Limitation (Act XIV of 1859) as to realty was held to bar the remedy, but not to extinguish the right.)

('77) 1 Bom 592 (598, 599) (DB), *Rambhat Agnihotri v. Collector of Poona*. (Case under Bombay Regulation V of 1827.)]

4. ('67) 11 Moo Ind App 345 (361, 363) : 7 Suth W R 21 : 1 Suther 676 : 2 Sar 284 (PC).

5. ('29) 16 AIR 1929 Cal 149 (154) : 118 Ind Cas 566 (DB), *Khantamoyee Debi v. Hridayanand*.

See also the cases cited in Foot Notes (2) and (3) above.

6. ('50) 37 AIR 1950 Kutch 69 (Pr 18), *Bhura Dhana v. Kala*.

3.Lim.58.

Section 28

Note 2

instituting a suit for possession" imply that limitation has begun to run against the person for instituting the suit referred to and has expired.¹ It follows that where a person could not or need not have sued for possession, there is no question of any determination of the period limited to him for instituting a suit for possession and consequently no question of the applicability of this section.²

Illustrations.

1. A person in possession of property has obviously no need to sue for possession thereof. The section, therefore, cannot apply where, as a defendant, he seeks to rely upon his possession as a defence to a suit.³

Section 28 — Note 2

1. ('35) 22 A I R 1935 Bom 326 (330) : 59 Bom 502 : 159 Ind Cas 213, *Gopal Bhaurao v. Jagannath Wasudeo*.

('20) 7 AIR 1920 Lah 504 (507), *Basanta v. Indar Singh*. (Puisne mortgage of property in possession of prior usufructuary mortgagee — Puisne mortgagee given right under his mortgage, to redeem prior mortgage and take possession of mortgaged property — Puisne mortgagee not bound to claim redemption within twelve years of his mortgage and his failure to do so does not extinguish his right under this section ; Article 135 does not apply to such a case : ('19) A I R 1919 Lah 402, *Budha v. Mul Baj*, followed.)

[See ('44) 31 AIR 1944 Nag 250 (255, 257): ILR (1944) Nag 473 (FB), *Tulsiram Jiyamlal v. Hyder Lalla*. (Tenancy right extinguished by exclusion by trespasser for over three years under Sch. II Art. 1, C. P. Tenancy Act — Trespasser does not become tenant — Landlord is entitled to eject him.)]

[See also ('44) 31 AIR 1944 All 243 (245) : ILR (1944) All 612, *Avadesh Kumar v. Zakaul Husnain*. (So long as the person whose rights have been infringed remains in possession limitation does not begin to run against him.)]

2. ('46) 33 A I R 1946 Oudh 213 (218) : 224 Ind Cas 537 (DB), *Lait Mohan v. Lachmi Raj Kuar*, (Failure of Hindu widow to institute civil suit within 3 years of Magistrate's order under S. 145, Cri.P.C. — S. 28 bars only widow's right and not that of the reversioner.)

('43) 30 AIR 1943 Oudh 296 (297) : 206 Ind Cas 274, *Hittal v. Ram Oudh*. (Section refers to a suit by a person who is capable of instituting a suit and is not one suffering under any disability.)

('35) 22 AIR 1935 Mad 914 (917) : 59 Mad 51 : 161 Ind Cas 447, *Ramalingam v. Veerabhadradu*. (Suit for possession during adverse possession not capable of being brought in civil Court but only in revenue Court.)

('29) 16 AIR 1929 Mad 38 (41, 42) : 111 Ind Cas 152 (DB), *Alagarswami Thevan v. Ramabhadra*. (Need not have sued for possession.)

('90) 13 Mad 490 (492) (DB), *Kanharankutti v. Uthotti*. (Do.)

3. ('49) 36 AIR 1949 East Punj 29 (32): I L R (1948) East Punj 365 (DB), *Ram Sarup v. Ram Chandar*. (Transfer of occupancy rights — Consent of landlord not obtained — Landlord in possession — Suit by transferee for possession — Landlord can set up plea under S. 60, Punjab Tenancy Act, in defence and avoid transfer although he has not brought a suit under S. 60 within limitation.)

('39) 26 A I R 1939 Cal 163 (165, 166) : I L R (1938) 2 Cal 328 : 182 Ind Cas 389 (DB), *Nakul Chandra v. Kalipada Ghosal*. (There is no bar of limitation to defence under S. 53A of the Transfer of Property Act — Right of defence is not lost even if there is no present right to enforce contract — S. 28 does not apply to right of defence under S. 53A.)

('90) 14 Bom 222 (226, 227) (DB), *Hargovindas Lakshmidas v. Baji Bhai Jijibhai*.

('35) 22 AIR 1935 Bom 326 (330) : 59 Bom 502: 159 Ind Cas 213, *Gopal Bhaurao v. Jagannath Wasudeo*.

('16) 3 AIR 1916 Lah 229 (229): 1916 Pun Re No. 1 : 32 Ind Cas 485 (DB), *Gokulchand v. Naidarmal*.

Section 28
Note 2

2. Where property is in the possession of a usufructuary mortgagee and a third person trespasses on such property the mortgagor cannot sue the trespasser till on redemption he becomes again entitled to the possession of the property.⁴ Hence the mortgagor's right cannot be extinguished under this section by adverse possession against the mortgagee. Similarly, if property is subject to a simple mortgage and the possession continues with the mortgagor, adverse possession against the mortgagor cannot affect the rights of the mortgagee. (See Note 6.)

3. A reversioner of a Hindu widow cannot sue for possession from an alienee from the Hindu widow until her death, and his right will not be extinguished by the alienee continuing in possession for any period shorter than twelve years after the death of the widow.⁵

4. Where a person such as a tenant is entitled to be in possession for a particular period, the person entitled to the property after the expiry of the period cannot sue for possession before such expiry merely because the tenant claims to be in possession by virtue of a higher right. The right of the person entitled to the property after the expiry of the period cannot be extinguished in such a case by a failure to sue for possession before the expiry of the term.⁶ In *Mumtaz*

- (1907) 1907 Pun L R No. 26, p. 75 : 1907 Pun W R No. 3, *Baldeo v. Gajwa*.
 ('04) 27 Mad 28 (29, 30) (DB), *Subramaniya Ayyar v. Poovan*. (The vendor's lien is not extinguished by Section 28, Limitation Act, even though the right to sue to enforce the lien is barred by Article 111.)
 ('94) 17 Mad 255 (256, 257) (DB), *Orr v. Sundra Pandia*.
 ('16) 3 A I R 1916 Mad 350 (357) : 19 Ind Cas 596; 38 Mad 321 (DB), *Rajah of Ramnad v. Arunachallam Chettiar*. (('06) 30 Mad 169 (SB), *Lakshmi Doss v. Roop Lal* followed.)
 ('31) 18 A I R 1931 Lah 668 (670) : 132 Ind Cas 661 (DB), *Dalip Singh v. Sikh Gurdwara Parbandhak Committee*.
 ('23) 10 AIR 1923 Lah 247 (247) : 70 Ind Cas 966, *Chauhar v. Mansha Singh*.
 ('26) 13 AIR 1926 Nag 99 (106) : 89 Ind Cas 752, *Banau v. Ranjit Singh*. (Section 28 does not apply to C. P. Tenancy Act even in principle.)
 ('21) 8 AIR 1921 Bom 257 (258, 259) : 45 Bom 45 : 59 Ind Cas 118 (DB), *Mahadev Narayan v. Sadashiv Keshav*. (('07) 30 Mad 444 (DB), *Venkatachalapathi v. Robert Fischer*, followed.)
 4. ('35) 22 AIR 1935 All 542 (543) : 159 Ind Cas 151, *Salig Ram v. Gauri Shanker*.
 5. ('90) 13 Mad 512 (515) (DB), *Sambasiva v. Raghava*. (('70) 5 Mad H C R 428 (DB), *Atchamma v. Subbarayudu*, followed.)
 [See also ('99) 23 Bom 725 (736) : 1 Bom L R 607 : 3 Cal W N 621 : 26 Ind App 71 : 7 Sar 543 (PC), *Ranchordas Vandrawandas v. Parvatibai*. (Adverse possession against widow — Suit by heir after widow's death — S. 28 is not applicable.)]
 6. ('23) 10 AIR 1923 P C 118 (121) : 50 Ind Cas 202 : 26 Oudh Cas 231 : 45 All 419 : 74 Ind Cas 476 (PC), *Muhammad Mumtaz Ali Khan v. Mohan Singh*.
 ('30) 58 Mad L Jour 226 (228) (PC), *Raja Muhammad Mumtaz Ali Khan v. Dhanna Singh*. (A I R 1923 P C 118, followed.)
 ('27) 14 AIR 1927 Cal 913 (914) : 104 Ind Cas 812 (DB), *Rajani Kanta Banerjee v. Raj Kumari Dasi*. (('24) AIR 1924 P C 65 (PC), *Nainapillai v. Ramanathan*, followed.)
 ('23) 10 AIR 1923 Mad 661 (662) : 72 Ind Cas 690 (DB), *Sundararajachariar v. Ethebar Khan Sahib*.

Section 28
Note 2

Ali v. Mohan Singh,⁷ their Lordships of the Privy Council observed as follows :

"This section appears to have no application to the present case, for the appellant through his counsel did not maintain that he could institute a suit for possession of the village in question, or treat the plaintiffs as if they had merely been squatters, and the Board were not referred to and are not aware of any other section which would have the effect of extinguishing a right of property which is vested in one person and transferring it by the mere lapse of time to the person actually in possession."

5. C as agent of A let certain lands to B and was for sometime collecting the rents from B on behalf of A. He then began to collect the rents and to appropriate them for his own use asserting that the land was his own. It was held that A's right to the land could not, by reason of such assertion and appropriation, be extinguished by the operation of this section. So long as B was in possession, he was so as tenant of A and could not have been sued by A for possession.⁸

6. A and B usufructuarily mortgaged certain property to C but A alone received and appropriated the whole of the rent payable by the mortgagee under the mortgage. It was held that the receipt by A could not be considered to be the possession of the property by A, that it was at the best equivalent to non-payment of the rent by the mortgagee himself and that his right to redeem was not affected by this section.⁹

7. Where the possession of the defendant is, in law, the possession of the plaintiff, the latter is not bound to sue for possession and there is no "determination of the period limited for instituting a suit for possession." The plaintiff's right to the property cannot be extinguished under this section.¹⁰

8. Where the plaintiff is legally in possession, as where his property is under attachment under s. 146 of the Criminal Procedure Code, his title cannot be extinguished, however long the attachment may continue.¹¹

[See ('28) 15 AIR 1928 Pat 63 (64) : 104 Ind Cas 124 (DB), *Sheonandan Singh v. Keshao Prasad Singh*. ('12) 16 Cal W N 235 (DB), *Taran Chandra v. Ganendra Nath*, distinguished.)]

[But see ('05) 9 Cal W N 292 (299, 300) (DB), *Bagdu Majhi v. Raja Sri Sri Durga Prasad Singha*. (He can acquire such right if his claim of higher right is a repudiation of the tenancy or worked a forfeiture and the landlord failed to sue for possession for twelve years.)]

7. ('23) 10 AIR 1923 P C 118 (121) : 50 Ind App 202 : 26 Oudh Cas 231 : 45 All 419 : 74 Ind Cas 476 (PC).

8. ('14) 1 AIR 1914 Bom 296 (297, 298) : 21 Ind Cas 763 (764) : 38 Bom 53 (DB), *Krishnadixit Baldixit v. Baldixit Wamandixit*.

9. ('84) 7 Mad 26 (28, 29) (DB), *Chathu v. Aku*.

10. ('15) 2 AIR 1915 Cal 653 (654) : 28 Ind Cas 22 (DB), *Faizuddin Khan v. Reju Akab*. (Co-tenant's possession cannot become adverse until there is an ouster or the equivalent of an ouster of the other co-tenant.)

11. ('02) 26 Mad 410 (415) (DB), *Raja of Venkatagiri v. Isakpalli Subbayya*.

The *full* period prescribed for a suit for possession must have expired; otherwise, the title of the true owner is not extinguished in favour of the wrongdoer.¹² Thus, an owner of property does not lose his right to it merely because he happens not to be in possession of it for twelve years. His right is extinguished only when somebody else is in possession against whom a suit for possession could have been filed but had not been filed within the time prescribed.¹³

The institution of the suit itself within the power of limitation is sufficient to bar the operation of this section though the decree for possession is passed beyond the period.¹⁴

The words "hereby limited" show that the section does not apply to cases where the period of limitation is prescribed by some other Act. (See Note 3.)

2a. **Applicability of section to cases where there is a continuing wrong.** — See Section 23 Note 16.

3. **"Suit for possession."** — The section, in terms, applies only where *suits* for possession of property become barred by limita-

('29) 16 AIR 1929 Mad 38 (41, 42) : 111 Ind Cas 152 (DB), *Alagarswami Thevan v. Ramabhadra Naidu*. ('77) 1 Mad 309 (DB), *Akilandammal v. Periasami*, relied on.)

12. ('79) 7 Ind App 73 (80, 81) : 6 Cal L R 249 : 4 Sar 127 : 3 Suther 370 (PC), *Wise v. Amirconissa Khatoon*. (Possession for three years under order made under Act IV of 1840 does not create title against Government.)

('68) 9 Suth W R 283 (283) (DB), *Durga Churn Paul v. Pearee Mohun*.

('35) 22 AIR 1935 Pat 164 (165, 166) : 14 Pat 424 : 155 Ind Cas 1094 (DB), *Nando Kahar v. Sri Bhup Narain Singh*. (A I R 1922 P C 184 (PC), *Bhagwan v. Ram Krishna*, relied on.)

('34) 21 AIR 1934 Pat 485 (489) : 154 Ind Cas 1032 (DB), *Mt. Dharischhna Kuari v. Ramyad Kuar*. (A I R 1929 P C 166 : 56 I A 267 : 51 All 439 (PC), *Jaggo Bai v. Utsavalal*, relied on.)

[See also ('41) 28 AIR 1941 Pat 577 (581) : 20 Pat 346 : 192 Ind Cas 451 (DB), *Mohammad Hanif v. Khairat Ali*. (A acquiring khorposh rights in village in 1903 and dying without obtaining possession — A's uncle B suing A's widow in 1908 in respect of all his properties, obtaining decree in 1911 and taking out delivery of possession in 1912 — Subsequently B sued khorposhdars for khas possession, obtained decree in 1915 and took out delivery of possession in same year — In 1922 decree in suit of 1908 reversed and widow declared entitled to A's self-acquired property including kharposh rights in village — B in suing khorposhdar held represented widow — Widow's right to village held not extinguished under S. 28 (Per Meredith J.))]

13. ('21) 8 AIR 1921 Bom 368 (369) : 45 Bom 1020 : 62 Ind Cas 101 (DB), *Swamirao v. Bhimabai*.

('29) 16 AIR 1929 Oudh 402 (405) : 119 Ind Cas 866, *Mubinul Nisa v. Ali Hussain*.

('26) 13 AIR 1926 Oudh 313 (315) : 29 Oudh Cas 131 : 92 Ind Cas 825, *Sukh Deo v. Mt. Ram Dulari*. (A I R 1916 P C 21 : 39 Mad 617 : 43 I A 192 (PC), *Secy. of State v. Rama Rao*, followed.)

('25) 12 AIR 1925 Cal 981 (983) : 85 Ind Cas 594 (DB), *Abhoy Sankar v. Satyendra Prasanna*. (1847) 10 Ir L R 504, *McDonnell v. McKinty*, followed.)

14. ('42) 46 Cal W N 551 (553), *Maharam Ali v. Mobarak Ali*.

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Note 3

tion.¹ It does not apply to *applications* for possession.^{1a} Thus, the fact that an application for execution of a decree for possession is barred by limitation will not extinguish *ipso facto* the right of the applicant to the property.² But it has been held that the word 'suit' would include an application under S. 144, Civil P. C., an order under which is deemed to be a decree as provided in S. 2 (2), Civil P. C.^{2a}

The "suit for possession" referred to in the section is a suit in respect of which the period of limitation is prescribed by schedule I, Limitation Act.^{2b} This is clear from the words "period hereby limited" in the section. The section, therefore, does not apply to suits for possession to be brought in the revenue Courts for which no limitation

Section 28 — Note 3

1. ('18) 5 AIR 1918 Pat 492 (493) : 46 Ind Cas 569 : 3 Pat L Jour 478 (DB), *Bhaiga Parida v. Gannath Khandai*. (Section 28 provides only the extinction of the rights upon the termination of the period of limitation for a suit and not that at the termination of the period of limitation for an *application*, any right shall be extinguished.)
- ('30) 17 AIR 1930 All 866 (868) : 129 Ind Cas 375 (DB), *Abdul Alim v. Abdul Hamid*.
- ('29) 16 AIR 1929 Nag 145 (145) : 25 Nag L R 74 : 116 Ind Cas 421 (DB), *Naraindas v. Nenu*.
- ('09) 2 Ind Cas 981 (981) : 1909 Pun Re No. 69, *Aruramal v. Kesar Singh*.
- 1a. ('51) 38 AIR 1951 Cal 481 (Para 6) : I L R (1949) 1 Cal 378 (DB), *Govordhon Banerjee v. Sukhomoy Bhavani Prasad*. (In such a case the remedy would be barred but the right would not be extinguished, with the result that if a person who had not made an application for possession within the time limited by the proper article of the Limitation Act, somehow or other gets possession and is thereafter dispossessed by a third person his suit against the third person would not be defeated on the ground that he had no title at the date of the institution of that suit for possession.)
- ('44) 31 AIR 1944 Cal 328 (328) : 218 Ind Cas 144 (DB), *Arjun Lal v. Banbehari*. (Failure to apply for delivery of possession under O. 21, R. 95 within statutory period does not extinguish title.)
2. ('02) 25 Mad 300 (327) : 12 Mad L Jour 128 (FB), *Vedapuratti v. Vallabha Valiya Raja*.
- ('10) 8 I. C. 639 (643) : 35 Bom 79 (DB), *Vasudeo Atmaram v. Eknath Balkrishna*.
- ('09) 4 Ind Cas 246 (248, 249) (DB) (Bom), *Bala Kushaba v. Amrita Vaghmode*.
- ('95) 1 Cal W N 569 (571) (DB), *Jagabandhu Bhattacharjee v. Harimohan Roy*.
- ('66) 1 N W P H C R 154 (156), *Jugur Nath v. Balgobind*. (When a right to property has been established by a declaratory decree the barring of the right of execution by limitation does not extinguish the right.)
- ('87) 1887 Pun Re No. 3, *Ganda Mal v. Nanak Chand*. (('80) 5 Cal 897 (DB), *Nursing v. Hurryhur*, referred to; ('83) 9 Cal 651 (DB), *Cally Nath v. Koonjo Behary*, dissented.)
- 2a. ('48) 35 AIR 1948 All 400 (401) : 1948 All L Jour 536 (DB), *Amba Prasad v. Mumtaz Ali Khan*. (Where the landlord whose property has been sold in execution of a decree for theka money does not apply under S. 144, Civil P. C., for recovery of his property within three years of the date of the order setting aside the execution sale as provided by Art. 181, Limitation Act, his right to file such application is lost by lapse of time and his title to the property is also extinguished under S. 28, Limitation Act.)
- 2b. ('43) 30 AIR 1943 Oudh 296 (297) : 206 Ind Cas 274, *Hit Lal v. Ram Oudh*. (Section 28 not applicable to suits for which limitation is provided in Oudh Rent Act.)

is provided in this Act.³ But the principle of the section, which, as has been seen in Note 1, is of general applicability, has been applied to such cases.⁴ The section has been expressly made applicable to cases arising under the Central Provinces Tenancy Act by virtue of the provisions of S. 104 thereof.⁵

The following have been held not to be suits for possession of property for the purposes of this section :

(1) Suit for sale on a mortgage.⁶

3. ('35) 22 AIR 1935 Mad 914 (917) : 59 Mad 51 : 161 Ind Cas 447, *Ramalingam v. Veerabhadradu*. (A holder of a service inam, who is out of possession of the lands attached to his office must, under the Madras Hereditary Village Offices Act, sue for possession in the revenue Court within three years — Section 28 does not apply to such suits.)
- ('98) 21 Mad 134 (135) : 7 Mad L Jour 196 (DB), *Pichuvayyan v. Vilakudayam Asari*. (Rights to property which cannot be enforced in civil Courts by reason of the Regulation VI of 1831 are not extinguished under S. 28 of the Limitation Act XV of 1877, as the latter Act does not prescribe any period of limitation for suits under the Regulation aforesaid.)
4. ('49) 35 AIR 1949 East Punj 414 (416), *Gokal v. Haria*. (Sale by widow—Suit by collaterals of husband for declaration and decree that sale by widow would not affect reversionary rights of collaterals after death of widow passed — Property alleged to be ancestral *qua* plaintiffs in such suit — Punjab Limitation (Custom) Act held applied as suit was brought on basis of custom—Principle of S. 28 held applied and title of reversioners held extinguished as no suit for possession was brought within limitation after death of widow.)
- ('11) 11 Ind Cas 465 (467, 468) (DB) (Cal), *Nand Kumar Dobey v. Ajodhya Sahu*. (Cases governed by Article 3 of Schedule III of the Bengal Tenancy Act.)
- ('33) 20 AIR 1933 Pat 6 (15) : 11 Pat 701 : 141 Ind Cas 157 (DB), *Chaturbhuj Singh v. Sarada Charan*. (Do.)
- ('99) 21 All 204 (205, 206, 208) : 1899 All W N 36 (DB), *Dalip Rai v. Deoki Rai*. (Cases under Act XII of 1881 (N W P Rent Act), S. 95 (n).)
- ('35) 22 AIR 1935 Lah 787 (789) : ILR (1937) Lah 517 : 160 Ind Cas 1000 (DB), *Kartar Singh v. Kharkha*. (Section 28 does not in terms apply to cases under special or local laws, but the principle underlying it is of general application and has been applied to cases governed by local laws.)
- ('30) 17 AIR 1930 Cal 225 (227) : 127 Ind Cas 51 (DB), *Nalini Bhusan v. Hiralal Roy*. (Where a landlord keeps a ryot out of possession of his holding for the periods specified in Art. 3 of Sch. III of the Bengal Tenancy Act, the ryot's title in the holding is extinguished by adverse possession.)
- ('04) 27 All 372 (373, 374) : 2 All L Jour 69 : 1904 All W N 281, *Ram Lal v. Chuni Lal*. (Case under Agra Tenancy Act II of 1901.)
[But see ('30) 17 AIR 1930 Pat 476 (478, 479) : 126 Ind Cas 858 (DB), *Bankey Behary Lal v. Gudo Choudhury*. (11 Ind Cas 465 distinguished.)]
5. ('40) 27 AIR 1940 Nag 49 (55, 56) : ILR (1940) Nag 348 : 186 Ind Cas 731 (FB), *Punjaram Jagoba v. Ramuchintoo*. (The extinguishment spoken of by S. 28 occurs at the end of the period specified in the second schedule to the Tenancy Act and not at the end of the period prescribed by the Limitation Act.)
- ('28) 15 AIR 1928 Nag 281 (281) : 109 Ind Cas 403, *Dadoo v. Sukha*.
- ('34) 21 AIR 1934 Nag 61 (62) : 30 Nag L R 208 : 148 Ind Cas 733, *Sujalkhan v. Nazafali*.
- ('27) 14 AIR 1927 Nag 352 (352) : 107 Ind Cas 522, *Dharmu v. Dal Singh*. (('26) A I R 1926 Nag 99, *Banau v. Ranjitsingh* dissented from.)
6. ('30) 17 AIR 1930 All 416 (417) : 122 Ind Cas 411 : 52 All 539 (DB), *Jokhu Bhunja v. Sitla Bakhsh Singh*. (('28) AIR 1928 All 99 (DB), *Ramkishore v. Ram Nandan* relied on.)

Section 28
Note 3

- (2) Suit to enforce maintenance.⁷
- (3) Suit for the restitution of conjugal rights.⁸
- (4) Suit for a declaration.⁹
- (5) Suit for setting aside an order rejecting a claim to attached property.¹⁰
- (6) A suit to levy assessment of rent-free land.^{10aa}
- (7) A suit to recover the share money due from a shareholder by a Company.^{10ab}

A suit for pre-emption is a suit for possession within the meaning of this section.^{10a}

Where a person is *bound* to set aside a document before he can sue for possession, as in the case of a minor whose property has been alienated by his guardian on his behalf, a failure to sue to set aside the alienation within the time prescribed will extinguish his rights to the property under this section.¹¹ The reason is that the suit for

(35) 22 AIR 1935 Oudh 139 (141) : 10 Luck 531 : 153 Ind Cas 808 (DB), *Ram Adhar v. Shankar Baksh Singh*.

(18) 5 AIR 1918 Cal 933 (938, 940) : 44 Cal 425 : 37 Ind Cas 277 (DB), *Priya Sakhi Debi v. Bireswar Samanta*.

[See also (35) 22 AIR 1935 Oudh 213 (216) : 10 Luck 481 : 153 Ind Cas 307 (DB), *Sarada Nand v. Daya Shanker Singh*.]

7. ('24) 11 AIR 1924 Cal 364 (366) : 73 Ind Cas 235 (DB), *Gopal Chandra v. Kadambini Dasi*. (('78-79) 3 Bom 415 (P C), *Narayanrao v. Ramabai* and ('02) 29 Cal 557 (SB), *Siddessury v. Janardan* followed.)

8. ('01) 25 Bom 644 (657) : 3 Bom L R 371 (FB), *Dhanjibhoy Bomanji v. Hirabai*.

('12) 16 Ind Cas 124 (124) : 34 All 412 (DB), *Ayesha v. Faiaz Husain*.

9. ('48) 1948 Bur L R 402 (406) (DB), *A. L. M. Chettyar Firm v. Ma Sint*.

('10) 6 Ind Cas 881 (883) : 3 Sind L R 228 (FB), *Goverdhandas v. Naraindas*. (Suit for declaration of right to the flow of water and for injunction restraining defendant from obstructing it.)

('09) 2 Ind Cas 981 (981) : 1909 Pun Re No. 69, *Aruramul v. Kesar Singh*.

('28) 15 AIR 1928 Bom 383 (384) : 113 Ind Cas 378 (DB), *Chintaman Balwant v. Bhagwan Ganapati*. (Mortgage by Hindu father — Mortgagee not put in possession — Sale to mortgagee — Suit by son to set aside sale and recover his share.)

10. ('36) 165 Ind Cas 84 (85) (DB) (Cal), *Bama Pada v. Rama Nath*. (Claimant's right to property is not extinguished by his failure to get order set aside within period of limitation by regular suit.)

10aa. ('42) 29 AIR 1942 Bom 174 (175) : ILR (1942) Bom 326 : 201 Ind Cas 120 (DB), *Balkrishna Khanderao v. Anantabaji*. (A right to recover assessment is a mere right in action.)

10ab. ('49) 36 AIR 1949 All 195 (197) : ILR (1949) All 331 (DB), *Bhagwati Prasad v. Shiromani Sugar Mills Ltd.* (The notice intimating to the share-holder of the forfeiture of shares on account of non-payment of allotment money would be valid even though the notice included some items which were barred by limitation, no steps having been taken to recover them within the time fixed for limitation.)

10a. ('34) 21 AIR 1934 Oudh 303 (305) : 9 Luck 475 : 149 Ind Cas 258, *Salamat Ali v. Nur Muhammed Khan*.

11. ('33) 20 AIR 1933 Bom 42 (44) : 141 Ind Cas 806 (DB), *Jhaverbhai Hathibha v. Kabhai Becher Patel*.

possession in such cases will be governed by the same article which governs the suits to set aside such alienations.

Section 28
Notes 3-5

A suit for recovery of possession on redemption of a mortgage on the property is virtually a suit for *possession* and on the expiry of the period of limitation for such suit, the mortgagor's title to the property will be extinguished.¹² (See also Art. 148 Notes 2 and 25.)

As to whether the section applies to a suit for possession under s. 9 of the Specific Relief Act, see Note 2 under Article 3.

4. "Any person." — A title by adverse possession can be obtained against a *math*. The fact that during the period of prescription the *math* had no lawful manager will not affect the operation of this section.¹

5. "Any property." — Section 29 of the Act of 1871 corresponding to this section referred only to "land or hereditary office."¹ The present section is wider than s. 29 of the Act of 1871 and refers to "any property."² It would seem to include all property in respect of which a suit for possession can be filed. It is, however, necessary that the property must be one recognized by law.³ The following have been regarded as property for which a title can be acquired by the operation of this section :

(1) An exclusive right of fishery.⁴

('19) 6 AIR 1919 Cal 404 (404) : 52 Ind Cas 269, *Kanok Dasi v. Srihari Goswami*. (Suit to set aside invalid alienation by certificated guardian.)

('18) 5 AIR 1918 Mad 724 (726) : 41 Mad 102 : 40 Ind Cas 664 (DB), *Kandasamy Naicken v. Irusappa Naicken*.

('12) 12 Ind Cas 695 (697, 700) (DB) (Mad), *Doraiswamy Serumadam v. Nandisamy Selavan*. (A suit by a minor to set aside a sale by his guardian and to recover property is governed by Arts. 44 and 144 and also by S. 28.)

('14) 1 AIR 1914 Oudh 338 (339) : 17 Oudh Cas 52 : 23 Ind Cas 406, *Mt. Sheonatha v. Sheoraj Singh*. ((1900) 23 Mad 271 (PC), *Gnanasambanda v. Velu Pandaram* relied on.)

[But see ('40) 27 AIR 1940 Cal 589 (590) : 193 Ind Cas 168, *Lalit Kumar Das v. Nogendra Lal*. (Article 44 is not concerned with suits for possession — Ward's failure to sue within period prescribed by Art. 44 bars only his right to set aside transfer — It does not extinguish right to property under S. 28.)]

See also Note 2 to Article 44.

12. ('25) 12 AIR 1925 Bom 339 (340) : 87 Ind Cas 699 (DB), *Indurai Bhaurai v. Shivalal Nabhubhai*.

Section 28 — Note 4

1. ('94) 18 Bom 507 (511, 512) (DB), *Vithalbowa v. Narayan Daji Thite*.

Section 28 — Note 5

1. ('81) 3 All 435 (436) : 1881 All W N 9 : 5 Ind Jur 652 (DB), *Jagram Bibi v. Ganeshi*. (Trees growing upon land are "land" within the meaning of S. 29, Limitation Act, 1871.)

2. ('79) 4 Cal 283 (297) : 3 Cal L R 336 : 2 Shome L R 2 (DB), *Ramchunder Ghosaul v. Juggut Monmohiney Dabee*.

3. ('04) 28 Bom 399 (407) : 6 Bom L R 428 (DB), *Jethabhai v. Nathabhai*.

4. ('32) 19 AIR 1932 Cal 300 (302, 303) : 59 Cal 344 : 137 Ind Cas 279, *Krishna Nandi v. Lokenath Mootherjee*.

Section 28
Note 5

- (2) A right to maintain a projection over the neighbour's land. The right is a right to the occupation of space belonging to the neighbour and therefore of property.⁵
- (3) A right to levy assessment on rent-free lands.⁶
- (4) A right to a Buddhist monastery.⁷
- (5) A right to *birt jajmani*.⁸
- (6) A *nankar* allowance when that allowance forms part of a larger estate which has been divided and enjoyed in severalty for a long time.⁹
- (7) A right to an office of profit.¹⁰ It must be noted that where land is attached to the office as appurtenant to it and the

(23) 10 AIR 1923 Pat 58 (60, 62) : 1 Pat 674 : 67 Ind Cas 954 (DB), *Henry Hill & Co. v. Sheoraj Rai*. ((17) AIR 1917 Pat 528 (DB), *Baker Husain v. Ranjit Koer* followed.)

(30) 17 AIR 1930 Mad 679 (680, 683) : 125 Ind Cas 545, *Secretary of State v. District Board of Tanjore*. ((1911) 14 Cal L J 572 (DB), *Lokenath v. Jahania Bibi* followed.)

See also Note 10 to Section 2 (5), Note 10 to Article 39 and Note 7 to Articles 142 & 144.

5. (25) 12 AIR 1925 Bom 335 (335, 337) : 87 Ind Cas 1008, *Bahadurmal Gurumukhrai v. Mohanlal Surchand*. ((78-79) 3 Bom 174 (DB), *Mohanlal v. Amrat Lal* and (1904) 28 Bom 428 (DB), *Ranchod Shamji v. Abdullabhai*, followed.)

[See also (10) 7 Ind Cas 571 (572) (DB) (Mad), *Adinarayanamma v. Murtuza*. (A person constructing a buttress over a site belonging to another and enjoying its possession for the statutory period gets title to the site by adverse possession and not only an easement.)]

6. (21) 8 AIR 1921 Bom 303 (306, 307) : 45 Bom 694 : 61 Ind Cas 40 (DB), *Sakharam v. Trimbakrao*. ((80) 5 Cal 949 (DB), *Abhay Churn Pal v. Kally Pershad* and (77) 1 Bom 586 (DB), *Keval Kuber v. Talukdari Settlement Officer* followed.)

See also Note 5 to Article 130.

7. (23) 10 AIR 1923 Rang 40 (40) : 79 Ind Cas 273, *U Wiseikla v. U Parama*.

8. (08) 1908 Pun Re No. 34 : 1908 Pun L R No. 163 : 1908 Pun W R No. 96, *Mohan Lal v. Janki*.

9. (16) 3 AIR 1916 Oduh 129 (132) : 33 Ind Cas 461 : 19 Oudh Cas 49, *Deputy Commissioner, Fyzabad v. Jagjiwan Bakhsh Singh*.

10. (1900) 23 Mad 271 (279) : 27 Ind App 69 : 4 Cal W N 329 : 10 Mad L Jour 29 : 2 Bom L R 597 : 7 Sar 671 (PC), *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*. (Hereditary office.)

(03) 26 Mad 113 (115) (DB), *Raghavachariar v. Tirumalai Asari*. (Non-hereditary office.)

(09) 3 Ind Cas 8 (8, 9) (DB) (All), *Dharma Nand v. Khema*. (Hereditary office.)

(98) 21 Mad 278 (287) (DB), *Alagirisamy Naicker v. Sundareswara Iyer*. ((82-83) 10 I A 90 (PC), *Balwant Rao v. Purun Mal* followed.)

(09) 3 Ind Cas 408 (414) (DB) (Cal), *Sital Das Babaji v. Partab Chandar Sarma*. (The right of any person who might be regarded as lawfully entitled to the shebaitship may be extinguished by adverse possession.)

(20) 7 AIR 1920 Cal 800 (803) : 60 Ind Cas 165 (DB), *Kassim Hassan v. Hazara Begum*. (Hereditary office of mutawalli.)

[But see (30) 17 AIR 1930 All 866 (868) : 129 Ind Cas 375, *Abdul Alim v. Abdul Hamid*. (Non-hereditary office — Suit for possession of office is not suit for possession of property.)]

right to the office is barred, not only the right to the office but the right to the land also will be extinguished.¹¹

(8) A right to cut, appropriate and sell timber in a forest.^{11a}

(9) A jagir (right to collect rent). This is an interest in immovable property.^{11b}

A "right to property" would include a right to the joint enjoyment of the property as well as a right of survivorship to the property."¹²

It has been held in the undermentioned cases¹³ that this section is confined to *immovable* property. This is obviously incorrect.¹⁴

It has been held that the property referred to in the section must be property capable of being *physically* possessed and that consequently a right to redeem a usufructuary mortgage is not property for the purposes of this section.¹⁵ So also a suit to recover assessment of

11. (1900) 23 Mad 271 (279) : 27 Ind App 69 : 4 Cal W N 329 : 10 Mad L Jour 29 : 2 Bom L R 597 : 7 Sar 671 (PC), *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*. (Hereditary office.)

('20) 7 AIR 1920 Cal 800 (803) : 60 Ind Cas 165 (DB), *Kassim Hassan v. Hazara Begum*. (Do.)

('98) 21 Mad 278 (287) (DB), *Alagirisamy Naicker v. Sundareswara Iyer*.

('03) 26 Mad 113 (115) (DB), *Raghavachariar v. Tirumalai Asuri*. (Non-hereditary office.)

('05) 28 Mad 197 (200, 201) (DB), *Pydigantham Jagannatha Rao v. Rama Doss Patnaik*. (Hereditary office with property.)

('17) 4 AIR 1917 All 49 (51, 52) : 39 All 636 : 42 Ind Cas 77 (DB), *Ram Piari v. Nand Lal*. (Hereditary office.)

[But see ('30) 17 AIR 1930 All 866 (868) : 129 Ind Cas 375 (DB), *Abdul Alim v. Abdul Hamid* (Where action for possession of office of mutwalli is statute-barred, right to a particular wakf property is not necessarily extinguished under Section 28 — The decision proceeds on the view that a suit for possession of an office of mutwalli is of a personal character and is not a suit for possession of a property.)]

See also Note 11 to Article 124.

11a. ('39) 26 AIR 1939 Pat 587 (590) : 181 Ind Cas 777 (DB), *Jagdish Chandra v. Pratap Chandra*.

11b. ('41) 28 AIR 1941 Pat 219 (221) (DB), *Palma Kumari v. Nanda Padhan*.

12. ('21) 8 AIR 1921 Mad 24 (25, 27) : 44 Mad 131 : 60 Ind Cas 583 (DB), *Atchamma v. Bapiiah*. (('61-63) 9 M I A 539 (PC), *K. Natchiar v. S. R. M. V. Raganadha B. G. Taver* followed.)

('37) 24 AIR 1937 All 300 (302, 303) : 169 Ind Cas 125, *Mt. Jaidevi Kuari v. Dakshini Din*. (('02) 26 Bom 146 (DB), *Bhimappa v. Irappa* dissented from.)

13. ('39) 26 AIR 1939 Bom 494 (496); 1 L R (1939) Bom 685 : 185 Ind Cas 366, *Surat Borough Municipality v. Sarifa Karunnissa*.

('22) 9 AIR 1922 Pat 346 (349) : 63 Ind Cas 849; 6 Pat L Jour 408 (DB), *Niamat Ali v. Yad Ali Shah*.

14. See ('10) 7 Ind Cas 134 (138) (DB) (Bom), *Ramdas Chabildas v. Chabildas*. (Suit for recovery of ornaments barred — Right is extinguished.)

15. ('97) 20 Mad 305 (309, 310, 311) (DB), *Krishna Menon v. Kesavan*. (Defendant in possession of land in Malabar, as ottidar — Plaintiff purchasing the jenmi right — Defendant not suing for pre-emption within the period prescribed — Plaintiff subsequently suing for redemption — Defendant can assert his right of pre-emption and such right is not extinguished by his failure to sue within the period of limitation — ('84) 7 Mad 25 (DB), *Pattathil Chathu Nayar v. Pattathil Aku* and ('90) 13 Mad 490 (DB), *Kanharamkutti v. Uthotti* followed.)

Section 28
Notes 5-6

rent-free land is not a suit for possession of property.¹⁶

A suit to recover a debt or legacy is not a suit for possession of any property.¹⁷

See also Articles 142 & 144 Notes 6 and 7.

6. "Shall be extinguished." — Where a person who could have sued for possession of property, allows the period of limitation prescribed for the suit to expire, his title is, under this section, destroyed.¹ The extinguishment of the title of the rightful owner will

[But see ('02) 6 C W N 601 (612) (DB), *Lalla Kanhoo Lal v. Manki Bibi*. (Title to immovable property may be affected by S. 28 although the physical possession is not in question—Equity of redemption is capable of being extinguished by adverse possession)]

See also the Article in ('92) 2 Mad L Jour 283 (286, 287).

16. ('42) 29 AIR 1942 Bom 174 (175) : I L R (1942) Bom 326 : 201 Ind Cas 120 (DB), *Balkrishna v. Anant Abaji*. (Although a right to assessment may, for certain purposes, be regarded as immovable property, it is quite impossible to say that a suit to recover assessment is a suit for possession of any property. A right to recover assessment is a mere right in action.)

17. ('45) 32 AIR 1945 Pat 368 (369) : 24 Pat 249 (DB), *Baleswar Prasad v. Latafat Karim*.

Section 28 — Note 6

1. ('49) 36 AIR 1949 Mad 826 (827) . (1949) 1 Mad L Jour 314, *Tulasamma v. Nandula Buchiramaih*. (Prescriptive right to project eaves on neighbours' land can be acquired by 12 years' possession.)

('45) 32 AIR 1945 Bom 63 (64) : 219 Ind Cas 166, *Rachappa v. Madivalawa*.

('42) 29 AIR 1942 Bom 138 (141) : 200 Ind Cas 889, *Narasinhji v. Madhavsing*.

('41) 28 AIR 1941 Pesh 76 (78) : 196 Ind Cas 648, *Tila Mohd. v. Peshawar Municipality*. (Municipality not filing suit for possession of land encroached upon for 30 years loses its right to demand removal of encroachment and possession of land.)

('39) 26 AIR 1939 Lah 455 (457, 458) : 185 Ind Cas 858, *Banwari Lal v. Mt. Hussaini*. (Lessee continuing in possession after expiry of term of lease — No payment of rent — Nothing to show landlord's assent—Tenant's possession is adverse and landlord's title will be extinguished if he does not sue for possession within twelve years from expiry of lease.)

('39) 26 AIR 1939 Pat 587 (590) : 181 Ind Cas 777 (DB), *Jagadish Chandra v. Pratap Chandra*. (Lessee adversely and openly enjoying timber of adjoining jungle belonging to grantor for more than twelve years — Grantor held lost his right to timber by adverse possession.)

('24) 11 AIR 1924 P C 121 (122) : 51 Ind App 171 : 5 Lah 192 : 80 Ind Cas 788 (PC), *Mt. Lajwanti v. Safa Chand*.

('37) 24 AIR 1937 Cal 305 (307, 308) : I L R (1937) 2 Cal 242 : 172 Ind Cas 315 (DB), *Sri Raghunathjiu v. Ganga Gobinda*.

('20) 7 AIR 1920 Cal 852 (852) : 59 Ind Cas 719 (DB), *Harish Chandra v. Nirpendra Coomar*. (*P* purchasing benami in name of *D* and remaining in possession for more than two years but dispossessed by *D* — *P* sued for possession — *D*'s title had become extinguished by Sch. 3, Bengal Tenancy Act of 1885.)

('15) 2 AIR 1915 All 90 (91) : 27 Ind Cas 914, *Balbhadar Choube v. Somaru Rai*. (Failure to sue under section 79 of the Tenancy Act on dispossession extinguishes right.)

('22) 9 AIR 1922 All 124 (125, 126) : 66 Ind Cas 856, *Bhikhari Singh v. Jokhan*. (Do.)

('27) 14 AIR 1927 All 551 (552) : 101 Ind Cas 591, *Bhairo Lohar v. Abdul Wahab*. (Do.)

operate to give a good title to the wrongdoer.² In *Gunga Gobind*

('15) 2 AIR 1915 Cal 234 (234) : 27 Ind Cas 250 (DB), *Sachindra Kishore Dey v. Rajani Kanta*.

('77) 1 Bom 586 (590) : 1 Ind Jur 849 (DB), *Keval Kuber v. Taluqdari Settlement Officer*.

('37) 24 AIR 1937 All 300 (302, 303) : 169 Ind Cas 125, *Mt. Jaidevi Kuari v. Dakshini Din*.

('26) 13 AIR 1926 All 62 (63) : 48 All 145 : 92 Ind Cas 414 (DB), *Mt. Ram Kuer v. Govind Ram*. (Mortgagee remaining in possession after the redemption of mortgage with possession—Right of mortgagor to recover possession is barred.)

('83) 1883 All W N 178 (178) (DB), *Jaipal Rai v. Illahi Bakhsh*. (Redemption of mortgage by person claiming under title adverse to mortgagor—Adverse possession by such person extinguishes mortgagor's right.)

('29) 16 AIR 1929 PC 228 (231) : 51 All 675 : 120 Ind Cas 651 : 56 Ind App 330 (PC), *Abdul Jalil Khan v. Obaid Ullah Khan*. (Benami purchaser allowing true owner to be in adverse possession for twelve years—Latter gets a good title.)

('89) 11 All 438 (445, 455) : 1889 All W N 155 (DB), *Parmanand Misir v. Sahib Ali*.

('01) 24 Mad 387 (396) : 28 Ind App 81 : 3 Bom L R 303 : 5 Cal W N 545 : 7 Sar 819 (PC), *Vasudeva Padhi Khadangat Garu v. Maguni Devan Bakshi Mahapatrulu Garu*.

('77) 1 Mad 343 (348) : 2 Ind Jur 249 (DB), *Chenna Kesavaraya v. Mangadu Vaidelinga*.

('20) 7 AIR 1920 Nag 51 (51) : 55 Ind Cas 499 : 16 Nag L R 87, *Laxman v. Govind*. (('01) 23 All 175 (DB), *Bishan Dial v. Ghazi-ud-din* relied on.)

('19) 6 AIR 1919 Oudh 404 (405) : 53 Ind Cas 1005, *Parameswar Din v. Ram Nath*.

(1900) 27 Cal 1004 (1011) : 27 Ind App 103 : 4 Cal W N 565 : 7 Sar 718 (PC), *Fa'imatubinissa Begam v. Sundar Das*. (Suit for redemption of usufructuary mortgage barred by limitation—Right of mortgagor is extinguished.)

('87) 1887 All W N 103 (104) (DB), *Birangi v. Ramsaran*.

[See ('33) 20 AIR 1933 Oudh 462 (464) : 146 Ind Cas 987, *Ram Shankar v. Sheo Dutt*.]

[See also ('23) 10 AIR 1923 Rang 40 (40) : 79 Ind Cas 273, *Wiseikla v. Parama*.]

2. ('42) 29 AIR 1942 P C 64 (67) : I L R (1942) Kar (P C) 166 : 69 Ind App 137 (PC), *Hemchand v. Peary Lal*. (Provision in will creating charitable trust inoperative in law—Executor holding property adversely to heir on behalf of charity for 12 years—Title vests in charity—Title of heir becomes extinguished.)

('42) 29 AIR 1942 All 42 (43) : 198 Ind Cas 496, *Mahomed Yusuf v. Sarju Singh*. (The quality and extent of the right acquired by the person who has established his adverse possession depends upon the intention with which the person setting up the statute has been in possession.)

('41) 28 AIR 1941 Pat 181 (183) : 19 Pat 852 : 194 Ind Cas 243 (DB), *Akhauri Haliwant v. Deo Narain*.

('40) 27 AIR 1940 Nag 49 (53) : I L R (1940) Nag 348 : 186 Ind Cas 731 (FB), *Punjaram Jagoba v. Ramu Chintoo*.

'39) 26 AIR 1939 Cal 50 (62) : 180 Ind Cas 721 (DB), *Jitendra Kumar v. Debedra Chandra*. (Reason is that title to land cannot be in a state of suspense.)

('38) 25 AIR 1938 Lah 369 (373, 385, 886) : 175 Ind Cas 945 (FB), *Masjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar*. (Mosque adversely possessed by Sikhs for the statutory period—Sikhs become owners of the building—All rights of Muhammedans including right to pray are lost.)

('97) 21 Bom 509 (514, 516) (DB), *Budesab v. Hanmantha*.

('77) 8 Cal 224 (226, 227) (DB), *Gossain Dass Chunder v. Issur Chunder Nath*.

('66-67) 11 Moo Ind App 345 (PO), *Gunga Gobind v. Collector of Twenty-four Pergunnahs*, followed.)

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Mundul v. The Collector of 24-Pargunnahs,³ Lord Romilly observed as follows :

“The title to sue for dispossession of the lands belongs, in such a case, to the owner whose property is encroached upon; and if he suffers his right to be barred by the law of limitation, the practical effect is the extinction of his title in favour of the party in possession The High Court had decided that

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- (’87) 1887 All W N 92 (92) (DB), *Pir Bakhsh v. Mukhan Lal*.
 (’81) 3 All 435 (436, 437) : 1881 All W N 9 : 5 Ind Jur 652 (DB), *Jagrani Bibi v. Ganeshi*.
 (’06) 28 All 743 (746) : 1906 All W N 216 (DB), *Yakub Ali Khan v. Kishun Lal*.
 (’06) 29 All 133 (136, 137) : 3 All L Jour 760 : 1906 All W N 305 (DB), *Bhadder v. Khair-ud-Din Husain*.
 (’26) 13 AIR 1926 All 697 (698) : 96 Ind Cas 687 (DB), *Sajjad Hussain v. Qurban Ali Beg*.
 (’28) 15 AIR 1928 All 45 (46) : 49 All 713 : 102 Ind Cas 175 (DB), *Rikhdeo Tewari v. Sukhdeo Tewari*.
 (’31) 18 AIR 1931 All 635 (649) : 54 All 299 : 136 Ind Cas 145 (FB), *Ram Karan Singh v. Ram Das Singh*.
 (’90) 14 Bom 222 (226, 227) (DB), *Hargovindas Lakshmidas v. Bajibhai Jijibhai*.
 (’12) 17 Ind Cas 148 (149) : 37 Bom 37 (DB), *Maganchand Fulchand v. Vithalrao*.
 (’20) 7 AIR 1920 Bom 9 (10) : 58 Ind Cas 326 (DB), *Tayabali Abdullabhai v. Dohad Municipality*.
 (’79) 4 Cal 327 (331) : 2 Shome L R 106 (DB), *Bejoy Chunder v. Kally Prosonno Mookerjee*.
 (’97) 24 Cal 244 (248) (DB), *Suja Hossein v. Monahur Das*. (Where an insolvent has been in possession of land from before the date of insolvency and for more than twelve years after the insolvency the Official Assignee not having taken possession, the insolvent will have acquired a right by adverse possession.)
 (’10) 6 Ind Cas 392 (395) (DB) (Cal), *Nawab Bahadur, Murshidabad v. Gopinath Mandal*.
 (’22) 9 AIR 1922 Cal 193 (194) : 69 Ind Cas 7 (DB), *Satyendra Nath v. Krishna-sakha Kar*.
 (’86) 1886 Pun Re No. 16, *Daya Ram v. Badri Mal*.
 (’72) 1872 Pun Re No. 48, *Kurim Khan v. Bahadur Khan*.
 (’22) 9 AIR 1922 Lah 102 (103) (DB), *Lala v. Khalas*.
 (’19) 6 AIR 1919 Pat 447 (451) : 53 Ind Cas 114 (DB), *Badri Chaudhuri v. Harbans Jha*. (Fraudulent transferor continuing in possession for more than twelve years is entitled to declaration or recovery of possession even if fraud is carried out.)
 (’35) 22 AIR 1935 Pat 164 (165) : 14 Pat 424 : 155 Ind Cas 1094 (DB), *Nando Kahar v. Bhup Narain Singh*.
 (’14) 1 AIR 1914 Mad 708 (710) : 38 Mad 1064 : 24 Ind Cas 369 (DB), *Prasanna Venkatachala Reddiar v. Collector of Trichinopoly*.
 (’15) 2 AIR 1915 Mad 345 (348) : 25 Ind Cas 109 (DB), *Ganapathi Mudali v. Venkatalakshmi Narasayya*. ((’05) 15 Mad L Jour 368 (DB), *Usmankoya v. Chidriamokkusa*, followed.)
 (’16) 3 AIR 1916 Mad 415 (416) : 29 Ind Cas 168 (DB), *Ratna Bai v. Official Assignee of Madras*.
 [See (’17) 4 AIR 1917 Cal 369 (370) : 36 Ind Cas 11 (DB), *Chandra Ghosh v. Nilkamal Mukhopadhyaya*. (Quære – Whether Section 28 of the Limitation Act operates only to extinguish the interests of the dispossessed owner and not to assign that interest to the adverse possessor.)]
 [But see (’83) 1883 All W N 100 (100) (DB), *Dilsukh Rai v. Tika Ram*.]
 3. (1866-67) 11 Moo Ind App 345 (360, 361) : 7 Suth W R 21 : 1 Suther 676 : 2 Sar 284 (PC).

the Prince's title is barred; and the effect of that bar must operate in favour of the party in possession."

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The acquisition of the title by the wrongdoer is thus the corresponding effect of the right to the property being extinguished; if the one does not take place, the other does not.⁴ That this is so is also clear from the words "whereas it is also expedient to provide rules for acquiring by possession, the ownership of easements and other property" occurring in the preamble of this Act.

Where the title of a person is under this section extinguished in favour of the wrongdoer, it is not revived by that person again getting into possession. In other words, there is "no remitter to the old title."⁵

4. ('43) 30 AIR 1943 Bom 265 (266) : 209 Ind Cas 251, *Fakirappa v. Ningappa*. ('28) 15 AIR 1928 All 625 (625) : 115 Ind Cas 613, *Oudh Behari Lal v. Collector of Etah*.

('31) 18 AIR 1931 All 635 (649) : 54 All 299 : 136 Ind Cas 145 (FB), *Ram Karan Singh v. Ram Das Singh*.

('10) 6 Ind Cas 881 (883) : 3 Sind L R 228 (FB), *Goverdhan Das v. Narain Dass*. ('97) 21 Bom 509 (514) (DB), *Budesab v. Hanmanta*. ((1858) 27 L J Ex 297 *Brassington v. Llewellyn*, followed.)

5. ('42) 29 AIR 1942 All 42 (43) : 198 Ind Cas 496, *Mahomed Yusuf v. Sarju Singh*.

('35) 22 AIR 1935 Pat 164 (165) : 14 Pat 424 : 155 Ind Cas 1094 (DB), *Nando Kahar v. Bhup Narain Singh*. (There cannot be a revival of title of which there has been a statutory extinguishment.)

('20) 7 AIR 1920 Cal 800 (803) : 60 Ind Cas 165 (DB), *Kassim Hassan v. Hazra Begum*.

('99) 21 All 204 (208, 209) : 1899 All W N 36 (DB), *Dalip Rai v. Deoki Rai*. (Forcible entry by tenant after his right of occupancy of land is extinguished, is not as tenant but as trespasser.)

(1873) 20 Suth W R 114 (115) : 11 Beng L R 237 (DB), *Brindabun Chunder v. Tarachand Bindopadhyaya*. (('66-67) 11 M I A 345 (PC), *Gunga Gobind Mundul v. Collector of Twenty-four Pergunnahs*, followed.)

('30) 17 AIR 1930 Cal 225 (226, 227) : 127 Ind Cas 51 (DB), *Nalini Bhusan Roy v. Hiralal Roy*.

('27) 14 AIR 1927 Nag 401 (402) : 105 Ind Cas 835, *Sonaji v. Dattu*.

('28) 15 AIR 1928 Nag 280 (280, 281) : 109 Ind Cas 401, *Kapoor v. Nanhi*. (('26) A I R 1926 Nag 99, *Banau v. Ranjitsingh*, distinguished.)

('07) 9 Cal L Jour 621 (636) (DB), *Lilabati Misra v. Bishun Chobey*.

('35) 22 AIR 1935 Lah 787 (789) : I L R (1937) Lah 517 : 160 Ind Cas 1000 (DB), *Kartar Singh v. Kharkha*.

('34) 21 AIR 1934 Pat 485 (489) : 154 Ind Cas 1032 (DB), *Mt. Dharichhna Kuari v. Ramyad Kuar*. (But if he is in possession again for twelve years he may get a title.)

('25) 12 AIR 1925 Oudh 20 (23) : 84 Ind Cas 98 (DB), *Mt. Mahmudunnisa v. Zahid Raza*. (A I R 1920 Cal 800, followed.)

('76) 25 Suth W R 131 (132), *Kristo Gopal Roy v. Roodro Chunder Roy*.

('26) 13 AIR 1926 Rang 95 (96) : 95 Ind Cas 514, *Maung San Shin v. Mg. Maung*. (Where the right to bring a suit for land has become barred, the mere fact of a trespasser taking possession does not revive the right.)

[See also ('41) 28 AIR 1941 Nag 357 (361) : I L R (1942) Nag 564 : 197 Ind Cas 612 (DB), *Narainbhai Icharam v. Narbada Prasad*. (Widow of deceased testator remaining in possession despite provision in will bestowing property on another — Latter regaining possession after the period of limitation — His title is not revived.)]

Also see Note 93 to Articles 142 & 144.

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In *Brassington v. Llewellyn*,⁶ a leading case under the English statute of limitation, which has been followed in this country also, Sir William Channel observed as follows :

"The title to which, according to the doctrine of remitter, a party can be deemed to be remitted, must be a title on which he could have maintained an ejectment. But in 1842 could William have maintained an ejectment before his re-entry? It must be admitted that he could not have done so. Then, how could his re-entry operate by way of remitter? To hold that it could, would be quite at variance with the true doctrine of remitter, and would practically repeal the statute."

Where a title has been acquired by the operation of this section, a suit can be maintained by the person so acquiring it for a declaration of his title⁷ or for possession of the property if he is dispossessed of it.⁸

*The right that is extinguished cannot be anything more than what the rightful owner had in the property.*⁹ Thus, where the person prescribed against is only a person with a limited interest, it is only that interest that will be extinguished. In other words, no one can prescribe for more than what the person against whom he is prescribing is entitled to.¹⁰ Thus, where A mortgages by a simple mortgage his property to X, and A is thereafter dispossessed by B who remains in adverse possession for twelve years, A's title is extinguished. But A's title is only to the equity of redemption in the property and

6. (1858) 114 R R 1038 (1040) : 27 L J Ex 297.

7. ('77) 2 Cal 418 (421, 422) (DB), *Shiro Kumari Debi v. Govind Shaw Tanti*. ('70-71) 6 Mad H C R 420, *Tirumalasami v. Ramasami* dissented from.)

('73) 20 Suth W R 104 (105) (DB), *Ram Lochun Chackerbutty v. Ram Soonder Chackerbutty*. ('66-67) 11 M I A 345 (PC), *Gunga Gobind v. Collector of Twenty-four Pargunnahs* followed.)

('19) 6 AIR 1919 Pat 447 (451) : 53 Ind Cas 114 (DB), *Badri Chaudhuri v. Harbans Jha*. ('01) 28 Cal 370 (DB), *Govinda Kuar v. Lala Kishun* followed.)

('15) 2 A I R 1915 Sind 4 (6, 7) : 9 Sind L R 1 : 30 Ind Cas 13 (DB), *Karachi Municipality v. Shamoo Ladha*.

[See ('72) 17 Suth W R 490 (492) (DB), *Lallee Singh v. Mt. Arit Kooer*.]

[See also ('42) 29 AIR 1942 Bom 138 (141) : 200 Ind Cas 889, *Narasinghji v. Madharsing*. (If there is litigation between the adverse holder whose title is complete under S. 28, and the successor of the real owner the former can plead his title based on adverse possession.)]

8. ('20) 7 A I R 1920 Pat 538 (540) : 58 Ind Cas 380, *Ram Brich Singh v. Mt. Sonjharo Koer*. (AIR 1919 Pat 447 (DB), *Badri v. Harbans* followed.)

9. ('39) 26 A I R 1939 Cal 50 (62) : 180 Ind Cas 721 (DB), *Jitendra Kumar v. Debendra Chandra*. (Right acquired by adverse possession is equal in orbit to that extinguished.)

('37) 24 AIR 1937 All 300 (303):169 Ind Cas 125, *Mt. Jaidevi Kuari v. Dakshini Din*.

('16) 3 A I R 1916 Mad 990 (997, 998, 999) : 39 Mad 811 : 31 Ind Cas 412 (FB), *Vyapuri v. Sonamma Boi*.

10. ('46) 33 A I R 1946 Oudh 213 (218) : 224 Ind Cas 537 (DB), *Lalit Mohan v. Lachmi Raj Kuar*.

('15) 2 A I R 1915 Mad 539 (540) : 25 Ind Cas 692, *Venkataratnam v. Venkataramiah*. ('90) 13 Mad 512 (DB), *Sambasiva v. Ragava* followed.)

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it is only *that right* that will be extinguished. The right of X in the property cannot be extinguished.¹¹ As was observed by their Lordships in *Sambasiva v. Raghava*,¹² "the title acquired by adverse possession for twelve years is only equivalent to that given by a parliamentary grant of the interest vesting in the party affected by the adverse possession." Where an order under S. 145, Criminal Procedure Code, is passed declaring one of the two parties to be entitled to and in exclusive possession of the property in dispute and no suit for possession by the other party is filed within the time limited by Art. 47 of the Act, his right is extinguished whether such right is for exclusive possession or for joint possession.¹³

The right that is extinguished cannot also be anything more than the wrongdoer purports to prescribe for. Thus, where, though the owner has absolute title to the property the adverse possessor

11. ('16) 3 A I R 1916 Mad 990 (997, 998, 999) : 39 Mad 811 : 31 Ind Cas 412 (FB), *Vyapuri v. Sonamma Bai*. (('65) 4 Suth W R 37 (PC), *Prannath Ray v. Rookea Begum* distinguished.)

('12) 17 Ind Cas 632 (634, 636) : 34 All 640 (DB), *Nandan Singh v. Jumman*, (('11) 9 Ind Cas 791, *Parthasarathi v. Lakshmana* followed.)

('18) 5 A I R 1918 Cal 933 (935, 937, 938) : 44 Cal 425 : 37 Ind Cas 277 (DB), *Priya Saki Debi v. Bireswar Samanta*. (('06) 33 Cal 1015 (DB), *Aimadar Mandal v. Makhanlal* followed.)

12. ('90) 13 Mad 512 (516) (DB).

13. ('48) 35 A I R 1948 Nag 382 (385) : ILR (1948) Nag 50 (DB), *Vishwanath v. Mt. Deokatal*. (Possession not given to vendee under sale deed. Subsequent order under S. 145 (6), Criminal P. C., against vendee. Suit by vendee for possession filed after 3 years from order — Suit dismissed as barred by Art. 47 — Subsequent suit by vendee after six years from sale deed for compensation for failure to deliver possession held barred — Vendee's right to recover possession is also lost.)

('46) 33 AIR 1946 Oudh 213 (218) : 224 Ind Cas 537 (DB), *Lalit Mohan v. Lachmi Raj Kuar*. (Failure of Hindu widow to institute civil suit within 3 years of Magistrate's order under S. 145, Cr. P. C. — S. 28 bars only widow's right and not that of reversioner.)

('43) 30 AIR 1943 Cal 67 (70, 71) : I L R (1942) 2 Cal 332 : 205 Ind Cas 441 (DB), *Newaz Khan v. Labibuddin Ahmed*.

('12) 15 Ind Cas 24 (25) (DB) (Mad), *Devasikhamani Nataraja Desikar v. Mulhiah Chetty*.

('11) 9 Ind Cas 285 (286) (DB)(Mad), *Gangadharam Aiyar v. Sankarappa Naidu*.

('37) 24 A I R 1937 All 300 (303) : 169 Ind Cas 125, *Mt. Jaidevi Kuari v. Dakshini Din*.

('35) 22 AIR 1935 Pat 164 (166, 167) : 14 Pat 424 : 155 Ind Cas 1094 (DB), *Nando Kahar v. Bhup Narain Singh*. (('80) 6 Cal L R 93, *Aukhil Chunder v. Delawar Hossein* dissented from.)

('30) 17 AIR 1930 Nag 142 (143) : 26 Nag L R 160 : 122 I.C. 270, *Jagatram v. Pitai*.

('30) 17 A I R 1930 Cal 612 (614) : 128 Ind Cas 106 (DB), *Atale Sunarri v. Talib Hussain Mia*.

('20) 7 A I R 1920 Mad 545 (545) : 56 I C. 675 (DB), *Solai Ammal v. Jogi Chetty*.

[See also ('44) 31 A I R 1944 Oudh 250 (254) : 19 Luck 531 : 219 Ind Cas 115 (DB), *Amjadi Begam v. Syed Hasan* (Owner failing to sue within 3 years of order restoring possession under S. 145, Cr. P. C. Successful party claiming possession under license — Licensee's right does not ripen into full owner's right — Onus is on party asserting adverse title to prove that conditions necessary under Art. 47 and S. 28 are satisfied.)]

Also see Note 10 to Article 47.

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claims to be entitled only to a *limited* interest, it is only *such interest* of the owner that is extinguished by the operation of the section, and acquired by the wrongdoer.¹⁴ On the determination of such interest

14. ('46) 33 AIR 1946 Bom 193 (200): 224 I. C. 169, *Pandappa v. Shivalingappa*. (A widow by adverse possession acquires only a widow's estate after 12 years.)
- ('44) 31 AIR 1944 Oudh 250 (254): 19 Luck 531: 219 Ind Cas 115 (DB), *Amjadi Begam v. Syed Hasan*. (Owner failing to sue within 3 years of order restoring possession under S. 145, Cr. P. C. — Successful party claiming possession under licence — Licensee's right does not ripen into full owner's right — Onus is on party asserting adverse title that conditions necessary under Art. 47 and S. 28 are satisfied.)
- ('42) 29 AIR 1942 All 42 (43): 198 Ind Cas 496, *Mahomed Yusuf v. Sarju Singh*. (Where a person goes into possession in a special capacity such as Hindu widow or a mortgagee the possession must necessarily be attributed to that special capacity unless there is the strongest evidence to the contrary — But when stranger is in adverse possession, possession must be presumed to be with intention to claim full rights of owner.)
- ('42) 29 AIR 1942 Cal 233 (234): I L R (1941) 2 Cal 298: 201 Ind Cas 134 (DB), *Hemanta Kumari v. Midnapore Zamindari Co., Ltd.* (If claim is restricted to tenancy right in the property, possession is adverse to the extent of that limited interest only. There can be no question of absolute title by adverse possession when only a limited interest has been asserted.)
- ('39) 26 A I R 1939 Pat 587 (590): 181 Ind Cas 777 (DB), *Jagdish Chandra v. Pratap Chandra*. (Adverse possession of the right to the fruits and timber produced in a forest.)
- ('30) 17 AIR 1930 Lah 504 (505): 11 Lah 424: 123 Ind Cas 276 (DB), *Mahajan v. Mt. Purbho*. (Widow forfeiting widow's estate but continuing to be in possession for over twelve years after forfeiture — Possession after forfeiture completes her title to widow's estate only.)
- ('28) 15 A I R 1928 Cal 130 (134): 55 Cal 448: 105 Ind Cas 647 (DB), *Rukeya Banu v. Nazira Banu*. (If a person takes possession as mutwalli and holds possession on that basis he cannot afterwards turn round and say that the wakf being void he was in possession in his own right and claim the property as his own as against the beneficiaries.)
- ('27) 14 AIR 1927 All 274 (276): 99 Ind Cas 578, *Tarif v. Phool Singh*. (Forfeiture of widow's estate on remarriage — Widow continuing in possession after forfeiture — Her adverse possession can create title only to limited estate.)
- ('29) 16 AIR 1929 Lah 327 (328): 119 Ind Cas 238, *Desa v. Dani*. (Do.)
- ('25) 12 AIR 1925 All 369 (370): 86 Ind Cas 445, *Umrao Singh v. Pirthi*. (Do.)
- ('08) 35 Cal 470 (476, 477): 7 Cal L Jour 499: 12 Cal W N 636 (DB), *Icharan Singh v. Nilmoney Balidar*.
- ('05) 2 Cal L Jour 125 (136) (DB), *Ishan Chandra v. Raja Ramranjan*.
- ('94) 18 Bom 507 (512) (DB), *Vithal Bowa v. Narayan Daji*. (Mirasdar on inam estates in Bombay Presidency is only a tenant and adverse possession for the statutory period by person claiming to be such mirasdar confers on him only the position of such a mirasdar and does not absolve him from liability to pay rent.)
- ('25) 12 A I R 1925 Cal 1189 (1191, 1192): 89 Ind Cas 747 (DB), *Swarnamoyi v. Sourindra Nath*.
- ('12) 16 Ind Cas 960 (960) (DB) (Mad), *Sundara Gurukkal v. Subramaniya Archakar*. (The office of archaka of a temple and the properties appended thereto were usufructuarily mortgaged and the mortgagee continued in possession for the prescriptive period — Held that the mortgagee acquired only a usufructuary mortgagee's right by adverse possession and not the absolute ownership.)
- ('33) 20 AIR 1933 Oudh 92 (93): 7 Luck 320: 141 Ind Cas 831 (DB), *Mt. Parbati v. Ram Prasad*. (Possession of former husband's property continuing for more than twelve years — No assertion of absolute ownership — Only widow's estate is obtained by adverse possession.)
- ('14) 1 AIR 1914 Nag 81 (82): 10 Nag L R 35: 23 Ind Cas 719, *Sheo Lal v. Sheo Rajia*. (Person entering into possession as heir which is necessarily a limited title — Very cogent evidence is necessary to show that she claimed to be in possession as absolute owner.)
- ('16) 3 A I R 1916 Oudh 156 (158): 34 Ind Cas 416, *Sheo Narain Singh v. Bisai Singh*. (Under-proprietor of one land being in adverse possession of neighbour.

the right of the true owner to possession will again come into operation.¹⁵ The question whether the person in possession prescribes for a limited interest or for a full estate must be gathered from the facts of the particular case.

Where the right to property is extinguished under this section, rights *accessory* thereto and inseparable from it would also be extinguished.^{15aa} Thus, a right to property includes a right to its joint enjoyment^{15a} and a right of survivorship is incidental to the right to joint possession of property, and where the latter right is extinguished by limitation the right to survivorship also will be lost.¹⁶ A right to partition and recovery of a share cannot be claimed where the right to sue for joint possession is lost.^{16a} Similarly, where the right to recover possession of land from a tenant is lost by the failure to sue for twelve years after the termination of the lease, the landlord cannot recover rent for any period *after* the extinguishment of his right to the property.^{16b} It has been held that where the right to immovable property is extinguished under this section the right to recover rents and profits of the property even for a period *prior* to such extinguishment will be lost¹⁷ and that the extinguishment

ing land — Character of the possession must be taken to be that of under-proprietorship.)

[See also ('24) 11 A I R 1924 P C 121 (122) : 5 Lah 192 : 51 Ind App 171 : 80 Ind Cas 788 (PC), *Lajwanti v. Safa Chand*. (Adverse possession of property belonging to third person, by Hindu widow claiming as her husband's heir — Adverse possession enures to benefit of her husband's estate and after her death the property acquired by such adverse possession passes to her husband's heirs.)]

15. ('08) 8 Cal L Jour 557 (559, 560) (DB), *Raktoo Singh v. Sudhram Ahir*. (When tenant takes possession of land outside his tenancy, and professes to do so in his character as tenant, landlord is dispossessed in a limited sense — Landlord cannot eject him from *actual* possession, but he is not deprived of *proprietary* possession by receipt of rent.)

15aa. ('40) 27 A I R 1940 P C 116 (123) : 67 Ind App 251 : ILR (1940) Kar (PC) 251 : I L R (1940) Lah 493 : 189 Ind Cas 1 (PC), *Shahid Ganj v. S. G. P. Committee*. (Person holding adversely to wakf and every interest thereunder and perfecting title — Right of worshippers also lost.)

15a ('30) 17 AIR 1930 Nag 142 (143) : 26 Nag L R 160:122 Ind Cas 270, *Jagatram v. Pitai*. (('21) AIR 1921 Mad 24 (DB), *Atchamma v. Bapiiah* relied on.)

16. ('21) 8 A I R 1921 Mad 24 (25, 27) : 44 Mad 131 : 60 Ind Cas 583 (DB), *Atchamma v. Bapiiah*. (('61-63) 9 M I A 539 (PC), *K. Natchiar v. S. R. M. V. Raganadha B. G. Taver*, followed)

16a. ('30) 17 A I R 1930 Cal 612 (614) : 128 Ind Cas 106 (DB), *Atale Sunarri v. Talib Hussain*.

See also Article 47 Note 7.

16b. ('35) 22 AIR 1935 Mad 377 (378) : 157 Ind Cas 569 (DB), *Ambalam v. Peria Karuppan*.

17. ('03) 26 Mad 410 (417) (DB), *Rajah of Venkatagiri v. Isakapalli Subbiah*. ('30) 17 AIR 1930 Nag 142 (143) : 26 Na; L R 160 : 122 Ind Cas 270, *Jagatram v. Pitai*.

[See also (1863-66) 10 Moo Ind App 214 (218, 219) : 5 Suth W R (PC) 1 : 2 Sar 119 : 1 Suther 602 (PC), *Chundrabulle Debia v. Luckhee Debia*. (Suit for possession barred — Suit for damages for use and occupation also barred although suit relates to period before the time when the suit for possession became barred: NOTE. — The decision was one relating to the construction and application of cl 8 of Bengal Regulation II of 1805 and was based on the consideration, arising from the absence of any provision corresponding to S. 28, that unless it

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operates retrospectively in such cases.^{17a}

Where A and B were reversioners of a Hindu widow and A filed a suit against the *alienee* from the widow within twelve years of the death of the widow impleading B as a party defendant, but B filed a written statement after twelve years claiming his share also against the alienee, it was held that S. 28 did not apply to the case, and that B's right was not extinguished by his not filing the suit for his share within twelve years.¹⁸

The possession necessary to found a title by adverse possession under this section is not different in character (though it may be in duration) from possession required to prevent limitation from running under Art. 142 or 144.¹⁹

7. Inalienable property — Acquisition of title by adverse possession.
— See Notes under Articles 142 & 144.

8. Plea of title. — Where a plaintiff pleads title, it is not necessary for him to say that the defendant has lost his title by adverse possession inasmuch as it is a matter of evidence.¹ It has, however, been held in the undermentioned case² that a party pleading a prescriptive title must state all the material facts on which the plea has been based. See also O. 6 R. 2 of the Code of Civil Procedure.

9. Onus of proof. — See Notes under Articles 144 & 142.

was held that a suit for damages for use and occupation could be barred if a suit for possession was barred by time the result would be that a person might go on suing year after year for damages for use and occupation although his right to sue for possession had become barred by limitation, because, (there being no provision corresponding to S. 28) his title to the property would continue although his right to sue for possession had become barred — It is doubtful if the decision can be held applicable to cases arising after the enactment of Section 28.)]

17a. ('03) 26 Mad 410 (417) (DB), *Raja of Venkatagiri v. Isakapalli Subbiah*.

18. ('29) 16 AIR 1929 Bom 345 (347) : 53 Bom 472 : 119 Ind Cas 656, *Rayegavda Hanmantraya v. Ramlingappa Shidgavdappa*.

[See also ('09) 4 Ind Cas 249 (251) : 34 Bom 91, *Narsimha v. Vaman Venkatesh*. (The right of a person, who did not himself bring a suit within the prescribed period cannot be extinguished by the operation of S. 28 of the Limitation Act if he has been made a party (defendant) to a suit instituted by some other person within the period in which his right to the property in suit can be effectually determined.)]

See also Note 21 to Article 141.

19. ('48) 35 AIR 1948 P C 76 (80) : 1948 All L Jour 221, *Hafiz Mohammad v. Swarup Chand*.

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1. ('01) 24 Mad 887 (396) : 28 Ind App 81 : 5 Cal W N 515 : 3 Bom L R 309 : 7 Sar 819 (PC), *Vasudeva Padhi Khadangat Garu v. Maguni Devan Bakshi Mahapatrulu Garu*.

2. ('49) 36 A I R 1949 Nag 265 (267) : I L R (1948) Nag 978, *Karimulla Khan v. Bhanupratapsingh*. (A plea in defence that plaintiff's suit is barred by time without stating facts is vague.)

PART V.

SAVINGS AND REPEALS.

29.* ^a[(1) Nothing in this Act shall affect section 25 of Savings. the Indian Contract Act, 1872.]

Section 29

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law —

(a) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(b) the remaining provisions of this Act shall not apply]

^b[(3) Nothing in this Act shall apply to suits under the Indian Divorce Act.

^c[(4) Sections 26 and 27 and the definition of "easement" in section 2 shall not apply to cases arising in territories to

* Act of 1877 : S. 6.

6. When, by any special or local law now or hereafter in force in British India, a period of limitation is specially prescribed for any suit, appeal or application, nothing herein contained shall affect or alter the period so prescribed.

Act of 1871 : S. 6.

6. When, by any law not mentioned in the schedule hereto annexed, and now or hereafter to be in force in any part of British India, a period of limitation differing from that prescribed by this Act is especially prescribed for any suits, appeals or applications, nothing herein contained shall affect such law.

And nothing herein contained shall affect the periods of limitation prescribed for appeals from, or applications to review, any decree, order or judgment of a High Court in the exercise of its original jurisdiction.

Act of 1859 : S. 3.

3. When, by any law now or hereafter to be in force, a shorter period of limitation than that prescribed by this Act is specially prescribed for the institution of a particular suit, such shorter limitation shall be applied notwithstanding this Act.

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which the Indian Easements Act, 1882, may for the time being extend.

- a. Sub-sections (1) and (2) were substituted for the original sub-section (1) of S. 29 by S. 3 of the Indian Limitation (Amendment) Act, X of 1922. The original sub-section (1) was as follows :—

29. (1) Nothing in this Act shall :—

Savings. (a) affect the Indian Contract Act, 1872, section 25;

(b) affect or alter any period of limitation specifically prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India.

- b. The original sub-section (2) was re-numbered as (3) by S. 3 of the Indian Limitation (Amendment) Act, 1922 (X of 1922).

- c. The original sub-section (3) was re-numbered as (4) *ibid.*

Synopsis

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| 1. History of the section. | 6. Special or local law. |
| 2. Sub-section (1). | 6a. Applicability of the Act to periods fixed by the Civil Procedure Code. |
| 3. Sub-section (2). | 7. Applicability of the Act to suits under the Indian Divorce Act — Sub-section (3). |
| 4. "Expressly excluded." | |
| 5. "The remaining provisions of this Act shall not apply." | |

TOPIC INDICATOR

Appeals from decrees in suits under Divorce Act — Prohibition in sub-s. (3) not applicable. See Note 7.

Special or local law

Civil Pro. Code. See Note 6.

English statutes. See Note 6.

Letters Patents. See Note 6.

Provincial Insolvency Act. See Note 6.

Rules made by High Court. See Note 6.

Suit for dissolution of marriage of person not governed by Divorce Act — Sub-s. (3) not applicable. See Note 7.

1. **History of the section.**—Section 3 of the Act of 1859 provided that where a *shorter* period than that prescribed by that Act was specially prescribed by any law in force for any suit, such shorter period should be applied and not the period provided by the Limitation Act. See the undermentioned cases¹ where the provisions of the

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1. ('13) 19 Ind Cas 387 (389) : 37 Bom 231 (DB), *Rangacharya Appacharya v. Dasacharya Sankhalpacharya*. (Section 1 of Bombay Regulation V of 1827 not affected by Limitation Act of 1859.)
 (1864) 1864 Suth W R Act X Rul 13 (13) (DB), *Roy Kally Prosonno Sein v. Kisto Nund Dundee*.
 (1864) 1864 Suth W R Act X Rul 116 (117) (D B), *Sreemutty Dabee v. Nukee Sunnissa Bebee*.
 (1864) 1864 Suth W R Act X Rul 120 (121) (D B), *Poorneema Chowdhraim v. Rajchunder Roy*.
 (1864) 1 Suth W R 349 (349) (DB), *Banee Asmedh Koonwur v. Joykurun Lall*.
 (1864) 1 Suth W R 67 (68) (DB), *Ram Sunkur Sanaputty v. Gopaul Kishen Deo*.
 ('73) 5 N W P H C R 30 (31) (DB), *Mt. Nona v. Dhoomun Dass*.
 (1864) 1864 Suth W R (Gap) 140 (141) (D B), *Modhoosoodun Singh v. Rajah Peertee Bullub Paul*.
 1864) 1 Suth W R 265 (265) (DB), *W. Stephen v. Gasper*.
 (1864) 1 Suth W R 131 (131) (DB), *Nuttoo Nushyo v. Soodh Bewa*.
 ('73) 10 Bom H C R 204 (206) (DB), *Hari Ramchandra v. Vishnu Krishnaji*.
 ('74) 21 Suth W R 318 (320) : 1 Ind App 167 : 13 Beng L R 292 : 3 Sar 363 (PC), *Mohammed Buhadoor Khan v. The Collector of Bareilly*.

Limitation Act were held inapplicable in view of the special provisions of other laws.

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Section 6 of the Limitation Act of 1871, which corresponded to s. 3 of the Act of 1859, provided that where by any law not mentioned in schedule thereto annexed and in force in any part of British India, a period of limitation *different* from that prescribed by that Act was specially prescribed for any *suits, appeals or applications*, nothing contained in the Limitation Act should *affect* such law. That section also contained another paragraph providing that nothing contained in the Act should affect the periods of limitation for appeals from, or applications to review, any decree, order, or judgment of a High Court in the exercise of its original jurisdiction.

Section 6 of the Act of 1877 omitted the second paragraph of s. 6 of the Act of 1871, but re-enacted the other provisions of the section in a somewhat modified form. It provided that where by any *special or local law* in force in British India, a period of limitation was specially provided for any suit, appeal or application, nothing contained in that Act should affect *or alter* the period so prescribed.

Section 29 sub-section (1), cl. (b) of the Act of 1908 substantially re-enacted the provisions of section 6 of the Act of 1877. Clause (a) of sub-s. (1) and sub-ss. (2) and (3) (corresponding to the sub-ss. (1), (3) and (4) in their present form) were newly introduced.

In the interpretation and application of the provisions of s. 6 of the Acts of 1871 and 1877, and of sub-s. (1) (b) of s. 29 of the Act of 1908 before its amendment in its present form, there was a conflict of judicial opinions. According to one view the general sections of the Limitation Act could not be applied to the periods of limitation fixed by the special or local laws.² The reason given in some cases for the

(1864) 1864 Suth W R (Gap) Act X Rul 133 (134) (D B), *Ranee Surnomoyee v. Singhroop Bebee*.

('73) 19 Suth W R 5 (7) : 15 Beng L R 60n (P C), *Unnoda Persaud Mookerjee v. Krishto Coomar Moitra*.

2. ('91) 18 Cal 368 (372) (FB), *Nagendronath v. Mathura Mahun*. (Bengal Ren. Act X of 1859 — Section 14, Limitation Act of 1877, not applicable.)

('97) 20 Mad 476 (478) (DB), *Akkappa Nayanim Bahadur v. Sithala Naidu*. (Madras Rent Recovery Act, 1865 — Section 12 of Act of 1887 not applicable.)

('99) 22 Mad 179 (181) : 8 Mad L Jour 265 (DB), *Sambasivachari v. Ramasami Reddi*. (Madras Rent Recovery Act — Section 4 not applicable.)

('17) 4 AIR 1917 Pat 555 (570) : 40 Ind Cas 13 : 2 Pat L Jour 402 (FB), *Krishna Dayal Gir v. Abdul Gaffur*. (Bengal Land Revenue Sales Act, XI of 1859 — Section 5 not applicable.)

('09) 4 Ind Cas 70 (71) (Cal), *Panchkouri Ghosh v. Pran Gopal Mukerjee*. (Bengal Land Revenue Sales Act — Section 7 not applicable.)

('15) 2 AIR 1915 Mad 1211 (1212) : 39 Mad 646n : 21 Ind Cas 595 (DB), *Raja of Pittapore v. Venkata Subba Rao*. (Madras Estates Land Act, 1908 — Section 7 does not apply.)

('01) 4 Oudh Cas 182 (188) (DB), *Raghubar Dayal v. Sheo Charan*. (Oudh Rent Act, 1886 — Section 5 not applicable.)

('20) 7 AIR 1920 Cal 70 (70) : 54 Ind Cas 228 (DB), *Khagendra Narayan Roy v. Bamni Barmani*. (Indian Registration Act, 1908.)

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- (20) 7 A I R 1920 Cal 14 (15) : 47 Cal 300 : 54 Ind Cas 705 (F B), *Kalimuddin Mollah v. Sahibuddin Molla*. (Do.)
- (03) 30 Cal 532 (535) : 7 Cal W N 550 (D B), *Abdul Hakim v. Latifunnessa Khatun*. (This case held correctly decided by AIR 1920 Cal 14 (F B).)
- (95) 18 Mad 99 (103) (F B), *Veeramma v. Abbiah*. (Indian Registration Act, 1877.)
- (96) 20 Mad 249 (250) : 7 Mad L Jour 94 (D B), *Appa Rau Sanayi Aswa Rau v. Krishnamurthi*. (Do.)
- (15) 2 A I R 1915 Mad 442 (443) : 23 Ind Cas 23 (D B), *Subramanian Pattar v. Krishna Iyer*. (Do.)
- (26) 13 AIR 1926 Nag 126 (127) : 89 Ind Cas 884, *Fatelal v. Mt. Sati*. (Do.)
- (18) 5 A I R 1918 Mad 213 (216) : 41 Mad 169 : 44 Ind Cas 805 (F B), *Lingayya v. Chinna Narayana*. (Provincial Insolvency Act, 1907.)
- (15) 2 AIR 1915 Mad 360 (360) : 25 Ind Cas 610 (D B), *Duraisami Aiyangar v. Meenakshisundara Aiyar*. (Do.)
- (16) 3 AIR 1916 Mad 376 (377) : 39 Mad 593 : 30 Ind Cas 703 (D B), *Siwaramayya v. Bhujanga Raw*. (Per Oldfield, J.; Sadasiva Aiyar, J., dissenting.)
- (15) 2 AIR 1915 Mad 1053 (1054) : 39 Mad 74 : 27 Ind Cas 144 (D B), *Deva Rao v. Parameshwara*. (Provincial Insolvency Act, 1907.)
- (19) 6 AIR 1919 Cal 949 (950) : 47 Ind Cas 524 (D B), *Gangadar Nanda v. Janakimoni Dasi*. (Bengal Tenancy Act, 1885.)
- (19) 6 A I R 1919 Cal 819 (821) : 46 Cal 193 : 47 Ind Cas 502 (D B), *Secretary of State v. Sahib Narain Hazra*. (Do.)
- (19) 6 A I R 1919 Cal 1001 (1002) : 46 Ind Cas 899 (D B), *Secretary of State v. Laksi Narain Das*. (Do.)
- (18) 5 AIR 1918 Cal 278 (279) : 45 Cal 934 : 45 Ind Cas 228 (D B), *Secretary of State v. Gangadhar*. (Do.)
- (21) 8 A I R 1921 Cal 661 (671) : 66 Ind Cas 287 (D B), *Secretary of State v. Ananda Mohan*. (Do.)
- (14) 1 AIR 1914 Cal 46 (47) : 20 Ind Cas 760 (D B), *Radhe Shyam Kar v. Dina Bhandhu Biswal*. (Do.)
- (19) 6 AIR 1919 Oudh 349 (350) : 52 Ind Cas 643 : 22 Oudh Cas 147 (D B), *Ram Deo v. Dy. Commissioner, Sultanpur*. (U. P. Land Revenue Act, 1901.)
- (18) 5 A I R 1918 Oudh 99 (100) : 43 Ind Cas 473, *Nurul Hassan v. Sarju Prasad*. (Do.)
- (10) 5 Ind Cas 884 (886) : 34 Mad 505 (F B), *Abu Baker v. Secretary of State*. (Madras Forest Act, 1882.)
- (81) 3 Mad 92 (94) : 5 Ind Jur 242 (D B), *Thir Singh v. Venkataramier*. (Madras Boundary Act, 1860.)
- (76) 1 All 254 (255) (D B), *Timalkuari v. Ablakh Rai*. (Section 15 of Act of 1871 does not affect period fixed by Act XVIII of 1873.)
- (89) 1889 Pun Re No. 86, *Buta v. Ralla Ram*. (Punjab Courts Act, 1884, as amended in 1888.)
- (11) 11 Ind Cas 34 (35) (Lah), *Katara v. Arjan Singh*. (Punjab Land Alienation Act, 1900.)
- (23) 10 AIR 1923 Nag 306 (307) : 73 Ind Cas 1021 (D B), *Lakshman v. Keshao Rao*. (Central Provinces Land Revenue Act, 1917.)
- (18) 5 A I R 1918 Sind 50 (52) : 11 Sind L R 106 : 45 Ind Cas 168, *Mossaji Ahmad & Co. v. Asiatic Steam Navigation Co., Ltd.* (Karachi Port Trusts Act, 1886.)
- (80) 4 Cal 50 (52) : 2 Cal L R 543 (D B), *Purran Chunder Ghose v. Mutty Lall*. (Bengal Rent Act, 1869.)
- (21) 8 AIR 1921 Pat 365 (366) : 59 Ind Cas 179 (D B), *Deoki Lal v. Ramanand Lal*. (Patna Letters Patent.)
- (21) 8 AIR 1921 Lah 26 (27) : 61 Ind Cas 327 : 2 Lah 127 (D B), *Dyal Singh v. Budha Singh*. (Lahore Letters Patent and High Court Rules.)
- (98) 21 All 22 (24) : 1898 All W N 151, *Muhammad Husen v. Muzaffer Husen*. (N. W. P. Rent Act, 1881.)

said view was that where the special or local law was a *complete* Code, recourse could not be had to the sections of the Limitation Act; other cases supported the view on the ground that, independent of the question whether the special or local law was a complete Code or not, the effect of the application of the general provisions of the Limitation Act would be to "affect or alter" the period so prescribed. According to the second view, the general provisions of the Limitation Act would be applicable to periods prescribed by the special or local law if such laws were not complete Codes in themselves, the reason given being that the words "affect or alter" related only to the period prescribed and not to the *computation* of such period.³

('10) 6 Ind Cas 752 (753) : 10 Oudh Cas 103 (DB), *Iqbal Narain Pandit v. Babu Singh*. (Oudh Rent Act, 1886.)

('09) 4 Ind Cas 872 (873) (Mad), *E. I. Distilleries & Sugar Factories Ltd. v. Tinnevely Sarangapani Sugar Mills Co., Ltd.* (Indian Companies Act, VI of 1882.)

('02) 24 All 402 (412, 419): 1902 All W N 99 (FB), *Udit Upadhia v. Imam Bandi Bibi*. (Indian Registration Act, III of 1877.)

[See ('74) 22 Suth W R 17 (21) : 13 Beng L R 445 (DB), *Thakoor Kapilnath v. The Government*.]

[See also ('16) 3 A I R 1916 Mad 415 (420) : 29 Ind Cas 168 (DB), *Ratna Bai v. Official Assignee of Madras*. (Limitation Act has no application to special procedure provided by Presidency Towns Insolvency Act.)]

3. ('12) 16 Ind Cas 149 (153) : 34 All 496 (FB), *Dropadi v. Hira Lal*. (Appeal under the Provincial Insolvency Act, 1907 — Section 12 applied — Overruling (1911) 11 Ind Cas 197 (DB) (All), *Jugal Kishore v. Gur Narain*.)

('13) 20 Ind Cas 258 (259): 9 Nag L R 91, *Ganga Ram v. Ramchandra*. (Appeal under Provincial Insolvency Act, 1907 — Sections 5 and 12 applied.)

('16) 3 AIR 1916 Lah 307 (308) : 33 Ind Cas 730, *Ram Kishen v. Mt. Umrao Bibi*. (Do.)

('80) 5 Cal 314 (316, 317) (DB), *Golachand Nowlukha v. Kristo Chunder Dass*. (Bengal Rent Act, VIII of 1869.)

('80) 5 Cal 303 (308) (DB), *Parbuttinath Roy v. Tejomoy*. (Do.)

('81) 7 Cal 690 (693) (DB), *Khoshelal Mahton v. Gunesh Dutt*. (Do.)

('05) 9 Cal W N 1025 (1026) (DB), *Hari Har Lal v. Gunedar Pershad*. (Bengal Tenancy Act, VIII of 1885.)

('80) 5 Cal 110 (112): 4 Cal L R 371 (DB), *Beharilall Mookerjee v. Mungola Nath Mookerjee*. (Bengal Rent Act, VIII of 1869.)

('16) 3 AIR 1916 Mad 1093 (1097) : 38 Mad 92 : 18 Ind Cas 617 (DB), *Srinivasa Iyengar v. Secretary of State*. (Madras Revenue Recovery Act, II of 1864.)

('18) 5 AIR 1918 Lah 372 (373) : 40 Ind Cas 588 : 1918 Pun Re No. 89, *Waryam Singh v. Wadhava*. (Provincial Insolvency Act, 1907, is not a complete Code.)

('02) 1902 All W N 34 (34, 35), *Joti Sarup v. Ramchandrar Singh* (N. W. P. Rent Act, XII of 1881, is not a complete Code — Section 19 applied.)

('01) 23 All 277 (279, 281) : 1901 All W N 72 (DB), *Beni Prasad Kauri v. Dharaka Rai*. (N. W. P. Rent Act, XII of 1881, is not a complete Code.)

('93) 20 Cal 264 (268) (DB), *Girjanath Roy v. Ram Narain Das*. (Bengal Public Demands Recovery Act, VII of 1880.)

('87) 10 Mad 210 (211) (DB), *Reference under Section 39 of Act V of 1882, Forest Act*. (Appeal under S. 14 of Madras Forest Act, 1882 — Section 5 applied.)

('88) 12 Mad 1 (5) (DB), *Seshama v. Sankara*. (Suit under Section 25, Madras Boundary Act, 1860 — Benefit of S. 14 allowed.)

('88) 12 Mad 467 (471) (DB), *Kullayappa v. Lakshmipathi*. (Suit under S. 78 of Madras Rent Recovery Act, VIII of 1865 — Benefit of S. 14 given.)

Section 29 Notes 1-2

By the Indian Limitation (Amendment) Act, X of 1922, sub-ss. (1) and (2) were substituted for the old sub-s. (1), and sub-ss. (2) and (3) were renumbered as (3) and (4). This amendment has now set the conflict at rest. The words "affect or alter" have been deleted, and the extent and applicability of the several general provisions of the Act, to the periods prescribed by the special or local laws, specifically laid down.⁴

2. Sub-section (1).—Section 20 of the Act of 1871 corresponding to the present S. 19, provided *inter alia* that no promise could take the case out of the operation of the Act unless it was, before the expiration of the prescribed period, made in writing signed by the person to be charged therewith or by his agent. Section 25, sub-s. (3) of the Contract Act which was enacted in 1872 provided, however, that a promise to pay a *barred debt* was good and enforceable.¹ This would seem to

('93) 3 Mad L Jour 255 (258) (DB), *Iswara Patter v. Karuppan*. (Suit under Madras Revenue Recovery Act, II of 1864—Section 18 applied.)

('91) 14 Mad 365 (372) (DB), *Mahadevi v. Vikrama*. (Appeal to Governor-in-Council under Madras Act, XXIV of 1839—Benefit of S. 12 given.)

('92) 2 Mad L Jour 217 (219): 16 Mad 344 (DB), *N. Ram Row v. X. R. Fernand*. (Appeal to District Judge under Madras Rent Recovery Act, VIII of 1865—Benefit of Section 12 given.)

('84) 8 Bom 529 (531) (DB), *Gurucharya v. President of the Belgaum Town Municipalities*. (Section 14 applied to a suit under S. 86, Bombay District Municipal Act, VI of 1873.)

('81) 8 Cal 910 (911): 10 Cal L R 333: 7 Ind Jur 84 (DB), *Nijabutoolla v. Wazir Ali*. (Registration Act, III of 1877.)

('05) 28 All 48 (49): 1905 All W N 175: 2 All L Jour 714 (DB), *Suraj Bali Prasad v. H. E. Thomas*. (Do.)

('90) 1890 Pun Re No. 74 (FB), *Nigahya v. Ballun Mal*. (Do.)

('93) 1893 All W N 117 (117) (DB), *Pem Kunwar v. Imrat Kunwar Zemindar*. (N. W. P. Rent Act, XII of 1881.)

('91) 14 Mad 404 (405) (DB), *Abdool v. Mahamed*. (Appeal under Insolvency Act filed on day when Court reopened after vacation—*Held*, appeal was not time-barred.)

[See ('19) 6 AIR 1919 All 274 (275): 51 Ind Cas 113 (DB), *Bhairao Prasad v. S. P. C. Dass*. (Question not decided but principle approved.)]

[See also ('14) 1 AIR 1914 Oudh 255 (255): 17 Oudh Cas 254: 25 Ind Cas 703, *Binda Parshad v. Ram Bhajan*. (Section 4 applies to appeals under Oudh Rent Act by virtue of S. 119A of that Act: **NOTE**—After the amendment S. 4 would apply for another reason also viz., that its application has not been expressly excluded by the Act.)]

4. ('50) 37 AIR 1950 Mys 13 (Prs 9, 10) (DB), *Adinaranappa v. Mallamma*. (After the amendment of the section certain sections of the Limitation Act are applicable unless excluded and other sections are not applicable unless included, whether the special or local laws provide or do not provide a separate or self-contained body of provisions with regard to limitation of suits, appeals or applications.)

('46) 1946 Rang L R 270 (274) (DB), *A. R. O. V. R. Chettyar v. Thimammai Achi*.

[See ('39) 26 AIR 1939 All 403 (410): 183 Ind Cas 242: 1 L R (1939) All 647 (FB), *Durag Pal Singh v. Pancham Singh*. (Per Iqbal Ahmad, J.—Necessity for amendment explained.)]

Section 29 — Note 2

1. See the undermentioned cases:

have given room for the contention that the two provisions were contradictory to each other. Section 19 of the Act of 1877 deleted the word "promise" from the section. But it was still possible to argue that that section contradicted S. 25 of the Contract Act, inasmuch as a promise to pay a barred debt was valid while an acknowledgment (which has been held to imply a promise to pay), would not be valid if made after the prescribed period. This sub-section has been introduced in order to make it clear that the substantive provision in S. 25, sub-s. (3) of the Contract Act is not affected by any provisions of this Act. At the same time, this sub-section does not preclude S. 25 of the Contract Act from being construed in such a way as not to conflict with the provisions of this Act.

See also section 19 Note 9.

3. Sub-section (2). — This sub-section is only an enactment of the general principle enunciated by the maxim *generalia specialibus non derogant* — general words do not derogate from the special. It accordingly provides that where a special or local law provides for any suit, appeal or application a period different from the period prescribed therefor by the first schedule, the provisions of the Limitation Act will not apply except to the extent expressly specified in this section.¹

(178) 4 Cal 500 (508): 3 Cal L R 554 (DB), *Heera Lall Mookhopadhyaya v. Dhunput*
(21) 8 AIR 1921 Pat 29 (29, 30): 60 Ind Cas 514: 6 Pat L Jour 121 (DB), *Ram Bahadur Singh v. Dimodar Prasad Singh*.

(177) 1 Bom 590 (592): 1877 Bom P J 74 (DB), *Raghoji Bhikaji v. Abdul Karim*,
(108) 30 All 268 (270): 5 All L Jour 274: 1908 All W N 129 (DB), *Gobind Das v. Sarju Das*. (In order to come under Section 25 (3), there must be a distinct promise to pay and not a mere acknowledgment which may imply a promise.)
(15) 2 AIR 1915 Cal 186 (187): 25 Ind Cas 89 (DB), *Debi Prasad v. Ram Ghulam*. (Sorkhol showing merely balance due and not containing promise to pay within the meaning of S. 25 (3) cannot be relied on to recover time-barred debt entered therein.)

See also Note 9 to Section 19.

Section 29 — Note 3

1. (142) 29 AIR 1942 All 429 (431, 432): 1 L R (1943) All 84: 204 Ind Cas 1 (FB), *Raja Pande v. Sheopujan Pande*. (Petition for insolvency under S. 2 or S. 13, Provincial Insolvency Act is not an application and therefore cannot attract S. 29 (2) (a), Limitation Act — Only Ss 5 and 12 of Limitation Act apply to insolvency proceedings.)
- (140) 37 AIR 1940 Pat 476 (477): 187 Ind Cas 539, *Mt. Deorati Kuer v. Dasarath Dubey*. (Holding originally belonging to certain tenant purchased by A — Suit for rent by landlord against original tenant — Landlord in execution of decree obtaining dakhil dehani — Landlord taking advantage of A's conviction in criminal case dispossessing him — Suit by A for possession held governed by Art. 3, Bihar Tenancy Act, and not by Art. 142, Limitation Act.)
- (140) 27 AIR 1940 Cal 113 (113): 1 L R (1939) 2 Cal 358: 187 Ind Cas 301 (DB), *Smt. Bajroga Khatun v. Province of Bengal*. (Suit to recover possession of land claimed by plaintiff as raiyat is governed by S. 184, Bengal Tenancy Act, and not by S. 3 or S. 29 of this Act.)
- (140) 27 AIR 1940 Mad 819 (820), *Venkata Suryanarayana v. Tirupatayya*. (Madras Local Boards Act — Suit for recovery of cess under S. 89 — Suit falls under S. 77, Madras Estates Land Act — Limitation for suit is governed by Sch. A, Art. 8, Madras Estates Land Act — Limitation Act does not apply.)

Section 29
Note 3

Section 3 is expressly mentioned as being applicable to such cases² and consequently every suit, appeal or application for which a period of limitation is prescribed by a special or local law, must be dismissed if it is made or filed after the prescribed period, even though limitation is not set up as a defence.³ Sections 4, 9 to 18 and 22 would apply to such cases only in so far as and to the extent to which they are *not expressly* excluded by such special or local law.^{3a} (See also Note 5.)

('88) 25 AIR 1938 All 213 (215) : 175 Ind Cas 20, *Fakhruddin Husain v. Abdul Wahid*. (Provisions of the Indian Limitation Act do not govern suits and applications provided for by the Agra Tenancy Act.)

('87) 24 AIR 1937 Cal 587 (589) : 173 Ind Cas 540 : I L R (1937) 2 Cal 631 (DB), *Munshi Alauddin Ahammed v. Tomizuddin Ahammed*.

('36) 23 AIR 1936 Rang 501 (502) : 14 Rang 728 : 166 Ind Cas 148 (DB), *Rattilal Jamnadas v. Pragjee*. (Special rule of limitation held *ultra vires*; hence Limitation Act applied.)

('31) 18 AIR 1931 Sind 55 (55) : 131 Ind Cas 181, *Secretary of State v. Municipality of Karachi*. (Suit by Secretary of State against Municipality for damages - S. 167, Bombay District Municipal Act, III of 1901, applies in preference to Article 149.)

[See also ('07) 30 All 44 (46) : 4 All L Jour 713 : 1907 All W N 282, *Banwari Lal v. Gopi*. (Section 199, Agra Tenancy Act, II of 1901.)]

2. ('39) 16 AIR 1929 Nag 185 (190) : 116 Ind Cas 427 (DB), *Kawdu v. Berar Ginning Co. Ltd.*

[See also ('50) 37 AIR 1950 Cal 356 (Para 16) : 54 Cal W N 297 (DB), *Province of Bengal v. Amulya Dhon*. (Where the local or special law is silent on the matter of limitation and some article of Schedule I of the Limitation Act would cover the case the whole of S. 3 would be applicable)]

('29) 16 AIR 1929 Mad 490 (491) : 119 Ind Cas 318, *Chandramauleswara Prasad v. Papayya*. (Provisions of Limitation Act made applicable by S. 211 (2) Madras Estates Land Act, are subject to operation of S. 210 and the periods limited by the schedule in Madras Act.)]

3. ('33) 20 AIR 1933 Cal 132 (133) : 60 Cal 618 : 142 Ind Cas 280 : 34 Cri L Jour 299 (DB), *Manmatha Nath Biswas v. Emperor*. (Section 33 (2), Bengal Emergency Powers Ordinance, 1931)

('24) 11 AIR 1924 Oudh 127 (128) : 26 Oudh Cas 324 : 73 Ind Cas 127 (DB), *Samuel Buge v. Improvement Trust, Lucknow*. (U. P. Land Acquisition Act, S. 18—A waiver of the question of limitation under any special or local law is no longer permissible.)

See also Note 23 to Section 3.

3a. ('48) 35 AIR 1948 Oudh 49 (51) : 231 Ind Cas 132, *Raunak Ali v. Unao Municipality*. (Section 15 (2) applies to period of limitation prescribed by S. 326 (3), U. P. Municipalities Act.)

('49) 53 Cal W N 159 (163), *Fatema Bibi v. Hota Khuki*. (Section 14 of the Limitation Act applies to cases governed by the Bengal Tenancy Act—A I R 1929 Cal 325 : 56 Cal 805, *Sati Prosad v. Gobinda Chandra*, Rel. on.)

('45) 32 AIR 1945 All 35 (37) : I L R (1944) All 703 (DB), *Muntaz-un nissa v. Abu Sayeed*. (Section 18 of the Limitation Act is applicable to proceedings under the U. P. Encumbered Estates Act.)

('42) 29 AIR 1942 All 429 (433) : I L R (1943) All 84 : 204 Ind Cas 1 (FB), *Raja Pande v. Sheopujan Pande*. (Phraseology of the sections mentioned in S. 29 (2), Limitation Act, except S. 12 makes those sections wholly inapplicable to petitions of insolvency under Provincial Insolvency Act. Hence application of those sections must be deemed to have been expressly excluded—Per Iqbal Ahmad C. J. and Plowden J., Das J., dissenting.)

- ('42) 29 AIR 1942 Oudh 316 (317) : 18 Luck 66 : 199 Ind Cas 712, *Shoo Dulari v. Chandrabhal*. (Section 12 (2), Limitation Act, applies to application for leave to appeal under S. 12 (2) of Oudh Courts Act.)
- ('42) 46 Cal W N 706 (711), *Chunni Lal v. Amluk Chandji*. (Section 14 (2), Limitation Act, assumed to apply to application under S. 167, Bengal Tenancy Act, by virtue of S. 29 (2).)
- ('39) 26 AIR 1939 All 542 (544), *Chunni Lal v. Chandan Gopal*. (Section 18 applies to proceedings under U. P. Encumbered Estates Act.)
- ('39) 26 AIR 1939 Oudh 227 (228) : 14 Luck 694 : 183 Ind Cas 382 (DB), *Kazim Husain v. Mt. Mubarak Jahan Begam*. (Do.)
- ('28) 25 AIR 1938 Cal 324 (324) : 177 Ind Cas 798 (DB), *Dinesh Chandra v. Rajendra Chandra*. (Section 22 applies to application under S. 26F of Bengal Tenancy Act.)
- ('38) 25 AIR 1938 Nag 454 (455) : 178 Ind Cas 479 : I L R (1939) Nag 377, *Balkisan Seth v. Bhanuprasad*. (Section 4 applies to application under S. 54, Provincial Insolvency Act.)
- ('38) 25 AIR 1938 Oudh 186 (188) : 177 Ind Cas 48 : 14 Luck 138 (DB), *Ram Dass v. Chhedi Lal*. (Section 4 applies to application under Section 12 (2) of the Oudh Courts Act.)
- ('32) 19 AIR 1932 Bom 259 (266) : 56 Bom 135 : 137 Ind Cas 545 (DB), *Chhaganlal Sakeral v. Municipality of Thana*. (Section 167, Bombay District Municipal Act, 1901—S. 15 (2) applies.)
- ('33) 20 AIR 1933 Cal 782 (784) : 60 Cal 970 : 148 Ind Cas 15 (DB), *Midnapore Zamindari Co. Ltd. v. Priyabala Dasee*. (Section 18 applies to application under S. 174 (3), Bengal Tenancy Act, as amended in 1928.)
- ('29) 16 AIR 1929 Lah 170 (170) : 117 Ind Cas 831 (DB), *Mahomed Hayat Haji Muhammad Sardar v. Commissioner of Income-tax, Punjab and N. W. F. P.* (Application under S. 66 (3), Income-tax Act, 1922—S. 12 applies.)
- ('30) 17 AIR 1930 Pat 14 (18) : 122 Ind Cas 810 : 9 Pat 172 (DB), *Mohan Lal Hardeo Das v. Commissioner of Income-tax, Bihar and Orissa*. (Do.)
- ('30) 17 AIR 1930 Lah 800 (801) : 132 Ind Cas 377 (DB), *Jivan Singh v. Managing Committee, Gurdwara Tahli Sahib*. (Section 4 applies to a suit under S. 28 of the Sikh Gurdwaras Act, 1925.)
- ('31) 18 AIR 1931 Rang 209 (209, 210) : 9 Rang 150 : 134 Ind Cas 223 (DB), *Ma Than Mey v. Briliff of Town-ship Court of Kyaukse*. (Section 4 applies to an application under S. 68 of the Provincial Insolvency Act, 1920.)
- ('30) 17 AIR 1930 Oudh 371 (374) : 6 Luck 93 : 127 Ind Cas 23, *Mt. Dhanpati Kuer v. Kandhaiya Baksh Singh*. (Section 4 applies to a suit under S. 111 (b), U. P. Land Revenue Act, III of 1901.)
- ('23) 10 AIR 1923 Mad 95 (95) : 71 Ind Cas 217 : 24 Cri L Jour 89 (DB), *In re Mittoor Moideen Hajee*. (Section 12 applies to Martial Law Ordinance I of 1922.)
- ('23) 10 AIR 1923 Mad 652 (658) : 73 Ind Cas 106 : 46 Mad 488, *Secretary of State v. Chellasan Venkata atnam*. (Madras Irrigation Cess Act, 1865, S. 1—Time under S. 15 (2) can be deducted as per Schwabe, C. J., and Venkatasubba Rao, J.; Krishnan, J., dissenting held that the case was under Section 59, Madras Revenue Recovery Act 1864, and hence Limitation Act did not apply.)
- ('26) 13 AIR 1926 Pat 260 (262) : 5 Pat 404 : 94 Ind Cas 624 (DB), *Mathura Prasad Singh v. Jageswar Prasad Singh*. (Section 15, Limitation Act, applied to a suit under Chota Nagpur Encumbered Estates Act, VI of 1876, before amendment by Bihar and Orissa Act, VIII of 1922.)
- ('30) 17 AIR 1930 All 193 (196, 200, 205) : 124 Ind Cas 540 : 52 All 501 (FB), *Ananti v. Chhannu*. (Section 14 applied to suits under the Agra Tenancy Act, 1926.)
- ('34) 21 AIR 1934 Mad 294 (296) : 1933 Mad W N 1049 (1053) : 150 Ind Cas 339, *Narayan Ayyar v. Official Receiver, South Malabar*. (Provincial Insolvency Act, V of 1920—Section 4 applies.)

Section 29 Notes 3-4

This sub-section only applies where the special or local law prescribes a period of limitation.^{3b} It does not apply where the special or local law only provides for a mode of computing the period of limitation.⁴

This section has no application to the enforcement of a registered agreement before the Debt Conciliation Board under the C. P. Debt Conciliation Act.⁵

Section 13 of the Bombay Khoti Abolition Act 1949 (6 of 1950) provides that Ss. 4, 5, 12 and 14 of the Limitation Act, shall apply to the filing of an appeal to the Bombay Revenue Tribunal under that Act. Similar provision is made also in S. 10 of the Bombay Taluqdari Tenure Abolition Act 1949 (62 of 1949) and in S. 7 of the Panch Mahals Mehwassi Tenure Abolition Act 1949 (63 of 1949).

4. "Expressly excluded."—The expression 'expressly excluded' means an exclusion by express words, that is, by express reference to the section and not exclusion as a result of a logical process of reasoning.¹ Thus, S. 167 of the Bombay District Municipal Act, III of

[But see ('27) 14 AIR 1927 All 181 (182) : 98 Ind Cas 1050, *Ramlochan Ram v. Jagat Narain*. (Special rule of limitation in S. 71 (2), U. P. Village Panchayat Act. VI of 1920, must derogate from general rule embodied in S. 14, Limitation Act—Decision is incorrect in view of the present section.)]

3b. ('50) 37 AIR 1950 Mys 13 (Prs. 12, 13) (DB), *Adinaranappa v. Mallamma*. (Suits under S. 24, Mysore Agriculturists' Relief Act—Only period of limitation stated but commencement not stated—No period is "prescribed"—Hence Ss. 19 and 20, Limitation Act apply with modification of extended period—Suit filed within 6 years of endorsement for interest is in time.)

('43) 30 AIR 1943 All 291 (293) : ILR (1943) All 569 : 209 Ind Cas 541 (DB), *Hulas Singh v. Data Ram*. (Section 29 does not apply to cases under U. P. Encumbered Estates Act which does not prescribe a period of limitation.)

4. ('41) 28 AIR 1941 Oudh 276 (277) : 192 Ind Cas 840, *Ram Sagar v. Ram Nath*. (Provision in U. P. Village Panchayat Act of 1920, S. 71 (2), for exclusion of period abrogates, in cases coming under it, S. 14 of the Limitation Act—S. 14 cannot be applied by invoking S. 29 as the U. P. Act does not prescribe any period of limitation.)

5. ('48) 35 AIR 1948 Nag 147 (Prs 10, 12) : ILR (1948) Nag 63, *Rukhadu v. Krishnarao*. (Article 181 of the Act applies.)

Section 29 — Note 4

1. ('50) 37 AIR 1950 Assam 101 (Paras 5, 7, 8, 9) : ILR (1950) 2 Assam 181 (DB), *Tinsukia Municipal Board v. Bankim Chandra*. (Per Ram Labhaya, J. — S. 320 of the Assam Municipal Act (1 of 1923) covers a suit for malicious prosecution against a municipality and is subject to S. 15 (2) of the Limitation Act by virtue of S. 29 (2) of the latter Act as the operation of S. 15 (2) has not been excluded by anything contained in the Assam Act.)

('42) 29 AIR 1942 Cal 544 (545) : 202 Ind Cas 762, *Pabna Municipality v. Nirode Sundari*. (Words "and not afterwards" in S. 535 (2), Bengal Municipal Act do not amount to express exclusion—S. 15 (2), Limitation Act applies to period prescribed by that section.)

('40) 27 AIR 1940 Cal 305 (306) : 188 Ind Cas 705, *District Board Chittagong v. Emdadal Haque*. (Section 15 (2), Limitation Act, is not expressly excluded by S. 146 of Bengal Local Self-Government Act.)

('30) 17 AIR 1930 Sind 93 (95) : 122 Ind Cas 398 : 24 Sind L R 344 (DB), *Rewachand Fatehchand v. Karachi Municipality*. (Reversing A I R 1925 Sind 322, *Rewachand v. Karachi Municipality* on appeal.)

1901, which provides that no suit shall be commenced without one month's previous notice in writing, nor after six months from the date of the act complained of, has been held not to expressly exclude the applicability of S. 15 (2) of this Act, in respect of a suit against a municipality.² It has however been held by a Full Bench of the Allahabad High Court that if a special or local law is a complete Code in the matter of limitation, or if the phraseology of the sections enumerated in S. 29 (2) makes those sections inapplicable to proceedings under a special or local law, the application of those sections to proceedings under the special or local law must be deemed to have been expressly excluded.³

5. "The remaining provisions of this Act shall not apply." — It is provided in cl. (b) of sub-s. (2) of this section that the provisions of the Act other than ss. 4, 9 to 18 and 22 do not apply for the purpose of determining any special period of limitation prescribed for any suit, appeal or application by a special or local law.¹ Where

(1929) 16 AIR 1929 Cal 325 (327) : 56 Cal 805 : 121 Ind Cas 673 (DB), *Sati Prosad Garga v. Govinda Chandra*.

(1932) 19 AIR 1932 Bom 259 (261, 266) : 56 Bom 135 : 137 Ind Cas 545 (DB), *Chhaganlal Sakeral v. Municipality of Thana*. (AIR 1930 Sind 93 and AIR 1929 Cal 325 followed.)

2. (1932) 19 AIR 1932 Bom 259 (261, 266) : 56 Bom 135 : 137 Ind Cas 545 (DB), *Chhaganlal Sakeral v. Municipality of Thana*.

(1930) 17 AIR 1930 Sind 93 (95) : 122 Ind Cas 398 : 24 Sind L R 344 (DB), *Rewachand Fatehchand v. Karachi Municipality*.

3. (1942) 29 AIR 1942 All 429 (433) : ILR (1943) All 84 : 204 Ind Cas 1 (FB), *Raja Pande v. Sheopujan Pande*. (Per Iqbal Ahmad, C. J. and Plowden, J. — Per Dar J. contra.)

Section 29 — Note 5

1. (1949) 36 AIR 1949 East Punj 299 (300, 301) : 51 Pun L R 50, *Harbans Singh v. Karam Chand*. (Section 5 does not apply to Letters Patent Appeal under Cl. 10, Letters Patent (Lah)—Rules framed by High Court under Cl. 27, Letters Patent are a special law within S. 29.)

(1946) 33 AIR 1946 Mad 351 (352) : (1946) 1 Mad L Jour 271 (DB), *Venkataramayya v. Venkatasublayya*.

(1945) 32 AIR 1945 Bom 200 (205, 206) : ILR (1945) Bom 167 : 220 Ind Cas 67 (FB), *Janardan Eknath v. Ganesh Sadashiv*. (Suit under S. 72, Dekkhan Agriculturists' Relief Act, 1879—S. 19, Limitation Act cannot be taken advantage of by the plaintiff by virtue of S. 29 (2)—AIR 1944 Bom 89 : ILR (1944) Bom 71, *Kishorelal Stores v. Jagannath Baya*, is overruled—AIR 1942 Bom 131, Approved.)

(1942) 29 AIR 1942 Bom 131 (132) : 200 Ind Cas 12, *Keshav Krishna v. Bhagwan Sambhu*. (Suit under S. 3 (w), Dekkhan Agriculturists' Relief Act (XVII of 1879)—Section 20 cannot be availed of by plaintiff in view of S. 29.)

(1941) 28 AIR 1941 Mad 693 (694) : 200 Ind Cas 38, *Krishna Reddi v. Peda Satyam*. (Section 6 does not apply to suits under Ss. 13 & 14, Madras Village Hereditary Offices Act.)

(1941) 28 AIR 1941 All 207 (208) : 194 Ind Cas 404 (DB), *Chheda Lal v. Commanding Officer Meerut Cantonment*. (Section 5 does not apply to appeal under Cantonments (House Accommodation) Act.)

(1936) 163 Ind Cas 623 (625) (Nag), *Mishrilal Oswal v. Ratanlal Maheshri*. (Central Provinces Land Revenue Act, II of 1917.)

(1923) 10 AIR 1923 Mad 95 (95) : 71 Ind Cas 217 : 24 Cri L Jour 89 (DB), *In re Mittoor Moideen Hajee*. (Section 5 not applicable to proceedings under Martial Law Ordinance, I of 1922.)

Section 29
Note 5

no period of limitation different from that prescribed by Sch. 1 of the Limitation Act is indicated by the special or local law the provisions of S. 29 (2) will not apply so as to exclude the provisions of S. 5 from being applied.^{1a} The phrase "shall not apply" only means that the remaining provisions shall not apply *by virtue of this Act* and is not a provision prohibiting a special or local law from making those sections applicable by express reference.² To hold otherwise is to hold that it

- ('33) 20 AIR 1933 Cal 124 (126) : 60 Cal 571 : 143 Ind Cas 802 : 34 Cri L Jour 633 (DB), *Nil Ratan Ganguli v. Emperor*. (Section 5 is inapplicable to appeals from special Magistrates under S. 39 (2) of Ordinance II of 1932.)
- ('33) 20 AIR 1933 Mad 521 (523) : 144 Ind Cas 963, *Venkatadri Appa Rao v. Chakrapani Rao*.
- 1a. ('46) 33 AIR 1946 Mad 351 (352) : (1946) 1 Mad L Jour 271 (DB), *Venkataramayya v. Venkatasubbayya*. (Appeal under S. 25A, Madras Agriculturists' Relief Act 1938 as amended in 1943—S. 5, Limitation Act applies.)
2. ('46) 1946 Rang L R 270 (274) (DB), *A. R. O. V. R. Chettyar v. Thenammai Achi*. (Section 78 (1) of the Burma Insolvency Act covers an application under S. 68 of the Act and S. 5 of the Limitation Act is applicable to an application under S. 68—S. 78 permits in explicit terms the application of the provisions of Ss. 5 and 12 of the Limitation Act to appeals and applications under the Burma Insolvency Act.)
- ('44) 31 AIR 1944 Pat 310 (311) : 23 Pat 437, *Ramendra Kumar v. Brajamohan*. (The general provisions of the Limitation Act including Ss. 19 and 20 except Ss. 6 to 9 apply to all suits, appeals or applications mentioned in S. 238 of the Orissa Tenancy Act, 1913 by virtue of S. 239 of that Act.)
- ('41) 28 AIR 1941 Pat 499 (501) : 196 Ind Cas 609, *Jagdeo Singh v. Babu Lal*. (Section 184 of the Bihar Tenancy Act applies all provisions except Ss. 7, 8 and 9, Limitation Act to periods of limitation mentioned in Sch. 3 of that Act.)
- ('41) 28 AIR 1941 All 207 (208) : 194 Ind Cas 404 (DB), *Chheda Lal v. Commanding Officer Meerut Cantonment*. (Expression "the remaining provisions of this Act shall not apply" Meaning explained — S. 5, Limitation Act, does not apply to appeal under S. 29, Cantonments (House Accommodation) Act of 1923.)
- ('26) 13 AIR 1926 Nag 236 (237) : 91 Ind Cas 563, *Madho Rao Ghatate v. Balaji Narayan*. (Section 6 applies to a suit under S. 160 (3) of the Central Provinces Land Revenue Act, 1917.)
- ('33) 20 AIR 1933 Cal 124 (125) : 60 Cal 571 : 143 Ind Cas 802 : 34 Cri L Jour 633 (DB), *Nil Ratan Ganguli v. Emperor*.
- ('36) 163 Ind Cas 623 (625) (Nag), *Mishrilal Oswal v. Ratanlal Maheshri*. (Section 160 (3), Central Provinces Land Revenue Act, 1917, applies all provisions of Limitation Act.)
- ('33) 20 AIR 1933 Cal 90 (92) : 141 Ind Cas 716 (DB), *Wazed Ali Khan v. Brojendar Kumar*. (Sections 19 and 20, Limitation Act, apply to suits under S. 184, Bengal Tenancy Act, 1885, by virtue of S. 185 therein.)
- ('30) 17 AIR 1930 Pat 301 (304) : 9 Pat 747 : 126 Ind Cas 299 (DB), *Hassan Imam v. Brahmdeo Singh*. (Section 185, Bengal Tenancy Act, 1885, makes Ss. 19 and 20 applicable to proceedings under that Act.)
- ('34) 21 AIR 1934 Pat 198 (198) : 148 Ind Cas 717 (DB), *Susil Chandra Mukherjee v. Mian Mohammad Ahsan*. (Bengal Tenancy Act, 1885 Section 19 applies.)
- [See also ('33) 20 AIR 1933 Mad 521 (523) : 144 Ind Cas 963, *Venkatadri Appara v. Chakrapani Rao*. (Under S. 211, Madras Estates Land Act, some specific sections of the Limitation Act are declared to be not applicable to suits and applications mentioned in S. 210 — Other provisions of the Limitation Act would apply subject to the provisions of Chap. 16, Estates Land Act.)]

is a prohibition of the future as well as the past application of these provisions by a special or local law which is obviously impossible and it is not the intention of this section to restrict the power of the Legislature to apply those sections.

6. Special or local law. — A *local law* as defined in Penal Code is a law applicable only to a particular part of British India. The meaning of the words “special law” is not so clear. The words have not been defined except in the Penal Code and it is not permissible to use that definition as a guide to the meaning of that expression in this Act.¹ In *Dropadi v. Hira Lal*,² where the question was whether s. 12 of the Limitation Act applied to applications under the Provincial Insolvency Act, III of 1907, Richards, C. J., observed as follows :

“It may be that the expression (viz., special law) was intended to cover only laws like the Rent Act, X of 1859, which was held by the Privy Council to be a complete Code in itself, but it seems more likely that the words were intended to be understood in their ordinary sense as meaning an Act dealing with a particular subject. Even so the expression is not free from difficulty. The Civil Procedure Code is a general law (see *Phoolbas Koonwur v. Lalla Jogeshur Sahoy*³), though it purports to deal only with procedure. The Forfeited Property Act of 1859 is obviously a special law. But what of such an Act as the Transfer of Property Act? The Registration Act has been held to be a special law, and we think rightly. The Provincial Insolvency Act, though it applies to a large part of British India, appears to us to be a special law, as it creates a special jurisdiction and deals with a very special branch of the law.”

In *Mukund Mahto v. Niranjana Chakravarty*,⁴ it was observed by the High Court of Patna that “by ‘special or local laws’ is meant special or local legislative enactment for special or local circumstances.” This does not seem very helpful in making the meaning of the expression clear.

It is submitted that the words, “special law” must be understood only in a *relative* sense. On a question of limitation, the Limitation Act would be a general Act, and all other Acts, in so far as they deal with questions of limitation would be special laws. On a question of civil procedure, the Civil Procedure Code would be a general law and all other Acts dealing with civil procedure would be special laws. Similarly, on a question of insolvency, the Insolvency Act would be a general law and all other Acts dealing with questions of insolvency

Section 29 — Note 6

1. ('12) 16 Ind Cas 149 (151) : 34 All 496 (FB), *Dropadi v. Hira Lal*.
2. ('12) 16 Ind Cas 149 (151) : 34 All 496 (FB).
3. ('76) 1 Cal 226 (242) : 3 Ind App 7 : 25 Suth W R 285 : 3 Sar 573 : 3 Suther 236 (PC).
4. ('34) 21 AIR 1934 Pat 353 (354) : 151 Ind Cas 107 (DB).

Section 29

Note 6

law would only be special laws. It would follow that in so far as the Civil Procedure Code deals with a question of limitation, it would only be a special law. This view expressed in the previous edition of this book has since been taken by the Nagpur High Court.^{4a} It has, however, been held in a series of decisions that it is not a special law even where it deals with a question of limitation.⁵ These decisions are not based on any general test as to what is a special law.

A "special or local law," it is conceived, is a law *in force in British India*. An English statute, which is not in force in British India but which may have to be administered by Courts in particular cases, is not therefore a special or a local law.⁶

There is a conflict of judicial views as to whether the Letters Patent and the Rules made thereunder are a special or local law within the meaning of this section. According to the High Courts of Rangoon and Patna, they do not constitute such law.⁷ The contrary view has been held by the Lahore High Court.⁸ The same view has

4a. ('44) 31 AIR 1944 Nag 155 (157) : I L R (1944) Nag 250 : 217 Ind Cas 298 (DB), *Sitaram v. Chunnilalsa*.

5. ('39) 26 AIR 1939 All 403 (405) : I L R (1939) All 647 : 183 Ind Cas 242 (FB), *Durag Pal Singh v. Pancham Singh*.

('90) 17 AIR 1930 Rang 228 (235) : 8 Rang 380 : 127 Ind Cas 161 (FB), *Abdul Ganny v. I. M. Russel*.

('22) 9 AIR 1922 Mad 268 (269) : 45 Mad 785 : 70 Ind Cas 396 (DB), *Subbarayan v. Natarajan*.

('15) 2 AIR 1915 Mad 449 (451) : 24 Ind Cas 195 (DB), *Venkataperumal Raja v. Velayuda Reddi*.

('12) 16 Ind Cas 149 (151) : 34 All 496 (FB), *Dropadi v. Hira Lal*. (The Civil Procedure Code is a general law — 1 Cal 226 (PC) followed.)

('75-76) 1 Cal 226 (242) : 3 Ind App 7 : 3 Sar 573 : 3 Suther 236 : 25 Suth W R 285 (PC), *Phoolbas Koonwar v. Lalla Jogeshur Sahoy*.

('91) 18 Cal 631 (634) (DB), *Peary Mohun Aich v. Anunda Charan Biswas*.

('34) 21 AIR 1934 Oudh 465 (471) : 10 Luck 208 : 151 Ind Cas 541 (DB), *Narendra Bahadur Singh v. Oudh Commercial Bank Ltd., Fyzabad*.

('31) 18 AIR 1931 Oudh 351 (351) : 132 Ind Cas 257 : 7 Luck 49 (DB), *Ganeshi Lal v. Imtiaz Ali*.

6. ('31) 18 AIR 1931 Sind 124 (127) : 25 Sind L R 222 : 133 Ind Cas 77, *Haji Shakoor Gany v. Volkart Brothers*. (Carriage of Goods by Sea Act (English) of 1924.)

7. ('47) 34 AIR 1947 Pat 329 (331) : 26 Pat 157 (SB), *Lalit Kuari v. Mahaprasad*. (Per Manohar Lall J.)

('30) 17 AIR 1930 Rang 228 (235) : 8 Rang 380 : 127 Ind Cas 161 (FB), *Abdul Ganny v. Mrs. I. M. Russel*.

('34) 21 AIR 1934 Pat 353 (354) : 151 Ind Cas 107 (DB), *Mukund Mahto v. Niranjana Chakravarty*.

[But see ('21) 8 AIR 1921 Pat 365 (366) : 59 Ind Cas 179 : 5 Pat L Jour 701 (DB), *Deoki Lal v. Ramanand Lal*.]

8. ('41) 28 AIR 1941 Lah 257 (262) : ILR (1941) Lah 191 (FB), *Punjab Co-operative Bank Ltd. v. Punjab Cotton Press Co. Ltd.* (Statutory rules framed by the High Court under Cl. 27 of the Letters Patent under the authority delegated to it by His Majesty who, in turn, was acting under the powers conferred on him by Act of Parliament are a "special law" within the meaning of S. 29 of Limitation Act—Time requisite for obtaining copy of judgment to be excluded

now been taken by the Punjab High Court.^{8a}

Section 29
Notes 6-6a

For instances of special laws within the meaning of this-section, see the undermentioned cases.⁹

6a. Applicability of the Act to periods fixed by the Civil Procedure Code. — It has been seen in Note 6 that the generally accepted view, on the decided cases, is that the Code of Civil Procedure is not a special law for purposes of limitation. Hence, the question has arisen whether the general provisions of this Act, such as S. 15, will apply to the computation of the twelve years' period under S. 48 of the Civil Procedure Code. On this question there is a conflict of views.

in computing limitation for Letters Patent appeal — AIR 1935 Lah 328 (FB), *Jog Dhian v. Hussain*, overruled.)

8a. ('49) 36 AIR 1949 East Punj 299 (300) : 51 Pan L R 50, *Harbans Singh v. Karam Chand*. (AIR 1941 Lah 257 : ILR (1941) Lah 191 (FB), *Punjab Co-op. Bank v. P. C. Press Co.*, followed.)

[See also ('41) 28 AIR 1941 Nag 216 (216) : ILR (1941) Nag 563 : 197 Ind Cas 415 (DB), *Firm Kisanlal Hanumanbux v. Tansukhrail Binjraj*. (Court was inclined to hold that rules under Letters Patent are included within the term 'law' in S. 29 but did not decide it.)]

9. ('51) 38 AIR 1951 Raj 22 (Para 7) (DB), *Bhonra v. Shivram*. (Section 31 (2), Alwar Pre-emption Act does not prescribe a special period of limitation for all suits for pre-emption within the meaning of S. 29, Alwar Limitation Act.)

('50) 37 AIR 1950 Cal 356 (Para 5) : 54 Cal W N 297, *Province of Bengal v. Amulya Dhon*. (In computing the period of limitation for an appeal under S. 3, Calcutta Improvement (Appeals) Act 1911 the appellant is entitled to deductions under S. 12 of the Limitation Act. That section is applicable either by reason of S. 29 (2) or otherwise.)

('50) 37 AIR 1950 Cal 54 (Para 11), *Kunja Behari v. Mritunjoy Prosad*. (Bengal Act II [2] of 1942 which inserted S. 37A in the Bengal Agricultural Debtors Act is a local and special law — Period of limitation would, under S. 29 (2) (a) be governed, as regards parties added, by S. 22 — Application under S. 37A — Names of present occupiers need not be stated — Addition of lessees beyond period of limitation does attract bar of limitation.)

('49) 53 Cal W N 191 (192), *Gangaram v. Santosh Kumar*. (In computing the period of limitation for an application under S. 21 of the Bengal Finance (Sales Tax) Act, the time requisite for obtaining a copy of the order of the Board of Revenue should be excluded as provided in S. 29 of the Limitation Act.)

('42) 29 AIR 1942 All 429 (433) : ILR (1943) All 84 : 204 Ind Cas 1 (FB), *Raja Pande v. Sheopujan Pande*. (Provincial Insolvency Act, 1920 is a special law.)

('41) 1941 Pat W N 183 (137), *Jagdeo Singh v. Babu Lal Sah*. (Section 15 of the Limitation Act operates on the periods of limitation prescribed by the Bihar Tenancy Act, by reason of the combined operation of sub-ss. (1) and (2) of S. 185 of the Bihar Tenancy Act.)

('41) 28 AIR 1941 All 207 (208) : 194 Ind Cas 404 (DB), *Chheda Lal v. Commanding Officer, Meerut Cantonment*. (Cantonments (House Accommodation) Act.)

('26) 13 AIR 1926 Rang 135 (136) : 96 Ind Cas 110, *H. N. Burjorjee v. Special Collector of Rangoon*. (Land Acquisition Act.)

('33) 20 AIR 1933 Cal 124 (125) : 60 Cal 571 : 143 Ind Cas 802 : 34 Ori L Jour 633 (DB), *Nil Ratan Ganguli v. Emperor*. (Ordinance II of 1932.)

('20) 7 AIR 1920 Cal 14 (15) : 47 Cal 300 : 54 Ind Cas 705 (FB), *Kati Muddin Mollah v. Sahibuddin Moola*. (Indian Registration Act, 1908.)

Section 29 Note 6a

Thus, it has been held by the High Court of Madras¹ and the Chief Court of Oudh² that S. 15 of this Act does not apply to the twelve years' period prescribed under S. 48 of the Civil Procedure Code. These decisions proceed on the ground that the twelve years' period under S. 48 of the Civil Procedure Code is not a "period of limitation prescribed" within the meaning of S. 15 of this Act. The High Court of Patna³⁻⁴ has also held that S. 48 of the Civil Procedure Code is not subject to the provisions of S. 15 of this Act and that the only exceptions to which S. 48 is subject are provided for in the section itself. Similarly, it has been held by the Patna High Court⁵ and the Chief Court of Oudh⁶ that the period of twelve years fixed by S. 48 of the Civil Procedure Code cannot be extended by means of an acknowledgment of liability under S. 19 or a payment under S. 20. The High Court of Calcutta^{6a} has held that the period of twelve years referred to in S. 48, Civil Procedure Code is not a period prescribed within S. 14 of this Act and therefore is not controlled by it. But a Full Bench of the Allahabad High Court has held that S. 15 of this Act will govern the computation of the twelve years' period under S. 48 of the Civil Procedure Code.⁷ The decision proceeds on

Section 29 — Note 6a

1. ('45) 32 AIR 1945 Mad 70 (72): (1944) 2 Mad L Jour 403, *Manickam v. Ramaswami*. (Following AIR 1922 Mad 268: 45 Mad 785, *Subbarayan v. Natarajan*.)
- ('28) 15 AIR 1928 Mad 1154 (1156): 113 Ind Cas 260 (DB), *Tandava Murthi v. Durgamba*.
- ('22) 9 AIR 1922 Mad 268 (268, 271): 45 Mad 785: 70 Ind Cas 396 (DB), *Subbarayan v. Natarajan*.
- [But see ('15) 2 AIR 1915 Mad 449 (451): 24 Ind Cas 195 (DB), *Venkataperumal Eaja v. Velayuda Reddi*. (Per Sadasiva Iyer J.—Sections of the Limitation Act relating to exclusion of time govern the twelve years' period under S. 48, C. P. Code.)]
2. ('31) 18 AIR 1931 Oudh 351 (351): 132 Ind Cas 257: 7 Luck 49 (DB), *Ganesh Lal v. Imtiaz Ali*.
- [But see ('32) 19 AIR 1932 Oudh 69 (71): 134 Ind Cas 878: 7 Luck 397 (DB), *Nak Ched Shah v. Kashmiri Bank Ltd., Fyzabad*. (Section 48, C. P. C., in effect lays down the period of limitation applicable to an application for execution of a decree within the meaning of S. 78 (2) of the Provincial Insolvency Act.)]
- ('10) 8 Ind Cas 377 (378): 13 Oudh Cas 303 (DB), *Mohammad Abdul Karim Khan v. Nawaz Singh*. (Section 48 is also a rule of limitation.)]
- 3-4. ('29) 16 AIR 1929 Pat 597(600): 120 Ind Cas 315 (DB), *Kirtyanand Singh v. Pirthichand Lal*. (Obiter.)
5. ('17) 4 AIR 1917 Pat 485 (486): 34 Ind Cas 27: 1 Pat L Jour 214 (DB), *Krishna Dayal Gir v. Sakina Bibi*. (The words "fresh period of limitation" in S. 19 do not refer to the twelve years' period under S. 48, C. P. C.)
6. ('34) 21 AIR 1934 Oudh 465 (471): 10 Luck 208: 151 Ind Cas 541 (DB), *Narendra Bahadur Singh v. Oudh Commercial Bank Ltd., Fyzabad*. (Sections 19 and 20 cannot be applied to S. 48, C. P. C., as that would render S. 48, C. P. C., nugatory.)
- ('08) 11 Oudh Cas 220 (223) (DB), *Bhikhari v. Gauri Shankar*. (Section 19 Limitation Act, cannot affect the absolute prohibition imposed by S. 48, C. P. C.)
- 6a. ('46) 50 Cal W N 12(13), *Makhan Lal v. Firm Madan Mohan*. (AIR 1922 Mad 268: 45 Mad 785, *Subbarayan v. Natarajan* Approved; AIR 1939 All 403: ILR (1939) All 647 (FB), *Durga Pal Singh v. Pancham Singh*, Dissent from.)
7. ('39) 26 AIR 1939 All 403 (405, 406): ILR (1939) All 647: 183 Ind Cas 242 (FB), *Durga Pal Singh v. Pancham Singh*. (Overruling AIR 1918 All 216 (2))

the ground that the words "period of limitation prescribed" in s. 15 mean "period of limitation prescribed by any law for the time being in force" and that the twelve years' period under s. 48 of the Civil Procedure Code is a period of *limitation*. The Bombay High Court also has in the undermentioned case⁸ expressed the view that there is nothing on general principles to prevent the application of section 15 to the computation of the period of twelve years fixed by s. 48 of the Civil Procedure Code. The view of the Allahabad Full Bench has been followed in a subsequent decision by the Bombay High Court^{8a} and by the High Courts of Nagpur^{8b} and East Punjab.^{8c}

It is submitted that the question whether the general provisions of the Limitation Act are applicable to the determination of the periods of limitation prescribed by the Civil Procedure Code should be treated as concluded by the decision of the Privy Council in *Phoolbas Koonwur v. Lalla Jogeshur*⁹ in which it was held that the extension of limitation in the case of minors provided for by s. 11 of the Limitation Act of 1859 would apply to periods of limitation prescribed by the Civil Procedure Code. No doubt the actual decision in the above case has been superseded by legislation inasmuch as s. 6 of the Limitation Act is now expressly limited to periods of limitation prescribed by the first schedule. But in cases where there is no such express limitation, the reasoning adopted by the Privy Council in the above case is still applicable.

7. Applicability of the Act to suits under the Indian Divorce Act—Sub-section (3). — The provisions of this Act do

- (DB), *Jurawan v. Mahabir* and AIR 1919 All 64 (2) (DB), *Shyam Kanan v. Collector of Benaras*.)
8. ('39) 26 AIR 1939 Bom 75 (77) : ILR (1939) Bom 87 : 180 Ind Cas 45 (DB), *Rango Ramacharya v. Gopal Narayan*.
- 8a. ('43) 30 AIR 1943 Bom 164(166) : 208 Ind Cas 254(DB), *Ramgopal Bhutada v. Sidram Annayya*. (AIR 1939 All 403 : ILR (1939) All 647 (FB), *Durga Pal Singh v. Pancham Singh* followed.)
- 8b. ('48) 35 AIR 1948 Nag 272 (274) : ILR (1948) Nag 280, *Deorao Suryabhanji v. Ramchandra Amrutlal*. (AIR 1944 Nag 155 : ILR (1944) Nag 250 followed.) ('47) 34 AIR 1947 Nag 101 (104) : ILR (1947) Nag 25 : 228 Ind Cas 576 (DB), *Meer Bismilla Meer Jangu v. Jagannath Binjraj*. (AIR 1944 Nag 155 : ILR (1944) Nag 250, Foll. ; AIR 1939 All 403 : ILR (1939) All 647 (FB), *Durga Pal Singh v. Pancham Singh* and AIR 1939 Bom 75 : ILR (1939) Bom 87, *Rango Ramacharya v. Gopal Narayan*, Rel. on.)
- ('44) 31 AIR 1944 Nag 155 (158) : ILR (1944) Nag 250 : 217 Ind Cas 298 (DB), *Sita Ram v. Chunilals*.
- [But see ('20) 7 AIR 1920 Nag 68 (69) : 54 Ind Cas 279, *Govinda v. Untrao Singh*.]
- 8c. ('49) 36 AIR 1949 East Punj 213 (218) : 50 Pun L R 294, *Firm Daulat Ram v. Gurlaksh Singh*. (Section 48 prescribes a period of limitation and consequently is not uncontrolled by the provisions of s. 15 of the Limitation Act and of s. 26 of the Punjab Relief of Indebtedness Act which has been drafted on the lines of s. 15 of the Limitation Act.)
9. ('75-76) 1 Cal 226 (242) : 3 Ind App 7 : 3 Sar 573 : 3 Suther 286 : 25 Suth W R 285 (PC).

Section 29 Note 7

not apply to suits under the Indian Divorce Act, IV of 1869.¹ This is merely declaratory of the old law. For, even in the absence of such a provision, it was held in the undermentioned cases² that the Limitation Acts, IX of 1871 and XIV of 1859, did not apply to suits under the Indian Divorce Act. Though this Act is inapplicable, delay in presenting or prosecuting a petition for dissolution of marriage under the Divorce Act is a ground for disallowing the petition.³ But the objection on the ground of delay will not hold good in cases where the marriage is *ab initio* void.⁴

The prohibition in this sub-section will not however, apply to appeals from decrees in suits under the Indian Divorce Act.⁵ They will be governed by Art. 151 of Sch. I. Nor will this sub-section apply to suits for dissolution of marriage by persons who are not governed by the Indian Divorce Act.⁶ So also where the suit is not one under the Divorce Act in the matrimonial jurisdiction of the High Court but in its ordinary original civil jurisdiction for a declaration of the nullity of the marriage this sub section will not apply.⁷ See also Note 47 to Article 120.

*30. Notwithstanding anything herein contained, any

Provision for States for which the period prescribed is shorter than that prescribed by any law previously in force in a Part B State.

suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by any law corresponding to this Act in force in a Part B State which is repealed by the Part B States (Laws) Act, 1951, may be instituted within the period of two years next after the coming into force of this Act in that Part B State or within the period prescribed for such suit by such corresponding law whichever period expires first.

a. Inserted by the Part B States (Laws) Act, 1951 (III of 1951), S. 3 & Sch [1-4-1951]. The original Section 30 which was repealed by the Repealing and Amending Act, 1930 (VIII of 1930), S. 3 & Sch. II was as follows :

Section 29 — Note 7

1. ('33) 20 AIR 1933 Sind 27 (28) : 26 Sind L R 423 : 141 Ind Cas 284, *Mr. W. D. v. Mrs. E. D.*
2. ('72) 18 Sath W R 480 (480) : 10 Beng L R 301 : Ind App Supp Vol 106 : 9 Moo P C (N S) 102 (PC), *Lord William Hay v. Gordon.*
(70) 1870 Pun Be No. 58, *Gordon v. Gordon.*
3. ('78) 3 Cal 688 (693), *J. Williams v. Williams.*
4. ('01) 5 Cal W N 104n, *Mills v. Mills.*
5. ('98) 22 Bom 612 (616) (DB), *A (husband) v. B (wife).*
See also Note 2 to Article 151.
6. ('22) 9 AIR 1922 Oudh. 109 (111) : 65 Ind Cas 452, *Muhammad Hamidullah Khan v. Mt. Fakhrijahan Begam.*
7. ('45) 32 AIR 1945 Cal 484 (485) : 1LR (1946) 1 Cal 32, *Sophy Aurbach v. Shivaprasad.* (Marriage performed in France under French law between a Hindu and a Jewess — Suit for declaration that marriage was void under French law instituted on Original Civil Side of Calcutta High Court — Suit is not one under the Divorce Act.)

"30. Notwithstanding anything herein contained, any suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the Indian Limitation Act, 1877, may be instituted within the period of two years next after the passing of this Act, or within the period prescribed for such suit by the Indian Limitation Act, 1877, whichever period expires first."

Section 30

31. *[Repealed by the Repealing and Amending Act, 1930 VIII of 1930), section 3 and schedule II.]*

Section 31

The repealed section was as follows :

" 31. (1) Notwithstanding anything contained in this Act or in the Indian Limitation Act, 1877 in the territories mentioned in the second schedule a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of this Act, or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first ; and no such suit in the said territories instituted within the said period of sixty years and pending at the date of the passing of this Act, either in a Court of first instance or of appeal, shall be dismissed on the ground that twelve years' rule of limitation is applicable.

(2) Where in the aforesaid territories the claim of a mortgagee for foreclosure or for sale has been wholly or in part dismissed or withdrawn after the twenty-second day of July 1907 and before the passing of this Act, either in a Court of first instance or of appeal on the ground that a twelve years' rule of limitation applied to such claim, the case may be restored on an application in writing to the Court by which the claim was dismissed or in which it was withdrawn, provided the application is made within six months from the date of the passing of this Act ; and on such restoration, the provisions of sub-section (1) shall apply."

32. *[Repealed by section 3 and schedule II of the Second Repealing and Amending Act, 1914 (XVII of 1914).]*

Section 32

The repealed section was as follows :

" 32. The enactments mentioned in the third schedule are repealed to the extent specified in the fourth column thereof."

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Overlooking of Precedents leads to Erroneous Decisions

"Ignorance of the Judge is the misfortune of the innocent." Latin Maxim.

1953 S. C. 478 (Pr. 20) (AIR V 40 C 118)— "It cannot be disputed that the High Court, even though it was hearing an appeal from an order of acquittal, had full powers to review the entire evidence on the record and reach its own conclusion that the acquittal order should be set aside. But, as the Privy Council pointed out in *Sheoswarup v. Emperor*, 1934 P. C. 227 (2) (AIR V 21) in exercising these powers the High Court should and will always give proper weight and consideration to such matters as : The High Court, in our opinion, did not clearly keep before it these rules and principles well known and recognised in the administration of criminal justice."

1953 S. C. 473 (Pr. 7) (AIR V 40 C 116) — "It is unfortunate that the last mentioned case (i. e. (1949) 29 Tax Cas 395) was not brought to the notice of the High Court before the judgment under appeal was delivered."

1952 S. C. 358 (361) (Pr. 12) (AIR V 39) — "This decision (*Md. Keramuttullah Miah v. Keamutulla*, 1919 Cal. 218) (AIR V 6) was reached on 19-7-1918, i. e. almost 5 months after the decision of their Lordships of the Privy Council (in 1918 P. C. 11 (AIR V 5)), but it does not appear that the ruling was brought to the notice of the learned Judges of the Calcutta High Court."

1953 S. C. 459 Pr. (10) (AIR V 40 C 111) — "It seems to us that the attention of the High Court was not drawn to this Court's decision in *Surajpal Singh's case* (1952 S. C. 52 (AIR V 39)) wherein it was pointed out that compelling reasons."

1943 Privy Council 189 (191) AIR V 30) — In an appeal from Allahabad the question for decision involved was as to the inherent power of the Court to grant restitution to the successful defendant. Their Lordships observed: "The decision of the Board in 1919 P. C. 55 (AIR V 6) was not cited in either of the Courts in India The application now before the Board invoked the powers of the learned Subordinate Judge to assess the sum due by way of restitution by the method laid down in 1919 P. C. 55 (AIR V 6), . . . For this purpose the case must go back to the Court of the Subordinate Judge. . . ."

1922 Privy Council 11 (13) (AIR V 9) — Section 89, T. P. Act, 1882, ended after providing for the decree "and thereafter the defendants' right to redeem and the security shall both be extinguished." These words do not occur in either the foreclosure section of the Act of 1882 or the corresponding rule of o. 34, Civil P. C.

"The difficulty which had arisen as to these words in several cases, e.g., *Vanmikalina v. Chidambara*, (1905) I. L. R. 29 Mad. 37 — which case, it may be mentioned, does not seem to have been brought to the notice of the Board in *Het Ram's case*, 1918 P. C. 34 (AIR V 5)—therefore no longer arises."

1956 All. 338 (Pr. 22) (FB) (AIR V 43 C 125)— "A learned single Judge of this Court held in *Chunna Lal v. Governor-General in Council*, 1950 ALL. 89 (AIR V 37 C 30) that if the consignor could establish that the consignee was merely a commission agent he could sue. It seems that the earlier cases of various High Courts were not placed before the learned Judge except for one case of the Madras High Court which he distinguished."

1954 All. 557 (Pr. 7) (A. I. R. V. 41 C. 192)— "No doubt, a contrary view was expressed by single Judge of this Court in *Damodar Swarup v. State*, cri. Ref. no. 267 of 1951 decided by Brij Mohan Lal J. on 4-12-1951 (ALL.) but obviously his attention was not invited to these and other cases previously decided by this Court."

1955 Andhra 112 (Pr. 9) ((S) A. I. R. V 42 C. 41) — "A careful perusal of that judgment (1954-2 M. L. J. 707) shows that none of the cases cited before me were placed before the learned Judge, who states at p. 708 of the report as follows: I have no doubt that, if the learned Judge's attention had been drawn to the Bench decision of the Madras High Court in *Narayayyan v. Nageswarayyan*, ((1894) 17 Mad. 389), the learned Judge would have followed it and come to a different conclusion."

OVERLOOKING OF PRECEDENTS LEADS TO ERRONEOUS DECISIONS

1955 Andhra 49 (Pr. 27) ((S) A. I. R. V. 42 C. 21) — "I am really surprised that the Courts below summarily dealt with the question of estoppel and regarded the matter so simple that they did not even refer to the decision of the Privy Council or the Full Benches of the Allahabad, Bombay and Madras High Courts or even the passages from the leading Text books. I wish to condemn the practice of the Subordinate Judiciary in not referring to the decisions which are binding upon them. By a casual reference to the leading text books, the courts below should have discovered that the Full Bench case in 1929 Mad. 502 (AIR v 16) has at least an important bearing in deciding the question of estoppel. It is the bounden duty of the members of the bar and the Judges who administer the law to keep themselves informed of the march and progress of law, i.e. statutory and case law. If every illiterate man is presumed to know law and ignorance of law is no excuse, it is all the more important that those who are concerned in the administration of law, namely the members of the Bar and the Judges should read the law Reports regularly and be aware not only of the latest reports, but also decisions of the Supreme Court and the High Courts."

1955 Bom. 227 (Pr. 6) ((S) A. I. R. V. 42 C. 57) — "With very great respect to the Federal Court, Mr. Justice Kania completely overlooked the judgment of the Bombay High Court (in 1945 Bom. 315 (AIR v 32)) to which reference has been made and to which he was a party."

1954 Bom. 273 (Pr. 11) (A. I. R. V. 41 C. 78) — "It does not appear to have been brought to the notice of the learned Judges (in 1951 Pun. 324 (A. I. R. v. 38 C 79)) that the view which they were taking was opposed to the consensus of judicial opinion amongst the other Indian High Courts."

1954 Cal. 412 (Pr. 9) (A. I. R. V. 41 C. 141) — "Unfortunately the earlier decision in the case of 11 Cal. L. J. 87 was not brought to the notice of the learned Judges in Afazuddi's case, (39 Cal. 133) with the result that the expression 'Projabili' was held to include the creation of a tenure in the latter case, while the decision in the former case was to the contrary."

1955 Hyd. 28 (Pr. 15) ((S) A. I. R. V. 42 C. 7) (F. B.) — "After carefully considering the views expressed in the aforesaid two sets of authorities reported in the Urdu Law Reports, one thing is clear that the first set of rulings followed the line taken by the former British Indian High Courts and that a Full Bench of the pre-constitution High Court of the State has also expressed similar view in 9 Ain-e-Deccan 530 (Q); as against this the later set of cases so far as the Abkari Act is concerned are decisions by Division Benches, which did not consider the Full Bench ruling referred to above which was evidently not brought to their Lordships' notice."

1955 Mad. 78 (Pr. 5) ((S) A. I. R. V. 42 C. 21) — "But neither of the decisions of the Privy Council, viz., 22 ALL. 149 (P. C.) and 1924 P. C. 226 (AIR v 11) appear to have been placed before the learned Judges (in 1925 Bom. 501 (AIR v 12)) and if the learned Judges had before them the principle governing such cases as laid down by the Privy Council, it was not likely that they would have taken a strict and narrow view of the scope of the proviso 6 to s. 92, Evidence Act."

1955 Mad. 341 (Pr. 6) ((S) A. I. R. V. 42 C. 92) (F. B.) — "The Full Bench in 1936 Mad. 324 (AIR v 23) which till then governed the practice on the original side of this Court, does not appear to have been placed before the learned Judge, in (1953 Mad. 858 (AIR v 40 C 335)) as it should have been by the learned Advocates on the original side who appeared in that case."

1954 Mad. 788 (Pr. 23) (A. I. R. V. 41 C. 260) (F. B.) — "Before leaving this case, we have to point out, that had the learned Advocate for the respondent, when the case was referred to the Full Bench, brought to our notice, the cases which he cited before the Full Bench, we might not have referred the matter to the Full Bench and therefore the remarks by the Full Bench "therefore a reference to the Full Bench was not strictly necessary" would not have been made. Before us only two decisions were cited and the learned Advocates on either side suggested a reference to a Full Bench."

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A. I. R. Commentaries Judicially Noticed.

1953 S. C. 23 (27) (A. I. R. V. 40 C 7)—[Touching the revisional jurisdiction of the High Court set out in s. 115, Civil P. C.] "A large number of cases have been collected in Edn. 4 of Chitaley & Rao's Code of Civil Procedure (vol 1) which only serve to show that the High Courts have not always appreciated the limits of the jurisdiction conferred by this section."

1949 P. C. 156 (158) (A. I. R. V. 36. C 47)—*Sir John Beaumont*.—"There have been no doubt, decisions in some High Courts in India which lend support to the view upon which the Judges acted. The cases are collected in Edn. 4 of Chitaley and Rao on the Code of Civil Procedure Vol. I, page 1105."

(1949) 15 Malayan L. Jour. 134 (135).—*Per Storr J.*—"On the point relating to section 127, Civil Procedure Code (corresponding to o. 9, r. 13 in Indian Civil P. C.), raised in this appeal A. I. R. Commentaries, Code of Civil Procedure (4th edition, 1944) at page 1755 states: 'But a person who is not a party though he may be interested in the suit is not entitled to apply under this rule' Agreeing with the views expressed above, I am of the opinion that section 127, Civil Procedure Code, is not available to a person who is not a party to the suit"

1955 J. & K. 1 (Pr. 5) ((S) A. I. R. V. 42 C. 1), *Shahmiri J.*—"As stated in Chitaley's Code of Criminal Procedure (1950) Edition) a valid divorce of the wife by the husband where it is sanctioned by personal law, puts an end to the marital relation and the status of husband and wife, and no order for maintenance can be made subsequent to the date of such divorce."

1955 Mad. 100 (Pr. 16) ((S) A. I. R. V. 42, C 28), *Ramaswami J.*—"The most exhaustive, lucid and analytical commentary on Art. 14 is to be found in the recently published A.I.R. Commentaries on the Constitution of India, Vol. 1 pp. 202-295. I am greatly indebted to this monumental work in the preparation of this decision. It is now well settled as these learned commentators of what may legitimately be described as the Indian Willoughby that this conception does not involve the idea of absolute equality among human beings which is a physical impossibility."

1955 Mad. 350 (Pr. 31) ((S) A. I. R. V. 42 C. 94), *Ramaswami J.*—"Some of the decisions relating to Rent Control Acts and their being upheld as valid are collected in the characteristically exhaustive and meticulously accurate A. I. R. Commentaries on the Constitution of India Vol. 1 pp. 439-440 and are indicated below—*Ramandas v. State of Uttar Pradesh*, 1952 ALL 703 at p. 705 (AIR V 39) (FB)"

1955 Mysore 81 (Pr. 22) ((S) A. I. R. V 42 C. 27), *Vasudevamurthy J.*—"Interference by the Court will be warranted by the law when even an executive authority is not exercising its powers bona fide for the purpose contemplated by the law or influenced by extraneous and irrelevant considerations and where injustice has resulted—See the Constitution of India by V. V. Chitaley 1954 Edn. Vol. 2 pp. 1799-1800."

1956 Sau. 54 (56) (Pr. 3) (A I R V 43 C 18) — *Shah C. J.* — "The question has been considered in a lucid and exhaustive note in the Constitution of India by Chitaley and Rao Vol. 1 (N. 2 at pp. 183-185) which is in accord with the view of Chagla C. J. and we are in agreement with this view."

1956 Trav.-Co. 127 (Pr 12) (A I R V 43 C 52)—*Varadaraja Iyengar J.*—"The error may be one of fact but is not limited to matters of fact and include also errors of law. But the law must be definite and capable of ascertainment. An erroneous view of law on a debatable point or a wrong exposition of the law or a wrong application of the law or a failure to apply the appropriate law cannot be considered a mistake or error apparent on the face of the record. See Chitaley's C. P. C. Vol. III, pp. 8549-50, 5th Edn."

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